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THE SOUTH CHINA SEA
AND AUSTRALIA'S REGIONAL
SECURITY ENVIRONMENT

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De Castro, Renato Cruz
Do Thanh, Hai
Emmers, Ralf
Roberts, Christopher B.
Rothwell, Donald R.
Schofield, Clive
Wesley, Michael
Zhang, Jian
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- Editors:** Dr Leszek Buszynski; Dr Christopher Roberts
- Email address:** c.roberts@anu.edu.au
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National Security College
Level 2, Building 132a, 1 Lennox Crossing
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ACT 0200
T: (02) 6125 6480
E: national.security.college@anu.edu.au
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CONTRIBUTING AUTHORS

Leszek Buszynski

Dr Leszek Buszynski is a Visiting Fellow researching and teaching in strategic studies at the Strategic and Defence Studies Centre (SDSC) and at the National Security College, the Australian National University. From 1997 to 2010 he was Professor of International Relations at the International University of Japan (IUJ). Prior to this, he was Dean of the Graduate School of International Relations and Director of the IUJ Research Institute. Dr Buszynski was also Director of the Research Institute of Asian Development (RIAD) from 1995 until 1997. He researched and taught in the Department of Political Science at the National University of Singapore (NUS) from 1980 until 1987. Dr Buszynski's current research activity includes the South China Sea, which he has been examining over the past twenty years and has seen develop into a potential crisis point for US–China relations. He has also just completed a book project on the Six Party Talks in relation to North Korea's nuclear program.

Gary Collinson

Gary Collinson is a PhD candidate at the Australian National University, having commenced his doctoral studies in March 2012. Mr Collinson is an experienced consultant in the federal government domain, an accomplished project director and a former Australian Army Lieutenant Colonel. He has started complex projects from scratch, simultaneously managed up to 20 major and minor projects, represented the Australian Government overseas, implemented change, and provided independent advice to government. Apart from his current academic ambitions, he is also a graduate of: the Royal Military College – Duntroon (Australia); The Royal Military College of Science – Shrivenham (UK); the Army Command & Staff College – Queenscliff (Australia); and the NSW, Deakin and Oxford universities. Mr Collinson is also an amateur singer and actor within the local Canberra community.

Renato Cruz De Castro

Renato Cruz De Castro is a senior Professor in the International Studies Department, De La Salle University, Manila, and the holder of the Charles Lui Keung Professorial Chair in China Studies. He was the U.S. State Department ASEAN Research Fellow from the Philippines and was based in the Political Science Department of Arizona State University in 2009. He earned his PhD from the Government and International Studies Department of the University of South Carolina as a Fulbright Scholar in 2001. Professor De Castro obtained his BA and two masters degrees from the University of the Philippines. He has written over 60 articles on international relations and security that have been published in a number of scholarly journals and edited works in the Philippines, South Korea, Canada, Malaysia, France, Singapore, Taiwan, Germany, the United Kingdom and the United States.

Thanh Hai Do

Thanh Hai Do is one of twenty successful international recipients of the 2011 round of the Prime Minister's Australia Asia Awards. Before going to Australia, Thanh Hai was Deputy Director of the Centre for Political and Security Studies at the Institute for Foreign Policy and Strategic Studies, a think tank affiliated with the Diplomatic Academy of Vietnam. He holds a Bachelor of Arts in International Relations from the Institute of International Relations in Vietnam and a Master of Arts from the European Master's Course 'Global Studies – A European Perspective', jointly offered by the University of Vienna and the University of Wroclaw. Thanh Hai has previously been awarded an Erasmus Mundus Scholarship and the Award for Best Graduate of the Year 2008 by the Erasmus Mundus Global Studies Consortium. He is currently a PhD Candidate at Australian National University, utilising his Prime Minister's Australia Asia Award to undertake a doctorate focusing on the Vietnamese Government's dealings with maritime disputes and threats in the South China Sea.

Ralf Emmers

Ralf Emmers is Associate Professor and Coordinator of the Multilateralism and Regionalism Programme at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University (NTU), Singapore. He is the author of: *Geopolitics and Maritime Territorial Disputes in East Asia*; *Cooperative Security and the Balance of Power in ASEAN and the ARF*; *Resource Management and Contested Territories in East Asia*; and the co-author of *The East Asia Summit and the Regional Security Architecture*.

Christopher B. Roberts

Dr Christopher Roberts lived in Asia for five years and has conducted research in all the Association of Southeast Asian Nations (ASEAN) member-states. He regularly presents papers at international conferences and has conducted research for regional organisations and NGOs such as the ASEAN Secretariat and Friedrich Ebert Stiftung (FES). Christopher won the Australian Government's Endeavour Australia Cheung Kong Award in 2005 and was a Post-Doctoral Fellow at the S. Rajaratnam School of International Studies (Singapore). His most recent book was published by Routledge in 2012 and is entitled *ASEAN Regionalism: Cooperation, Values and Institutionalisation*; his earlier book was entitled *ASEAN's Myanmar Crisis* (ISEAS, 2010). Dr Roberts has also published nearly twenty book chapters, journal articles and working papers on issues ranging from political affairs in Laos, Brunei and Myanmar to regional relations, security issues, threat perceptions and institutional developments in ASEAN. His research interests include: Asia-Pacific politics and security; ASEAN; regionalism; Australian foreign policy in Asia; Politics, security and foreign relations in Myanmar/Burma, Brunei, Singapore and Indonesia; and the South China Sea.

Donald R. Rothwell

Donald R Rothwell is Professor of International Law and Head of School at the ANU College of Law, Australian National University, where he has taught since July 2006. His research has a specific focus on law of the sea, law of the polar regions and implementation of international law within Australia, as reflected in over 160 articles, book chapters and notes in international and Australian publications. Professor Rothwell has authored, co-authored or edited 17 books, including most recently *Law of the Sea* (Edward Elgar, 2013), and *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* with Alan Hemmings and Karen Scott (Routledge, 2012). In 2012 Professor Rothwell was also appointed an inaugural ANU Public Policy Fellow by the ANU Vice-Chancellor, Professor Ian Young. He is a regular media commentator on international law issues and his research includes: international law in Australia; international security law; law of the sea generally and in the polar regions; and the Commission on the Limits of the Continental Shelf.

Clive Schofield

Professor Clive Schofield is the Director of Research and Australian Research Council Future Fellow at Australian National Centre for Ocean Resources and Security (ANCORS). He is a political geographer specialising in international boundaries and particularly maritime boundary delimitation. He holds a PhD in Geography from the University of Durham, UK, and also holds an LLM in international law from the University of British Columbia. The central theme of his research can be summarised as the examination of the intersection of geographical/technical, legal and political disciplines in the law of the sea with particular reference to maritime boundary delimitation. The core objective of Professor Schofield's past and present academic activity is to make a constructive, substantial and lasting practical contribution to the resolution of maritime jurisdictional disputes.

Clive Schofield (continued)

Past research contributions have encompassed technical aspects of maritime boundary delimitation, trans-boundary resource management, boundary conflict resolution, and the maritime boundaries and political geography of Southeast Asia. As a result, he has had direct involvement in the peaceful settlement of boundary and territory disputes through the provision of technical advice and research support to governments engaged in boundary negotiations or in dispute settlement cases before the International Court of Justice, where, for example, Professor Schofield served as a Scientific and Technical Adviser on behalf of the Federal Republic of Nigeria in 1998 and 2002.

Prior to his appointment at ANCORS, Professor Schofield was a Vice Chancellor's Research Fellow at the School of Surveying and Spatial Information at the University of New South Wales and Director of Research at the International Boundaries Research Unit at the University of Durham, UK.

Michael Wesley

Professor Wesley was appointed as Professor of National Security at the Australian National University in 2012. As Director he leads the National Security College's Academic, Outreach and Research Program and contributes to a number of courses at the Crawford School of Public Policy. He has extensive experience teaching, researching and communicating on Australia's international engagements, particularly in Asia. Professor Wesley has published extensively and has authored several books on foreign policy, including *The Howard Paradox: Australian Diplomacy in Asia*. He won the 2011 John Button Prize for Best Writing in Australian Politics for his book, *There Goes the Neighbourhood: Australia and the Rise of Asia*. He was Executive Director of the Lowy Institute for International Policy from 2009 to 2012 and Professor of International Relations and Director of the Asia Institute at Griffith University from 2004 to 2009. He has also taught at a number of other universities in Australia and overseas. Professor Wesley was an Assistant Director-General in the Office of National Assessments in 2003/04 and served as co-chairman of the Security and Prosperity working group at the Australia 2020 Summit in 2008.

Jian Zhang

Dr Jian Zhang is a Senior Lecturer in the International and Political Studies program in the School of Humanities & Social Sciences, the University of New South Wales Canberra at the Australian Defence Force Academy. He received his Bachelor's and Master's degrees from Zhejiang University, China, and completed his PhD at Murdoch University, Australia. Dr. Zhang's primary research interests are Chinese politics, China's foreign and security policy and Australia–China relations. He has published widely in various international journals and edited volumes. Dr. Zhang is a member of the Australian Committee of the Council for Security Cooperation in the Asia Pacific (AUS-CSCAP).

INTRODUCTION

The papers included here were initially presented at a conference on the South China Sea held on 28 March 2013 and sponsored by the National Security College, at the Australian National University, Canberra. The stimulus for the workshop was concern over the development of events there and the conviction, as expressed by some commentators, that the area was a 'flashpoint' that could become unmanageable. Some see the issue as a case of Chinese pressure exerted upon ASEAN claimants – some of whom have been calling on or open to external support from countries such as the United States and Australia. China, they assert, is becoming expansionist and is pressing the ASEAN claimants to recognise its claim to the area by resorting deliberately to low-key pressure tactics against them. Others see the issue as a problem that could be resolved by negotiation within the framework of international law. They argue that China is simply pressing for recognition of its rights to the area and will negotiate with the ASEAN claimants in good faith in the fullness of time or, to use a well-known expression often voiced by Chinese representatives, 'when conditions are ripe'. Still others are undecided and wait for events to play out before committing themselves to any particular view. Presenters at the workshop adopted various perspectives that, one way or another, touched upon these views, depending on their professional background and their national affiliation.

The first paper by Leszek Buszynski examined the development of the dispute over past decades. It is necessary to remind ourselves that this was not always a major dispute in quite the same way that we see it now, and that it developed over stages. At one time China's claim to the Spratly islands was tentative, though it insisted on its claim to the Paracels. China's claim to the whole South China Sea, which includes both the Paracels and the Spratlys, is now set in stone, which makes it difficult to envisage negotiations and compromise over the issue. The second presentation, by Clive Schofield, examined the conflicting and overlapping claims to the South China Sea from spatial, legal and geopolitical perspectives. It outlined the geographical

context of the South China Sea in order to explain the factors that inform and underlie the South China Sea dispute. The third presentation was by Donald R. Rothwell, who examined the legal side of the dispute, and specifically the capacity of maritime features in the South China Sea to generate maritime zones consistent with the 1982 United Nations Convention on the Law of the Sea. One issue is whether these maritime features are Article 121 (1) islands, or Article 121 (3) rocks. A second issue is whether these features will be considered for the purposes of delimiting Exclusive Economic Zone (EEZ) or continental shelf maritime boundaries. Jian Zhang presented on China's perspective. He notes that China's assertive actions have been undertaken by civilian governmental and maritime law enforcement agencies, and that they could be described as 'administrative diplomacy'. He argues that within China there is increasing recognition of the importance and legitimacy of international law and the UN Convention on the Law of the Sea (UNCLOS), and that China is considering a diplomatic and even legal solution to the dispute in the future. Vietnam's perspective was explained by Do Thanh Hai, who argued that Hanoi has redefined its claims to maritime zones in the South China Sea so as to ensure consistency with international law and UNCLOS. It has clarified the limits of its EEZ and continental shelf claim as measured from the baseline of the mainland, and may be willing to accept that the Spratly and Paracel features may not be entitled to full maritime zones. Vietnam has been pressured by China, a circumstance that has made Vietnamese leaders aware of the importance of international law as a support for their own claims to the area. Renato DeCastro outlined the Philippine position. He examined China's challenge to the Philippine claim in the area, which led to a two-month long stand-off between Philippine and Chinese civilian vessels in the Scarborough Shoal. He notes that the Philippines was the first to bring the issue to adjudication when in January 2013 it appealed to an Arbitral Tribunal under Annex VII of UNCLOS. Ralf Emmers examined the US position over the South China Sea in the context of its efforts in rebalancing to the Asia Pacific. He noted that the

United States continues to stress the importance of freedom of navigation in the area and the need to uphold the key international rules for defining territorial claims in the South China Sea. Christopher Roberts and Gary Collinson examined ASEAN's role in the dispute and the reasons for its division over the issue. ASEAN had been relatively unified during the 1990s, but since China increased its assertiveness ASEAN has disturbingly become divided into three camps: that which is pro-Beijing; that which is indifferent; and the third camp comprising the claimant states – such as the Philippines and Vietnam – who have sought ASEAN solidarity over the issue. Michael Wesley traced the implications for Australia and argued that Australia's disinterest in the issue is unsustainable and that it has to become more ambitious in its foreign policy. He stresses that Australia should promote a sustainable solution to the South China Sea dispute in recognition of the extent to which its interests are affected.

What kind of solution can there be that has not been discussed before? Leszek Buszynski and Christopher Roberts explored the possibilities by examining past proposals and responses. Included were: legal resolution based on UNCLOS; joint development; second-track diplomacy, and a cooperative maritime regime – all of which had considerable appeal at the time they were raised. Dr Buszynski called for a UN conference on the South China Sea, which would combine the benefits of a maritime regime with a legal resolution, arguing that if there was going to be a resolution of the issue it would eventuate in no other way.



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The development of the South China Sea maritime dispute

Leszek Buszynski

Visiting Fellow, National Security College, Australian National University

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Introduction

The South China Sea is semi-enclosed, as defined in Article 122 of the UN Convention on the International Law of the Sea (UNCLOS). It includes the 15 islands of the Paracel archipelago, 45 islands and numerous reefs and rocks of the Spratly archipelago, the Macclesfield bank and the three islands of the Pratas group. The southern reaches extend to the Sunda Shelf, which is shallow, less than 200 metres, but the Palawan Trough at its south-eastern flank is deeper, dropping below 2000 metres. The dispute concerns the sovereignty of the islands and surrounding sea territory, involving China and five ASEAN countries: Vietnam, the Philippines; Malaysia; Brunei; and Indonesia. China and Vietnam have extensive claims over the area, which are largely undefined, while the Philippines, Malaysia, Brunei and Indonesia claim contiguous sea zones. The dispute involves complicated issues relating to UNCLOS which does not offer clear guidelines in situations where claims to sea territory, islands, and Exclusive Economic Zones (EEZs) overlap.

Factors in the dispute

Oil and gas

The competition for oil and gas became an important factor in the dispute in the 1970s. Surveys undertaken in 1969 indicated reserves of oil and gas, but the technology for off shore drilling at depths below 600 metres where the reserves were located was only developed in the late 1970s. The 1973 – 74 oil shocks were a stimulus to exploration in the area, and in March 1976 the first commercial field began operation off the Philippine island of Palawan at Reed Bank, involving a consortium of three Swedish and seven Philippine companies. Malaysia's Petronas is the major oil producer in the area, and in 2011 produced 500,000 barrels a day (bd) and 600 billion m³ of natural gas. PetroVietnam in 2011 produced 300,000 bd of oil and 100 billion m³ of natural gas. China's off shore fields are located in the Pearl River basin and it is not yet a producer in the disputed area. Because existing fields are being depleted, the demand for energy has increased and

both Petronas and PetroVietnam are obliged to tap new reserves, which could raise tensions with China. In 2011, China's oil imports accounted for about 54 per cent of its total demand and its interest in the oil and natural gas resources of the South China Sea has grown considerably. Some Chinese estimates claim that the area holds some 80 per cent of Saudi Arabia's oil reserves, although this figure is likely to be inflated. The US Energy Information Administration (EIA) says that 'there is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources.' It claims that the area around the Spratly Islands has virtually no proven oil reserves, and estimates that about '60 to 70 per cent of the region's hydrocarbon resources are natural gas.'

Fish stocks

Access to fish stocks of the area is another factor in the dispute. The South China Sea is one of the world's richest fishing regions, regarded by Chinese and Vietnamese fishermen as a traditional fishing zone. The University of British Columbia's Fisheries Center estimated that catch statistics in the South China Sea have increased from 4.7 million tons in 1994 to 5.6 million tons in 2003, averaging about 5 million tons. The UN has warned that global fish stocks are in jeopardy as demand rises, which intensifies the competition to exploit the fisheries of the area. The fish stocks of the area have been overexploited and catch rates have been declining, resulting in smaller fish sizes and the gradual move from large, high-value fish to smaller, lower-value fish. Competition for access in a situation of declining fish stocks has been one reason for the recent clashes that have occurred in the area. As the livelihood of local fishermen is threatened, host countries offer support from naval or coastguard vessels, which has resulted in a number of tense incidents.

UNCLOS

The UN Convention on the Law of the Sea may contribute to a solution, but it has also contributed to the scramble for maritime territory and resources. UNCLOS allows each littoral state to claim an Exclusive Economic Zone of 320 km, or a continental shelf, and specifies that islands can

generate their own EEZs or continental shelves. However, what the claimants may be entitled to by asserting sovereignty over islands will be limited by UNCLOS, since not all features can generate EEZs or continental shelves. In Article 121 (3) UNCLOS distinguishes between islands and rocks or reefs, which cannot generate EEZs or continental shelves, but which are entitled to a 12-mile territorial sea. Islands may not be entitled to full maritime zones in certain situations where they are close to continental land masses. Coastline length may be used to determine entitlement to the maritime zones of occupied islands, in which case the Philippines and Vietnam would benefit more than China. UNCLOS does not significantly benefit China, which has sought alternative ways of validating its claim to the area.

Strategic value

The South China Sea embraces some of the world's busiest sea lanes, which link Northeast Asia to the Indian Ocean and the Middle East. It has been estimated that over half of the world's annual merchant-fleet tonnage passes through the area. Oil imported by Japan, South Korea, Taiwan and southern China is shipped through the Malacca Straits and the South China Sea, giving it a special strategic significance. As Northeast Asian trade increases, so does the importance of the area. Control of the South China Sea by a hostile power would be a major interruption to shipping and trade and would require rerouting through alternative straits further west – the Sunda Strait and Lombok – adding to shipping costs. For these reasons external powers such as the United States and Japan seek to maintain freedom of navigation through the area, which means preventing control by one power, particularly a potentially hostile one. China has been very sensitive to foreign penetration of the area that could threaten its sea lanes, and was disturbed by French activity in the area in the early 20th century. It was alarmed by Soviet movements in the South China Sea, the Soviet alliance with Vietnam in November 1978, and Soviet use of Cam Ranh Bay beginning in March 1979. The Chinese economy has become vulnerable to external disruption of oil and energy supplies, obliging its leaders to protect its extended trade routes and energy access, as 54 per cent of its crude oil is imported from countries

in the Middle East. China's trade routes run through the Indian Ocean and the Malacca Straits, through which an estimated 80 per cent of its oil imports are shipped. These routes are vulnerable to interdiction by India and the United States in time of conflict, and both may hold China to ransom by blocking China's oil supplies. To protect its sea lanes and access to imported fuel, China is obliged to develop a naval capability, including aircraft carriers and accompanying escorts capable of reaching as far as the Indian Ocean. This naval capability would best be deployed in a way that would allow it access to the southwest, making the Hainan area and the South China Sea most suitable. Moreover, the South China Sea will become a base for China's second-strike submarine-adapted nuclear capability intended to deter the United States from risking conventional conflict with China over Taiwan or any other issue. For strategic reasons, the Chinese navy seeks control over the area and acts to prevent the United States from establishing a presence there that could threaten it.

The development of the dispute

The South China Sea dispute has developed in an action–reaction sequence as moves by one country in the area have stimulated countermoves by others intent on securing a position there. Qing dynasty China protested France's intrusion into the area over 1884–5, but China's concern then was the Paracels and not the Spratlys. There is evidence that China's southern border was then regarded as the Paracels, and its interest in the Spratlys was in response to French intrusion in the 1930s. France intended to mine the guano deposits of the islands and was motivated to exclude the Japanese. On 23 April 1930 France announced the annexation of the Spratlys and hoisted the tricolour over the islands between 7 and 12 April 1933. China protested the French move into the Spratlys, and in April 1935, China's Land and Water Maps inspection committee drafted a map of the South China Sea which included a U-shaped line with eleven dashes. Who authorised the map and why it took this shape is still not understood. It was published by the KMT

government in February 1948 and was inherited by the PRC, becoming the basis of China's claim today; two dashes were removed in 1953 as a concession to Vietnam. In December 1939 Japan moved into the area and declared the occupation of the Pratas islands, Paracels and Spratlys. The Japanese landed troops on Itu Aba island, which they used as a submarine base to attack allied shipping and to support operations in the Philippines and Indochina.

The San Francisco Conference was convened in September 1951 to decide the disposition of territories conquered by Japan. According to Article 2(f), 'Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.' Chinese Foreign Minister Zhou Enlai, who was excluded from the conference, declared Chinese sovereignty over the South China Sea on 15 August 1951, including the Spratlys, the Paracels, the Pratas islands and the Macclesfield bank. On 7 September the Vietnamese delegate to the conference, Tran Van Huu, asserted Vietnam's claim to the same islands. The conference stripped Japan of possession and in view of the competing claims did not designate a successor. The inability of the conference to identify where sovereignty lay opened the door to competing claims that today remain unresolved. Vietnam insisted on its rights as a 'colonial successor state,' claiming that it inherited sovereignty from France. France protested the Vietnamese claim, insisting that only the Paracels were ceded to Vietnam as a result of decolonisation enforced by the Geneva Conference of 1954. The Philippines argued that it was the successor state to Japan and that the San Francisco Conference had left the area as *res nullius*, and open to whoever was first on the scene. The first Philippine claimant was the adventurer Tomas Cloma in 1956, who called the area *Kalayaan* or 'freedom land.' The Philippine Foreign Ministry argued that its claim was limited to an area staked out by Tomas Cloma, which was separate from the Spratlys in any case. This claim was declared on 10 July 1971 and was reiterated in the Marcos presidential decree of 11 June 1978, which named it the 'Kalayaan Island Group.' The Malaysian claim was stimulated by the Marcos declaration and the Philippine occupation of eight islands in its claim zone. It was proclaimed in a map published in 1979; it was based on the continental shelf and overlaps with the Philippine claim. The problem is that the continental shelf is a

claim for resources, and not for islands, prompting Malaysia to occupy three islands in its claim zone in 1983 and another two subsequently. Brunei's claim to an EEZ overlaps with Malaysia's and was the case of several later disputes over the allocation of oil exploration rights.

China's moves

China had claimed the South China Sea but could not gain access to it. Excluded by the claims of neighbouring states and the US naval presence in the region during the Cold War years, China required a physical presence there as a public demonstration of its claim. China had occupied the eastern Paracels (the Amphitrite Group) since 1956 and ejected South Vietnam from the western Paracels (the Crescent Group) in a naval clash over 19–20 January 1974. Reunification in 1975 freed Vietnam from Chinese constraints and it began to press its claim to the South China Sea. Before Saigon fell, North Vietnam began to occupy islands over 11–22 April to pre-empt China. The Chinese were angered by what they considered to be Vietnamese perfidy and pointed to Pham Van Dong's statement of 14 September 1958, which indicated Vietnam's acceptance of 'Chinese ownership of the archipelagos in the Eastern Sea [South China Sea].' The Vietnamese, however, insist that the statement relates to Zhou Enlai's declaration of 4 September regarding a 12-mile territorial limit, and was not an endorsement of China's claim. The Chinese began to move into the Spratlys, and over 1979–1982 numerous small clashes were reported between China and Vietnam.

China's thrust into the South China Sea was triggered by rivalry with Vietnam. Whether it was orchestrated by the People's Liberation Army–Navy (PLA–N) according to a grand plan to seize the islands, or whether it was the result of a series of opportunistic steps is a matter for debate. China strengthened its South Sea fleet by moving five destroyers from the North fleet. Air patrols were initiated over the Spratlys and in 1983 a naval force was sent there to survey the area; the first comprehensive Chinese survey was completed in 1984. Over May–June 1987 China launched the first large-scale naval patrol of the area. Observation towers were constructed on Fiery Cross Reef, Subi Reef, Johnston Reef, Cuarteron Reef, Gaven Reef, and

Dongment Jiao. The naval clash with Vietnam on 14 March 1988 – in which three Vietnamese vessels were sunk and 73 sailors lost – was a result of this Chinese move to occupy islands. China eventually occupied nine features in the Spratlys. In March 1995 the Philippines discovered that in late 1994 China had occupied Mischief Reef in the Philippine claim zone and had built raised octagonal structures on it, with a small pier and radar antennae. Some Chinese sources suggest that it was a local initiative by Hainanese authorities to build shelters for fishermen, but subsequent extensions on this and other reefs indicated central direction and protection. This action triggered public uproar within the Philippines and reassessment by the United States, resulting in a Visiting Forces Agreement (VFA) in 1998. It was a controversial effort to engage the United States in the enforcement of the Philippine claim against China – a conflict that the Chinese had attempted to avoid.

China's historical rights

China, nonetheless, has continued to assert its historical rights over the South China Sea. The Chinese often declare that their historical notions of sovereignty predate Western international law and should be recognised as valid *ab initio*. Chinese commentaries argue that UNCLOS cannot be applied to the South China Sea since China had 'indisputable sovereignty' over the area to begin with. China ratified UNCLOS on 7 June 1996 and took advantage of Article 310, which allows states to make declarations relating to their application, providing they do not 'exclude or modify' the legal effect of those claims. China's exception was Article 2 of the Law on the Territorial Sea and the Contiguous Zone, which was announced on 25 February 1992. It listed the Paracels and Spratly islands as 'territorial sea', which conflicted with UNCLOS. While China may have the right to make declarations relating to the application of UNCLOS, it cannot go against its legal principles by attempting to uphold historical rights in this way; China's attempt to cite ancient records as a basis for sovereignty conflicts with international law. Justice Max Huber's tests in the Island of Palmas case (1928) noted that any rights obtained from history may be lost 'if not maintained in accordance with the changes brought about by the development of modern international law.'

The difficulty with the Chinese historical claim is that although Chinese records mention the Paracels, there are no ancient records for the Spratlys. China had little contact with the area, as Chinese trade routes in the South China Sea were circum-oceanic, not trans-oceanic: vessels would follow the Indo-China coast from port to port. There was the galleon trade with Spain, which went from Acapulco in Mexico to Manila and then to Guangdong, but that also avoided the Spratlys. Nonetheless, the Chinese authorities insist on a claim for which there is little historical support and are manufacturing the public conviction that the South China Sea has always been Chinese. Starting from April 2012, the U-shaped or nine-dash line appeared on new Chinese passports as part of a map of China to buttress this conviction among Chinese citizens. In January 2013, the Chinese media published a map of China which depicted a ten-dash line that embraced the South China Sea and incorporated Taiwan with the mainland, making them indistinguishable to the Chinese public.

Conclusion

Without conclusive legal support for its claim, China has been relying upon assertion and harassment tactics to intimidate the ASEAN claimants into accepting its position in the South China Sea. Prolonged Chinese harassment is intended to unnerve the ASEAN claimants and to induce them to settle bilaterally with China. The best interpretation of China's actions is that it seeks to hustle the ASEAN claimants into recognising China's historical claim to the area. However, China's actions have the potential to draw in external powers that are disturbed by what they understand to be China's threat to the strategic sea lanes of the area. The United States has reaffirmed its alliance ties with the Philippines and has sought a security relationship with Vietnam. India and Japan have also expressed their concerns. At the prospect of the involvement of external powers, China may draw back, as it has in the past, but a more confident and nationalistic China may continue to press its claim over the South China Sea, deciding that these external powers would avoid confrontation with it. This would be a reckless step that could result in unintended clashes and destabilising escalation.



Increasingly contested waters? Conflicting maritime claims in the South China Sea

Clive Schofield

Director Of Research, Australian National Centre For Ocean Resources And Security (ANCORS),
University Of Wollongong

Introduction

The South China Sea is host to a complex coastal geography, numerous sovereignty disputes over islands featuring multiple claimants, excessive and controversial claims to baselines, conflicting and overlapping claims to maritime jurisdiction and, most recently, contested submissions regarding extended continental shelf rights. The objective of this paper is to review and analyse these issues from spatial, legal and geopolitical perspectives. An overview and assessment of the geographical and geopolitical factors that inform and underlie the South China Sea disputes is offered prior to the claims of the littoral states to baselines and maritime zones being assessed. Maritime boundary agreements and joint development zones are also highlighted. Finally, indications that maritime jurisdictional claims are being more vigorously enforced are explored.

Geographical and geopolitical context

The South China Sea is a large semi-enclosed sea, encompassing at least three million square kilometres, bordered by – in clockwise order from the north – China and Taiwan; the Philippines; Malaysia; Brunei Darussalam (Brunei); Indonesia; Singapore; and Vietnam. Additionally, Cambodia and Thailand border the South China Sea's Gulf of Thailand extension. A key consequence of the South China Sea's semi-enclosed character, coupled with the large number of coastal states involved, is that their maritime claims tend to converge and overlap with one another. The broad dimensions of the South China Sea mean that there is in excess of 400 nautical miles (nm) between opposing shores; a large high-seas pocket or 'doughnut hole' may exist in the central South China Sea (see below). The maritime jurisdictional scenario is, however, considerably complicated by the presence of multiple groups of insular features of diverse types in the South China Sea. The principle island groups of the South China Sea are as follows (clockwise from the northwest):

- *The Paracel Islands*, which comprise around 130 islands, predominantly divided between the Crescent and Amphritite groups (disputed between China/Taiwan and Vietnam);
- *The Pratas Islands*, the principle feature of which is Pratas Reef, which is a circular coral reef 11 miles across, enclosing a substantial lagoon (under the administration of Taiwan, claimed by China);
- *Scarborough Reef (or Shoal)*, a feature consisting of a large coral atoll, submerged at high tide save for several small outcrops, and associated lagoon (disputed between China/Taiwan and the Philippines), and Macclesfield Bank, located to the west of Scarborough Reef, which is an entirely and permanently submerged feature;
- *The Spratly Islands*, consisting of around 150–180 generally small islands, islets, rocks, reefs as well as numerous low-tide elevations and submerged features (claimed in whole or in part by Brunei, China/Taiwan, Malaysia, the Philippines and Vietnam); and,
- *The Natuna Islands* which comprise an extensive group of over 200 islands and other insular features in the southwestern South China Sea.

As indicated above, with the exception of the Natuna Islands, which are under the uncontested sovereignty of Indonesia, sovereignty over all of these island groups is subject to dispute. Additionally, with respect to issues of maritime jurisdiction, the South China Sea islands are potentially highly significant. In this context the legal status of these insular features, as well as their potential role in the delimitation of maritime boundaries, assumes critical significance. For example, should the disputed South China Sea islands be classified as islands capable of generating exclusive economic zones (EEZs) to 200 nautical miles (as opposed to "rocks" which cannot), then the potential high seas pocket mentioned above disappears.

Geopolitical drivers for the South China Sea disputes

The key geopolitical factors that inform, underlie and drive the South China Sea disputes include abiding concerns over sovereignty and sovereign rights, concerns over freedom of navigation and the security of critical sea lanes, and marine resource access considerations. Among these factors sovereignty looms large. Despite deepening globalisation, bounded Westphalian territorial states have by no means withered away, perhaps least of all in East and Southeast Asia. Disputed sovereignty, especially over land territory (disputed islands), therefore remains a root cause for the South China Sea islands disputes, especially when coupled with the negative influences of historical competition and animosity.

The South China Sea is host to a series of Sea Lines of Communication (SLOCs) of regional and global significance. Secure SLOCs and freedom of navigation are essential to the smooth functioning of the global economy as international trade remains overwhelmingly reliant on maritime transport. Indeed, if anything, this dependence on sea-borne trade is accentuated for the generally resource-poor but export-oriented economies of East and Southeast Asia, and in this context the SLOCs that traverse the South China Sea are unquestionably crucial. There is also a strong, and increasing, energy security dimension to sea lane security in the region. It is worth noting that the network of SLOCs connecting the constricting chokepoints that provide entry to and egress from the South China Sea tend to avoid the disputed South China Sea islands as hazards to navigation.

Concerning access to marine resources, there has been a long-standing – though arguably not well-founded – perception that the disputed areas of the South China Sea host substantial reserves of seabed energy resources. Such hydrocarbons, should they exist, would undoubtedly be highly attractive to the South China Sea littoral states, all of whom save for Brunei are facing increasingly urgent energy security concerns. However, estimates regarding the oil and gas potential of the South China Sea vary wildly; they are often speculative, poorly supported, and are thus frequently highly misleading and should be viewed with caution. Nonetheless, the persistent

perception that the South China Sea represents a major potential source of seabed energy resources remains a key driver in the South China Sea disputes. Recent incidents involving oil and gas exploration activities in the South China Sea have served to reinforce this view.

Finally, the semi-enclosed, tropical environment of the South China Sea and Gulf of Thailand hosts marine environments of great richness in biodiversity terms. These environments support fisheries of significance in global, and certainly regional, terms, especially with respect to the food security of coastal populations numbered in the hundreds of millions. It follows that access to the waters of the South China Sea for fishing, as well as the preservation and protection of the marine environment that supports such activities, should be the top priority for the South China Sea coastal states. Unfortunately, however, the marine environment, biological diversity and living resources in question are widely acknowledged to be under serious threat.

Claims to maritime jurisdiction

All of the South China Sea littoral states, with the sole exception of Cambodia, are parties to the UN Convention on the Law of the Sea (UNCLOS). Consequently, it is appropriate to assess their claims to maritime jurisdiction against the backdrop of UNCLOS.

Baselines

Maritime claims are dependent on sovereignty over land territory possessing a coast in keeping with the legal maxim that 'the land dominates the sea'. Baselines along coasts are, in turn, fundamental to claims to maritime jurisdiction, as maritime zones are measured from such baselines. UNCLOS¹ provides for multiple types of baselines. However, in the absence of any other claims, 'normal' baselines coincident with the low-water line as shown on large-scale charts recognised by the coastal state concerned will prevail in accordance with Article 5 of UNCLOS. In the context of the South China

¹ United Nations, United Nations Convention on the Law of the Sea, Publication no.E97.V10, (New York, NY: United Nations, 1983). See, 1833 UNTS 3, opened for signature 10 December 1982, Montego Bay, Jamaica (entered into force 16 November 1994), <http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

Sea, normal baselines as well as the convention's provisions on the baselines of reefs (Article 6 of UNCLOS) are particularly relevant to the baselines and maritime claims of the generally disputed South China Sea islands. Normal baselines are also applicable to the maritime claims of Brunei as well as of those of China and Vietnam within the Gulf of Tonkin.

With regard to the mainland coasts of the states surrounding the South China Sea, the majority of the states concerned evidently consider that their coasts are deeply indented or fringed with islands in their immediate vicinity and have accordingly defined systems of straight baselines as provided for under Article 7 of UNCLOS. Such claims to straight baselines have been made by Cambodia, China and Taiwan, Thailand and Vietnam. While Malaysia has yet to officially publicise the location of its straight baselines, it is evident from Malaysian maps that such claims have been made. These claimed straight baselines are predominantly extensive and often front generally smooth coastlines or serve to link small, widely separated islands remote from mainland coastlines. Consequently, these claims have attracted international protests, notably from the United States, which undertakes a systematic review of the maritime practice of other states as part of its Freedom of Navigation (FON) program. Additionally, two of the South China Sea littoral states, Indonesia and the Philippines, are archipelagic states and have defined archipelagic baselines in keeping with Article 47 of UNCLOS.

Claims to maritime jurisdiction

In keeping with the relevant provisions of UNCLOS, the South China Sea coastal states have generally claimed 12nm territorial seas and EEZs to 200nm from baselines together with continental shelf rights. Most of these claims have tended to be ambit in character. That is, they simply specify the maximum allowable breadth of the maritime zone in question, in keeping with the terms of UNCLOS. However, some more specific unilateral claims have been advanced, notably within the Gulf of Thailand; in the South China Sea proper by Malaysia in 1979; by Brunei in 1988; and Indonesia in 2010. Perhaps unsurprisingly given the disputes concerning sovereignty over islands, these unilateral maritime claims overlap with one another to a substantial extent.

The South China Sea is also host to claims to maritime space apparently based on historic

arguments. Within the Gulf of Thailand, Thailand has since 1959 claimed the northernmost extension of that body of water, the Bight of Bangkok, as a historic bay. Additionally, since 1982 Cambodia and Vietnam have claimed an oblong area of 'joint historic waters' projecting from their coasts, but within their claimed straight baselines, in the Gulf of Thailand. The Philippines has also long claimed rights within its Treaty Limits, that is, the 'box' formed by several late nineteenth and early twentieth-century treaties. China's controversial so-called 'nine-dashed line' or 'U-shaped line' claim may also constitute a historic claim to large portions of the South China Sea. It remains uncertain whether the dashed line represents a claim to sovereignty over the disputed islands within that territory – indicative of a unilateral claim to a maritime boundary – or represents a claim to the maritime spaces within the dashes, whether as historic waters or another type of maritime zone.

Submissions relating to the outer limits of the continental shelf where it extends beyond 200nm from baselines made in 2009 by Vietnam alone and Malaysia and Vietnam jointly to the United Nations Commission on the Limits of the Continental Shelf (CLCS) have led to some clarification in the maritime claims of at least some of the South China Sea states. The implication of these submissions is that, as far as Malaysia and Vietnam at least are concerned, the disputed islands of the South China Sea should not be awarded full 200nm EEZ and continental shelf rights. These submissions prompted China to issue protest notes which, importantly, included maps showing China's nine-dashed line. These notes led to responses and counter-protests from other interested South China Sea states – notably Indonesia, Malaysia, the Philippines and Vietnam – that, in turn, led to further diplomatic correspondence. These diplomatic – and not so diplomatic – exchanges are revealing in that they serve at least to partially clarify the positions of these states. What is also clear, however, is that China not only regards the disputed South China Sea islands as being 'indisputably' subject to Chinese sovereignty, but also that these islands are capable of generating the full suite of claims to maritime jurisdiction.

Maritime boundary and joint development agreements

Although the South China Sea tends to be portrayed as host to numerous contentious territorial and maritime disputes and as a potential arena for conflict, several encouraging maritime agreements have been achieved, albeit generally and at the periphery of the South China Sea. Notable examples include boundary agreements between Brunei-Darussalam and Malaysia (inherited from the United Kingdom and through a 2009 Exchange of Letters), Indonesia and Singapore (1973 and 2009), Thailand and Malaysia (1979), Thailand and Vietnam (1997), China and Vietnam (2000), and Indonesia and Vietnam (2003).

Additionally, the South China Sea hosts multiple maritime joint development agreements and cooperative arrangements of a practical nature. These include those between Malaysia and Thailand (agreed in principle in 1979 and implemented from 1990) concerning seabed energy resources; between Malaysia and Vietnam, also related to seabed hydrocarbons exploration and development in 1992; and between China and Vietnam in 2000, concerning joint fishing activities as part of their above-mentioned maritime boundary treaty. Cambodia and Thailand also agreed in principle to pursue an accord on maritime joint development for part of their overlapping claims area in 2001, although little progress has subsequently been achieved. Further, through their 2009 Exchange of Letters Brunei and Malaysia reportedly reached an accommodation with respect to formerly disputed seabed areas now confirmed as under Brunei's jurisdiction, but according to Malaysia's national oil company, Petronas, a leading role in their exploration.

Increasingly contested waters?

In one sense little has changed in relation to the South China Sea disputes. The sovereignty disputes over islands that are at the root of the problem remain unresolved and there appears little prospect of their being addressed in the foreseeable future. Further, no new maritime claims have been advanced as such. For example, continental shelf rights are inherent to coastal states so the submissions relating to the outer limits to the continental shelf made to the CLCS do not constitute fresh claims in a legal sense. The counterpoint is that their articulation has proved to be highly contentious. Thus, these submissions and the diplomatic notes that they prompted

have provided welcome, albeit partial clarification regarding at least some of the previously ambiguous claims of the South China Sea coastal states. Simultaneously, however, the stark differences between the opposing positions of the claimant states have also been highlighted.

What does appear to have changed in recent years is that there has been a significant escalation in tensions in the South China Sea. In particular, in recent years a series of incidents have occurred involving Chinese maritime surveillance and enforcement agencies and Chinese-flagged fishing vessels in waters closer to the proximate mainland and main island coastlines than to the nearest disputed islands. Such actions appear to be based on the nine-dashed line, rather than maritime claims in line with the terms of UNCLOS advanced from the disputed islands. Incidents have included enforcement activities related to fisheries jurisdiction, for example with respect to waters that Indonesia considers to form part of its EEZ, as well as interventions to disrupt oil and gas survey and exploration activities conducted by Malaysia, the Philippines and Vietnam in their respective coastal waters. Moreover, in June 2012 the China National Offshore Oil Corporation (CNOOC) issued tenders for oil concessions in close proximity to the Vietnamese coastline, yet just within the nine-dashed line.

These incidents appear in part to have arisen as certain South China Sea coastal states, notably Indonesia, Malaysia, the Philippines and Vietnam have sought to undertake activities in what they consider to be their waters, proximate to their mainland and main island coasts. These states appear to have taken the view that those parts of the South China Sea closer to their undisputed territories than to any disputed feature in the South China Sea are undisputed. It is increasingly apparent that China disagrees. Worryingly, China not only appears resistant to such efforts to restrict or minimise the area of the South China Sea subject to dispute, but is also apparently increasingly willing to back up its assertions with enforcement actions on those waterways, apparently up to the limits of the nine-dashed line which encompasses the vast majority of the South China Sea. It also remains open to question whether recent efforts on the part of the Philippines to initiate arbitral proceedings with China under Annex VII of UNCLOS on a number of uncertainties in the Chinese position, including the status of the nine-dashed line assertion and the status and role of certain South China Sea insular features, will bear fruit. Consequently, for the foreseeable future the South China Sea states are indeed faced with increasingly contested waters.



Australian
National
University

National Security College

The 1982 UN Convention on the Law of the Sea and its relevance to maritime disputes in the South China Sea

Donald R. Rothwell

Professor of International Law, College of Law, Australian National University

National Security
College

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The 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹ is the dominant international maritime legal instrument. It identifies the scope and extent of various maritime zones and also provides mechanisms for the delimitation of maritime boundaries. All of the Southeast Asian states with interests in the South China Sea are parties to the UNCLOS. Under the UNCLOS a distinction needs to be made between the delineation of maritime claims on the one hand – which goes to the basis in international law for such a claim to be asserted and the outer limits of that claim; and on the other hand the delimitation of maritime boundaries in instances in which neighbouring states have overlapping claims and there is a need to resolve the boundary between two or more states. In this regard, maritime boundaries under the law of the sea can be distinguished from terrestrial boundaries, which will always delimit territory between two or more states. It is common under the law of the sea for unilateral maritime boundaries to exist in which a coastal state has asserted a claim to a maritime zone which does not in whole or in part adjoin or overlap an area claimed by neighbouring states.

The delineation of a maritime claim, and the ability of a coastal state to be able to justify the outer limits of that claim based upon law of the sea principles, raise different issues from the delimitation of maritime boundaries between two or more neighbouring states. In the South China Sea this is an important consideration as in most instances, the assertion of a maritime claim and the delineation of that claim is the first order issue that will need resolution. Once that matter is resolved, then a very extensive body of international law and practice concerning the delimitation of maritime boundaries between neighbouring states comes into play, by which well-settled principles can be applied.

Disputes concerning the legal status of maritime features

A central aspect of the UNCLOS is that it confers entitlements to assert a claim over a maritime zone to a 'coastal State'². While the term 'coastal State' is not defined in the UNCLOS, it is taken to encompass any state that has a territorial entitlement which encompasses a sea coast³. This extends not only to continental states, but also to island states, including those that are properly characterised as archipelagos such as Indonesia, Japan and the Philippines⁴. Problematic issues arise with respect to maritime features claimed by coastal states, including those that have been subject to territorial claims or which are encompassed within territorial claims, and the capacity of those features to generate maritime zones. These features will range in size from islands, as properly defined, through the entire gamut of associated maritime features, including atolls, cays, islets, rocks, banks, shoals, and reefs. The status of these features, their ability to be subject to territorial claims, and their ultimate capacity to generate maritime zones can be contentious. This is certainly the case with respect to such features in the South China Sea that are at the centre of land and maritime disputes.

In the case of islands, Part VIII of the UNCLOS details a so-called 'Regime of Islands' which contains provisions of considerable significance in the context of the South China Sea. Article 121(1) defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide', which can be referred to as Article 121(1) islands. An artificial island does not therefore meet the criteria, nor does an area of land not above water at high tide, which may in other respects meet the

² See, eg, LOSC, Arts. 2, 33, 56, 76.

³ To that end the LOSC make direct reference to a 'land-locked State' which is a 'State which has no sea-coast': LOSC, Art. 124(1)(a).

⁴ A distinction needs to be drawn between a state which is a geographic archipelago, such as Japan, and an 'archipelagic State' for the purposes of Part IV of the LOSC which is entitled to draw archipelagic baselines from which maritime claims can be asserted; see discussion in Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010), Ch. 8.

¹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994).

criteria of a low-tide elevation⁵. Rocks, shoals, or reefs which may be visible at low tide are therefore not islands for the purposes of the UNCLOS. The importance of Article 121(1) islands under the UNCLOS is that they generate the complete range of maritime zones. A small island is therefore capable of generating a continental shelf or EEZ that may be many times the size of the island's land dimensions and considerably more economically valuable in terms of living and non-living natural resources⁶.

The only exception to this entitlement is the case of islands that may be characterised as rocks, even though they may be above water at high tide. Rocks which 'cannot sustain human habitation or an economic life of their own' do not enjoy an entitlement to a continental shelf or an EEZ⁷, but will still nonetheless enjoy a territorial sea and contiguous zone. These maritime features can be referred to as Article 121(3) rocks. Perhaps the most prominent of these features is Rockall, which is a rock in the Atlantic Ocean to the north of Scotland, claimed by the United Kingdom, which Britain has conceded does not generate a continental shelf or EEZ⁸. The status of Japan's claim to an extended continental shelf offshore Okinotori Shima island, as identified in its 2008 CLCS submission, has highlighted these issues for East and Southeast Asian states and has been a matter of contention for Japan and its neighbours⁹.

Unsurprisingly these provisions of the UNCLOS have generated analysis and consideration by international courts as to the distinction between islands and rocks and the differential entitlements they enjoy to maritime zones. For example, in the cases of *Monte*

*Confurco*¹⁰ and *Volga*¹¹ before the International Tribunal for the Law of the Sea (ITLOS), Judge Vukas expressed the view that the sub-Antarctic Kerguelan Islands (France) and the Heard and McDonald Islands (Australia) in the Southern Ocean were not islands from which the coastal states were entitled to claim EEZs consistent with the UNCLOS. In the case of the two Australian islands, Judge Vukas attributed particular importance to the fact that the islands were uninhabited. However, such a view regarding sub-Antarctic islands¹², which considers the distinction between an Article 121(1) Island and an Article 121(3) rock turns on whether the maritime feature is inhabited or is capable of habitation has not found wider support in ITLOS or other international courts. It can therefore be observed that naturally formed islands, properly characterised as such and distinguished from Article 121(3) rocks and not ones that have been subject to the installation of man-made structures which are built upon low-tide elevations and features so that they sit above water at high tide for human habitation, do generate an entitlement to all UNCLOS maritime zones. It would appear that whether such islands are inhabited or not would not be determinative as to their capacity to generate an EEZ or continental shelf, though it may highlight issues associated with the island's size and whether it is capable of sustaining human habitation, including the presence of fresh water.

A further category of maritime feature referred to in the UNCLOS is a 'low-tide elevation' which is defined as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'¹³. Low-tide elevations can be distinguished from Article 121(3) rocks in that they are not subject to appropriation other than when they fall within the territorial sea limits of the coastal state and are otherwise not to be equated

5 LOSC, Art. 13(1) defines a low-tide elevation as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'.

6 This is highlighted by the case of the island state of Nauru which is comprised of a single land mass of 21 km² but which generates maritime zones consistent with the LOSC of 430,000 km²: *Nauru Country Study Guide* (Washington: International Business Publications, 2011) Vol. 1 at 49.

7 LOSC, Art. 121(3).

8 Clive R. Symmons, 'Ireland and the Rockall Dispute: An Analysis of Recent Developments' (Spring 1998) IBRU Boundary and Security Bulletin 78–93.

9 The Japanese submission was the subject of note verbales from the PRC (CML/2/2009: 6 February 2009) and Republic of Korea (MUN/046/09: 27 February 2009), online: CLCS http://www.un.org/Depts/los/clcs_new/submissions_files/submission_jpn.htm.

10 *Monte Confurco (Seychelles v. France)* (Prompt Release), Judgment of 18 December 2000, Declaration of Judge Vukas, [2000] ITLOS Rep. at 122.

11 *Volga (Russian Federation v. Australia)* (Prompt Release), Judgment of 23 December 2002, Declaration of Vice-President Vukas, [2002] ITLOS Rep. at para. 2.

12 None of the other judges in the *Monte Confurco* and *Volga* cases raised similar issues.

13 LOSC, Art. 13(1).

with land territory¹⁴. Therefore, low-tide elevations do not generate a territorial sea when located beyond the breadth of the territorial sea from the mainland or an island. Otherwise low-tide elevations may be used as a basepoint for the baseline in delineating the breadth of the territorial sea and other maritime zones and to that end may prove useful in determining the outer limits of a maritime zone, or for the purposes of maritime boundary delimitation.

In the South China Sea, distinguishing between Article 121(1) islands, Article 121(3) rocks and low-tide elevations is of greater significance because of the much greater number of maritime features that are in dispute, as are the efforts made by some of the disputing states to build structures such as platforms, lighthouses and small dwellings on these features in an effort to sustain their territorial claims and the capacity of those maritime features to be characterised as Article 121(1) islands¹⁵.

Maritime boundary delimitation

Another law of the sea issue of significance relates to how maritime boundaries may be determined following confirmation of territorial sovereignty over islands and associated maritime features, and whether they are capable of generating the full suite of maritime zones. It can first be observed that the law of maritime boundary delimitation is very well developed with Articles 73 and 84 of the UNCLOS, which provide a legal framework within which coastal states can seek to delimit their overlapping boundaries by negotiation, or within which international courts and tribunals can apply developed legal principles to bring about their resolution¹⁶.

The second observation is that the majority of the South China Sea islands, currently the subject of dispute, are generally small in size, are either uninhabited or have very small permanent or itinerant populations, and are at some distance either from continental Asia or major island systems such as the Philippines archipelago. International courts and tribunals have traditionally been conscious of the potential distorting effects that islands have on maritime boundaries, especially if those islands are granted their full entitlement to extensive maritime zones such as a continental shelf or EEZ, and a number of judicial techniques have been applied to address this problem¹⁷. There are also examples in state practice where small, sparsely inhabited islands which are located very close to the mainland of another state have been given minimal effect in negotiated maritime boundaries settled by way of treaty¹⁸.

This significance of ensuring that small islands do not have a distorting impact upon a maritime boundary is further reinforced in the UNCLOS, which makes clear that the delimitation of these maritime zones is intended to achieve an 'equitable outcome'¹⁹, as reflected in recent International Court of Justice (ICJ) decisions²⁰. In the 2012 decision of the ICJ in *Nicaragua v Colombia*, for example, notwithstanding the Court finding in Colombia's favour with respect to its sovereignty over several small islands and maritime features, many of these features were given diminished or no effect when it came to delimiting the continental shelf/EEZ boundary between Colombia and Nicaragua²¹. Of particular note was the manner in which the Court dealt with low-tide elevations within the territorial sea or particularly small maritime features that were above water

14 See *Pedra Branca/Pulau Batu Puteh* where the ICJ made a distinction between Middle Rocks and South Ledge, in which the latter were classified as a low tide elevation: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 12 at paras. 291–9; quoting with approval discussion in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, [2001] ICJ Rep 40 at paras. 205–6.

15 One of the most prominent of these features in the South China Sea is Mischief Reef which has been the subject of construction works: see Daniel J. Dzurek, 'China Occupies Mischief Reef In Latest Spratly Gambit' (April 1995) *IBRU Boundary and Security Bulletin* 65–71.

16 See discussion in Rothwell and Stephens, Ch. 16.

17 See, e.g., *Anglo-French Continental Shelf Arbitration*, (1979) 18 I.L.M. 397 at paras. 245–51 (where the Arbitral Tribunal elected to give the Scilly Isles in the southern portion of the English Channel 'half-effect').

18 See, eg, Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in an area between the two Countries, including the area known as the Torres Strait, and Related Matters, 18 December 1978, [1985] Australian Treaty Series No. 4 (entered into force 15 February 1985).

19 LOSC, Arts. 74(1), 83(1).

20 See, eg, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] ICJ Rep 61 at paras. 187–88.

21 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment (19 November 2012) para. 203.

at high tide, disregarding them for the purposes of constructing a provisional and an adjusted equidistance boundary line²². State practice and jurisprudence of international courts and tribunals in interpreting the UNCLOS would therefore suggest that even if territorial sovereignty was conclusively settled over islands and associated maritime features in the South China Sea, there is every likelihood that the ability of these features to generate vast maritime claims would be compromised either because they are not Article 121(1) islands, or because they would have a distorting impact upon the maritime boundaries based upon competing maritime claims from continental or island land masses the status of which is not in dispute.

Philippines Annex VII Arbitration application

One of the most significant recent developments with respect to South China Sea maritime disputes occurred in January 2013 when the Philippines commenced Annex VII Arbitral proceedings against China under the UNCLOS. The Philippines notification to China, dated 22 January 2013, seeks to activate procedures under Part XV of the UNCLOS, specifically under Article 287 and Annex VII, which provide for compulsory arbitration of disputes. The Philippines claim gives particular attention to the asserted invalidity under the UNCLOS of what is referred to as China's 'nine dash line', which is the line asserted by China in the South China Sea that purports to identify those maritime areas over which it seeks to assert influence²³. The Philippines contests the validity of this line and any attempts by China to assert sovereignty or sovereign rights over islands and other maritime features found within this area.

The Philippines application raises a number of procedural issues that will need to be addressed prior to the Arbitral Tribunal determining the claim on the merits. China's Article 298 Declaration declares that it does not accept the compulsory dispute resolution procedures under Part XV with

respect to historic title. On 19 February 2013 China rejected the Philippines application for Annex VII Arbitration and indicated that it would not participate in the proceedings. This position would appear to be based upon China's view that consistent with its Article 298 Declaration, the Annex VII Tribunal lacks jurisdiction. Nevertheless, Annex VII contains procedures whereby if one of the parties chooses to not participate in the proceedings, it remains possible for the Tribunal to be constituted and to proceed to a hearing of the application even in the case of China failing to appear²⁴. In the case of failure to appear the Tribunal would need to make a determination that it nonetheless possesses jurisdiction over the dispute, but also that the claim is 'well founded' in both fact and law²⁵. Accordingly, if the Philippines claim does proceed to arbitration, the Tribunal will in this instance have to determine whether it possesses jurisdiction to determine the Philippines claim on the merits, and in doing so it shall need to assess whether China's Article 298 Declaration is a bar to jurisdiction.

While the Philippines application raises a number of issues with respect to China's claim to both land and maritime features in the South China Sea, it has been drafted in order to avoid questions of territorial sovereignty and also historic title. Ultimately, however, this will be a threshold issue for the Arbitral Tribunal to determine. If the Tribunal does come to the view that it retains jurisdiction, then its determination of the Philippines claim would be the first by an international court or tribunal of the disputed law of the sea issues that exist in the South China Sea. In that respect the judgment would have implications for a number of the other disputes that exist in the region for which China's claims are central, and has the potential to bring clarity to some of the legal issues, especially those with respect to the ability of certain maritime features to generate maritime zones under the UNCLOS. Such an outcome would be of great benefit in terms of bringing some ongoing certainty to the interpretation and application of the UNCLOS in the South China Sea.

22 Ibid., at paras. 202, 203.

23 See discussion in Zhiguo Gao and Bing Bing Jia 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Journal of International Law* 98–124.

24 LOSC, Annex VII, arts 3, 9.

25 LOSC, Annex VII, art 9.



China's growing assertiveness in the South China Sea

A strategic shift?

Jian Zhang

Senior Lecturer in International and Political Studies in the School of Humanities & Social Sciences, the University of New South Wales Canberra at the Australian Defence Force Academy.

The renewed tension between China and some other claimant states over the disputed territories in the South China Sea in the last few years has generated widespread concerns about growing Chinese assertiveness in bolstering its claims. In contrast to its relatively conciliatory approach to the South China Sea dispute in the early to mid-2000s, Beijing has appeared to become increasingly uncompromising when handling the dispute. Does recent Chinese assertiveness represent a new shift in China's South China Sea policy due to the country's rapidly growing economic and military clout?

A number of explanations have been made for China's recent assertive stance. One influential explanation seeks to locate the growing Chinese assertiveness in the country's fragmented policy-making structure and diffuse maritime administrative system. According to this view, recent Chinese actions have been largely a product of lack of policy coordination within the Chinese governmental system, wherein different bureaucratic agencies compete to advance their own interests¹. While such a view is certainly valid, what remains unclear is why China has become increasingly assertive in recent years but not earlier, given that fragmentation has been an integral and longstanding problem in the Chinese polity. Some others argue that recent Chinese assertiveness has largely been driven by China's new naval strategy seeking to control the South China Sea due to its intention to compete with the United States for regional primacy². Moreover, it is widely perceived that intense nationalism has been a key driving force behind China's tougher posture. While these factors have undoubtedly influenced Beijing's policy, they cannot fully explain the specific manners in which China has more forcefully asserted its claims in recent years. Particularly, it should be noted that for the most part China's assertive actions have been undertaken by civilian governmental and maritime law enforcement agencies and, more often than not, in the form of so-called 'administrative diplomacy' through diplomatic and administrative measures³.

This paper seeks to provide additional insights into the causes and nature of China's recent actions in the South China Sea. It makes three arguments. First, it argues that recent Chinese actions represent a major and arguably long-term strategic shift in China's policy regarding the South China Sea, featured by the emergence of an increasingly proactive and purposeful approach to solidify Chinese claims. Second, it argues that instead of being motivated by a growing ambition of seeking regional dominance and control of the South China Sea, China's new assertive approach has been driven more by an increasing sense of anxiety. It reflects a growing concern within China that Beijing's past more moderate policy has failed to effectively protect the perceived Chinese sovereignty and maritime interests against the intensified 'encroachments' by other claimant states. Third, despite Beijing's constant refusal to settle the dispute through international legal mechanisms, this issue brief rather controversially argues that China's changing approach is also driven by an increasing recognition of the importance and legitimacy of international law of the sea such as UNCLOS, and the more serious consideration of seeking a future diplomatic and even legal solution to the dispute. Ironically, the growing importance Beijing has placed on international law and its subsequent intentions to build a stronger legal basis through various administrative and jurisdictional measures to consolidate its claims has led to a more proactive and assertive approach, raising tensions in the South China Sea and challenging the status quo.

Beijing's evolving approaches and growing assertiveness

Despite China's claim of indisputable sovereignty over the South China Sea, its approach to the long-running dispute has varied at different periods of time. The PRC first made its official claims to the South China Sea in August 1951 through a statement issued by the then Chinese premier and foreign minister Zhou Enlai in response to the signing of the San Francisco Treaty. The statement claimed that, among others, all the Nansha Islands (Spratlys), Zhongsha Islands (Macclesfield Bank) and Xisha Islands (Paracels) 'have always been

1 International Crisis Group, *Stirring Up the South China Sea* (I), Asia Report No. 223, 23 April 2012.

2 L. Buszynski, 'China's Naval Strategy, The United States, ASEAN and the South China Sea', *Security Challenges*, 8: 2 (2012), 19–32.

3 For example, see 'China's passport move stokes South China Sea dispute', *Strategic Comments*, 18: 10 (2012), v–vii.

China's territory'⁴. Between the 1950s and early 1970s, however, the South China Sea issue received relatively low priority on Beijing's overall national development and foreign policy agenda. China paid greater attention to the South China Sea in the 1970s in response to the actions undertaken by other countries to claim and occupy various islands in areas claimed by China, and took control of the Paracels after a military skirmish with South Vietnam in 1974⁵.

The signing of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 has substantially affected China's attitudes to the South China Sea. Beijing has increasingly recognised the economic and strategic significance of the maritime domain. As a state party to the UNCLOS, since the early 1990s Beijing has developed a body of domestic laws stipulating China's maritime sovereignty and rights largely within the framework of the UNCLOS. These laws include the 1992 'Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China' which asserted China's sovereignty claims over various maritime territories, including the areas listed in the above-mentioned 1951 statement. Following its ratification of the UNCLOS in 1996, Beijing promulgated 'The People's Republic of China Exclusive Economic Zone and Continental Shelf Act' in June 1998 to claim its maritime rights in the relevant waters. In the 1980s and 1990s Beijing undertook a number of assertive actions to enforce its claims. In 1988 China's military clashed with Vietnamese forces over the Johnson (Chigua) Reef in the Spratlys. China's occupation of Mischief Reef in 1995 and subsequent expansion of the structure it built on the reef in 1998 elicited vehement protests from the Philippines and raised regional concerns about Chinese 'creeping assertiveness'⁶.

Since the late 1990s Beijing has adopted a more moderate approach, largely due to the need to improve relationships with ASEAN countries. In November 2002 China signed the 'Declaration on the Conduct of Parties in the South China Sea' (DOC) with ASEAN countries; and in October 2003 it signed the Treaty of Amity and Cooperation in Southeast Asia, becoming the first non-ASEAN country to do so. Beijing has also actively promoted the idea of 'shelving the dispute and seeking joint developments' (*Gezhi zhengyi, gongtong kaifa*)⁷ with other claimant states to manage the dispute. In 2005 China, Vietnam and the Philippines signed an agreement to undertake joint seismic surveys in the South China Sea.

The last few years, however, have seen growing concern among the Chinese analysts that such a moderate policy has failed to protect China's sovereignty and maritime rights. This concern has been particularly acute with regards to other disputant states' exploitation of energy resources in the disputed areas. Ever since the discovery of hydrocarbon resources in the South China Sea in the 1960s and 1970s, competition over accessing the oil and gas has become one of the most important sources of tensions between China and other Southeast Asia claimants. While estimates of the scale of the oil and gas reserves in the South China Sea vary, Chinese analysts generally believe that the maritime domain is a critically important source of energy for China's long-term economic development. Some have estimated that the total oil and gas reserves in the South China Sea could account for one-third of the total energy reserves of China⁸. Others have referred to the South China Sea as 'China's Persian Gulf'⁹.

4 C-K. Lo (Chi-kin Lo), *China's Policy Towards Territorial Disputes: The Case of the South China Sea Islands* (London: Routledge), 1989, 28.

5 Guo J. 'Nanhai diyuan xingshi yu zhongguo zhengfu dui nanhai quanyi de weihi' (The geostrategic situation in the South China Sea and the Chinese government's efforts to protect its rights and interests in the South China Sea), *Taipingyang Xuebao*, 19: 5 (2011), 83-91.

6 I. Storey, 'Creeping Assertiveness: China, the Philippines and the South China Sea Dispute', *Contemporary Southeast Asia*, 21: 1 (1999), 95-118.

7 Luo G. 'Lijie nanhai gongtong kaifa yu hangxing ziyou wenti de xing silu: jiyu guojifa shijiao kan nanhai zhengduan de jie jue lujing' (New thinking on joint development and freedom of navigation in the South China Sea: Paths for Resolving the South China Sea Dispute Based on International law), *Dangdai yatai*, no. 3 (2012), 65-68.

8 Yang G., 'Lun Zhongguo zai nanhai wenti shang de guojia liyi' (On China's national interests in the South China Sea dispute), *Xin Dongfang*, no. 6 (2012), 10-16.

9 Chen X. 'Naihai de ziyuan shijie' (The world of resources in the South China Sea), *Sanlian shenghuo zhoukan*, no. 46 (2010), 15 November 2010, 62.

However, many Chinese analysts increasingly hold the view that the DOC has not been effective in preventing other claimant states from undertaking actions that advance their claims and exploit the energy resources in the South China Sea at the expense of China's interests. For example, some Chinese scholars have observed warily that 'currently the oil and gas resources in the South China Sea are being exploited at an alarming rate and scale by other claimant states'.¹⁰ They claim that 'the annual oil production of the other claimant states in the South China Sea is as high as 50 million tons, equivalent to the peak annual production of China's largest onshore oil field: the Daqing oil field'¹¹. Another analyst warned that 'given the current rate of exploitation, the energy resources of the South China Sea will be exhausted within the next 20 years'¹². Chinese concerns were further reinforced by the growing involvement of foreign oil companies in oil and gas exploration in the disputed area. Such developments have made the South China Sea dispute even more sensitive and complicated for China.

Not surprisingly, some analysts began to argue that Beijing should reconsider the proposal of pursuing joint development, arguing that such a proposal is largely unrealistic and should not be the core of China's South China Sea policy.¹³ An article published in the popular *International Herald Leader*, a newspaper run by the official Xinhua News Agency, bluntly referred to the period since the signing of the DOC as a 'lost decade' for China.¹⁴ At the official level, Chinese frustration was perhaps most clearly expressed by a recent article in the *People's Daily*. The article stated that while China proposed and adhered to the principle of 'shelving the dispute and seeking joint development', other countries should not take the advantage of this to make frequent

'encroachments' on Chinese territories by taking unilateral actions, warning that countries who made 'strategic misjudgments on this issue will pay the deserved price'.¹⁵

Growing disputes over fishing between China and other Southeast Asian claimants have become another major source of Chinese frustration over the current situation in the South China Sea. Accounting for around 10 per cent of the world's annual fishing catch, the South China Sea has been a historical fishing ground for Chinese fishermen from coastal provinces such as Hainan, Guangdong and Guangxi.¹⁶ In recent years, China's conflicts with other claimant states over fishing in the disputed area have occurred more frequently, causing periodical diplomatic tension and sometimes heightened mutual public hostility. According to a Chinese official source, the number of Vietnamese boats that had engaged in illegal fishing in areas surrounding the Paracel Islands increased from 21 in 2001 to more than 900 in 2007¹⁷. Moreover, it is reported that between 1989 and 2010, there have been more than 380 incidents involving foreign countries 'attacking, robbing, detaining and killing' Chinese fishermen. These incidents affected 750 Chinese fishing boats and 11,300 fishermen, with 25 Chinese fishermen being killed, 24 injured and some 800 detained and sentenced by foreign countries.¹⁸ Chinese commentators have angrily labelled the situation in the South China Sea one of 'small countries bullying the big power' (*Xiaoguo qifu daguo*).

Apart from the increasing concern of losing valuable economic resources, a more significant and deepening worry among Chinese analysts is that the actions of other claimant states may strengthen these states' claims over the sovereignty and maritime rights of the disputed areas. Such anxiety is further reinforced by growing recognition among Chinese scholars that China's claims over the South China Sea based on historical grounds will be unlikely to carry much weight in the contemporary international legal environment.¹⁹

10 Du et al 'Nanhai zhuquan Zhengduan de zhanlue taishi ji zhongguo de yingdui fanglue' (The strategic situation in the South China Sea dispute and China's policy responses), *Shijie dili yanjiu*, 21: 2 (2012) 8.

11 Ibid.

12 An Y. *Nanhai anquan zhanlue yu qianghua haiyang xingzheng guanli* (Security strategy in the South China Sea and strengthening maritime administration), Beijing: Zhongguo jingji chubanshe, 2012, 179.

13 Luo G. op. cit., fn. 7, 66.

14 Liang J. 2011, 'Zhongguo zai nanhai shi qu de shi nian' (China's lost decade in the South China Sea', <http://news.china.com/focus/nhcts/11101498/20110628/16618928.html>).

15 *People's Daily* 2011, 'Yanzhong de zhanlue wupan' (Serious strategic misjudgments), 2 August 2011.

16 International Crisis Group, op. cit., fn. 1.

17 Liang J. op. cit., note 15.

18 China's Ocean Development Report 2012, Beijing: Ocean Press, 71.

19 International Crisis Group, op. cit., fn. 1.

A number of Chinese legal experts have recognised that current international law and legal practice prioritises continuous and effective occupation and administration over that of historical discovery, warning that the current actions of other claimant states to reinforce their effective control over the dispute areas may place them in a favourable legal position in future dispute settlements.²⁰

Moreover, despite China's growing naval capability and the occasional tough statements made by some People's Liberation Army (PLA) commentators, most of the Chinese analysts and policymakers recognise that the use of force does not constitute a viable solution to the South China Sea dispute. Given China's multilayered strategic, political, economic and diplomatic interests in Southeast Asia, Chinese analysts generally believe that a military solution is neither feasible nor desirable for the foreseeable future. Some Chinese scholars thus warily argue that China is currently caught in a difficult situation featured by three 'cannots': it cannot reach an agreement with other claimants to resolve the dispute through diplomatic negotiations; it cannot afford to resort to force, and it cannot afford to allow the current situation to last indefinitely' (*Tan bu long, Da bu de, Tuo bu qi*).²¹

In this context, many Chinese analysts argue that China needs to take a more proactive, rather than reactive approach to strengthen its claims through administrative, diplomatic and legal means. For example, the Chinese maritime law expert Qu Bo argues that China should take concerted measures to reinforce its control over the disputed areas in the South China Sea. According to him, China should: adopt a zero-tolerance approach to the presence of other nationals in the areas surrounding the Paracels; take greater efforts to strengthen its control over the seven features occupied by China in the Spratlys and the surrounding maritime areas; establish and enforce relevant maritime laws and regulations; make greater use of jurisdictional measures to demonstrate China's sovereignty; strengthen the capability of the city of Sansha in defending China's maritime rights

in the disputed areas; increase Chinese military presence; and respond promptly to any actions by other countries which violate China's sovereignty.²² After China's standoff with the Philippines over the Scarborough Shoal in April 2012, Chinese legal analyst Zhang Lei warned that while China has indisputable historical rights to the Shoal, it also needs to take strategic and proactive measures to demonstrate and strengthen its continuous and effective administrations of the Shoal on the basis of international law.²³ The growing attention paid to current international legal norms was also reflected in official government documents. For example, in the latest China's Ocean Development Report released by the State Oceanic Administration, it is explicitly stated that China's claims to the sovereignty of the South China Sea Islands are based on 'historical discovery, occupation and longstanding, continuous and effective administration'.²⁴

It is not surprising that the last few years have seen the emergence of a more assertive and purposeful approach on the part of Beijing to bolster China's claims through increasingly proactive and systematic measures. In 2008 the Chinese State Council authorised China Marine Surveillance (CMS) under the State Oceanic Administration to commence regular patrols (*shunhang*) over all the maritime areas claimed by China, including the South China Sea. In 2009 CMS claimed for the first time that it undertook regular patrols over the entire claimed area in the South China Sea, reaching as far as Zengmu Ansha (James Shoal).²⁵ In 2010, the CMS ship also established a sovereignty marker on the Zengmu Ansha (James Shoal) during its patrol.²⁶ Moreover, in 2011 CMS undertook a series of 'special rights protection operations' (*zhuan xiang weiquan xingdong*) in the South China Sea, particularly targeting the 'illegal activities' of foreign countries undertaking 'oil and gas explorations and exploitations, maritime survey and military surveillance'.²⁷ It is thus not an isolated incident that

20 Zhang L. 'Jiaqiang dui huangyan dao youxiao kongzhi de guoji fa yiju' (Enhancing effective control of the Scarborough Shoal on the basis of international law), *Faxue*, no. 8 (2012), 67-75.

21 Zhang S. *Zhongguo Haiquan* (Chinese sea power), (Beijing: Renmin ribao chubanshe), 2009, 21.

22 Qu B., 'Nanhai zhoubian youguan guojia zai nansha qundao de celue ji woguo de duice jianyi' (The Spratlys Strategy of the relevant countries in the South China Sea and advice for China's policy responses), *Zhongguo faxue* no. 6 (2012), 58-67.

23 Zhang L. op.cit. fn. 21

24 China's Ocean Development Report 2012, op. cit. 51.

25 Ibid., 341-2.

26 Ibid., 351.

27 Ibid., 352.

in May 2011 a CMS ship cut off the cable of the Vietnamese seismic survey vessel, Binh Minh 2 in a disputed area in the South China Sea. In addition to the CMS, China's Fishery Administration Bureau (FAB) under the Ministry of Agriculture has also taken more proactive measures against what it regards as illegal fishing in the disputed areas and to protect the operations of Chinese fishermen against what it considers harassment by foreign countries.

Recent external developments provided further impetus for China to take a more assertive approach to counter other countries' claims over the disputed areas in the South China Sea. A joint submission had been made by Vietnam and Malaysia to the Commission on the Limits of the Continental Shelf (CLCS) regarding their claims for continental shelves beyond their EEZs in the South China Sea in May 2009. To protest against this, China subsequently submitted a *note verbale* restating China's indisputable sovereignty over the islands in the South China Sea and adjacent waters. What is notable, however, is that China also attached to its diplomatic note a map indicating a U-shaped line, the first time China officially used such a map to support its claims over the South China Sea.²⁸ The U-shaped line map was initially drawn by a Chinese cartographer in 1914 and was officially published in 1948 by the Republic of China to indicate China's claims to the South China Sea. Since 1949 it has been subsequently used by the current People's Republic of China (PRC) as the basis of Chinese claims. While the U-shaped line covers most of the South China Sea, the PRC government and its ROC predecessor has never clarified explicitly what it claims within the line.²⁹ Given the extensiveness of the areas covered by the U-shaped line and China's ambiguous claims, Beijing's use of the U-shaped line map in its May 2009 diplomatic note to the UN has been perceived by many as indicating growing Chinese assertiveness in the South China Sea dispute. Moreover, in response to Vietnam's promulgation of a national law of sea that stipulates its claims over the Paracels and Spratlys, in July 2012 China

declared the establishment of a new city, Sansha, which will have jurisdiction over the Paracels, Spratlys and Macclesfield Bank. While the idea of establishing Sansha was considered by Beijing as early as in 2007, it was not formally approved due to various considerations.³⁰ This announcement clearly signified Beijing's new assertive approach to reinforcing its claims by establishing a prefecture-level formal government that can exercise full administrative and jurisdictional functions over the disputed areas.³¹ According to Wu Shicun, the director of China's National Institute for South China Sea Studies, the establishment of Sansha city has been an important step in China's efforts to solidify its sovereignty claims through administrative and jurisdictional measures (*fali weiquan*).

In China's twelfth five-year plan, announced in March 2011, it was stipulated that China was to strengthen law enforcement efforts to protect its maritime rights and interests. In 2012, amid China's growing conflict with other countries over the disputed maritime territories, Beijing established 'the Central Maritime Affairs Leadership Small Group Office' (Zhonggong zhongyang haiyang quanyi gongzuo lingdao xiaozu bangongshi) to coordinate policies regarding China's maritime rights and interests, highlighting the importance placed by the Chinese leadership on maritime affairs. Members of the leadership small group include, among others, the Foreign Ministry, the State Oceanic Administration and the military.

China's proactive stance to assert its claims is further demonstrated by the issuance of a new version of the Chinese passport in November 2012. The passport contains a map of China that includes its claimed South China Sea area within the U-shaped line. According to one analysis, 'By printing the passports, and inviting other states to stamp their visas in them, Beijing is attempting to gain recognition for its claims to sovereignty [of the

28 K. Zou, 'China's U-shaped Line in the South China Sea Revisited', *Ocean Development & International Law*, 43:1 (2012), pp. 18-34.

29 For discussion of the origins, nature and significance of the U-shaped line, see K. Zou, op. cit.; and International Crisis Group, op. cit., 3-4.

30 J. Dreyer, 'Sansha: New City in the South China Sea', *China Brief*, XII:16, August 17, the Jamestown Foundation, 6-9.

31 Prior to this, China only had an ad hoc country-level working committee 'Xi, Nan, Zhong Sha (Sansha) Working Committee' as its administrative arm in the South China Sea. The working committee, however, is not a formal level of government and lacks relevant administrative and jurisdictional authority. J. Li, 'Sansha shi cheng li shi me' (The Establishment of the Sansha City), *Liaowang dongfang zhoukan*, 24 July 2012.

South China Sea].³² In March 2013 China further announced its plan to reorganise the State Oceanic Administration (SOA) to enhance China's maritime law enforcement capability. In addition to the CMS, the new SOA will take control of the FAB, the Coast Guard Forces of the Public Security Ministry, and the Maritime Anti-smuggling Police of the General Administration of Customs. The SOA will undertake law enforcement activities in the name of China Maritime Police Bureau.

Conclusion

China's new assertive approach to the South China Sea dispute will have far-reaching consequences for regional stability and future resolution of the dispute. Instead of reflecting a short-term, reactive policy stance, Beijing's recent actions represent a long-term, proactive and purposeful approach to bolster Chinese claims. China's new assertiveness, however, does not signify an increasing inclination to resort to force to settle the dispute. Rather it reflects a growing intention to employ legal, diplomatic and administrative measures to augment the basis of its claims to gain leverage in future diplomatic and legal negotiations. It should also be noted that despite its assertive approach, Beijing does not want to let the South China Sea issue dominate its relationship with ASEAN and the other claimant states. Instead, Beijing has taken efforts to reduce the damage caused by its increasingly assertive actions to its regional status by continually promoting closer economic, political and even military relationships with Southeast Asian countries. Nonetheless, China's new assertive approach will certainly add new uncertainties to the already tension-ridden South China Sea.

32 'China's passport move stokes South China Sea dispute', op. cit.



Australian
National
University

National Security College

Vietnam's evolving claims in the South China Sea

Do Thanh Hai

PhD candidate, Strategic and Defence Studies Centre, Australian National University

National Security
College

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Vietnam is a claimant in the South China Sea disputes. Its claims for sovereignty of islands and maritime regions of the sea overlap either wholly or partly with those of Brunei, China, Taiwan, Malaysia, and the Philippines. This paper examines the evolution of the claims of unified Vietnam to maritime territories in the South China Sea since 1975 and compares them with the provisions of the United Nations Convention on the Law of the Sea (UNCLOS). To this end, the paper will look into Vietnam's policy positions, its responses to major incidents, and the outcomes of negotiations with its neighbours. It also examines Vietnam's legal actions to trace continuity and changes in its maritime regulations. After that, the paper attempts to map out the main determinants behind these changes.

Claimed maritime zones as security buffers before *Doi Moi*, 1986

After unification in 1975, Vietnam allegedly pursued expansive claims in its East Sea, internationally referred to as the South China Sea. Vietnam asserted its longstanding claim to sovereignty over the entire Paracel and Spratly clusters of islets – referred to in Vietnamese as Hoang Sa and Truong Sa respectively – on a historical basis. It published three White Papers in 1979, 1981 and 1988, and presented a wide range of historical data to prove its peaceful acquisition of – and continuous, effective administration over – the island groups by different Vietnamese state authorities since the feudal reign of the seventeenth century. Additionally, Hanoi contested the legitimacy of China's use of force to expel the Vietnamese from the Paracel Archipelago in January 1974 and some Spratly reefs in March 1988.

Hanoi also relied on the nascent legal order of the ocean to claim a range of rights and jurisdictions over a large expanse of maritime areas. However, four claims of Vietnam were seemingly inconsistent with the law of the sea provisions. First, in a statement published in May 1977, Hanoi claimed a full suite of maritime zones stipulated by UNCLOS not only for its mainland coast but also for its offshore 'islands and archipelagos'.¹ Though no specific names of islands and archipelagos were

mentioned, it is a reasonable assessment that Hanoi sought to establish Exclusive Economic Zones (EEZs) and continental shelf entitlements for the Spratly and Paracel features.² It was a controversial issue as to whether these insular features could be considered as fully fledged islands that could generate EEZs and continental shelves of their own: almost all these features are remote, small, barren, and largely unable to host permanent human habitation without regular supplies.

Second, Hanoi also proposed to apply the status of 'historic waters' and use the north-south red line in the 1887 Franco-Chinese Treaty as the boundary line in the Gulf of Tonkin. The Vietnamese legal experts argued in favour of the title of 'historic waters' on the basis of longstanding usage and control of the gulf on the part of France/Vietnam and China. Additionally, they stressed the important security and defense aspects of the gulf, recalling that invasion forces had used it as a staging ground in the past. By the argument of 'historic waters', Hanoi clearly wanted to exercise greater control of an area that was critical to its defence. Though the concept is a part of international customary law, it was a contentious issue and was not recognised by UNCLOS in 1982.

Third, in November 1982 Vietnam followed the practices of some countries in the region to delineate straight baselines deriving from the central and southern parts of its coastline.³ Some proximal offshore islands were selected as base points because they were said to constitute 'a fringe in the immediate vicinity of coast' as prescribed by UNCLOS, and play an important role in the defense system for the south of Vietnam.⁴ Nevertheless, some legal experts were critical of Vietnam's baseline position. They said that the straight baseline model enabled Vietnam to incorporate significant sea area into its internal waters, more than if low waterline and closing lines were used across the many mouths of the Mekong River.

2 Article 121 of UNCLOS 1982 stipulates that the island is entitled to the EEZ and continental shelf while rocks, which are unable to sustain human habitation and economic life of their own, are not.

3 Declaration on the Baseline of the Territorial Waters of the Socialist Republic of Vietnam, issued on 12 November 1982.

4 Hai Thanh, 'The Baseline of Vietnam's Territorial Waters', *Nhan Dan* (Hanoi), 15 November 1982.

1 Statement on Territorial Sea, Contiguous Zone, and Continental Shelf issued by the Socialist Republic of Vietnam on 12 May 1977.

Lastly, Hanoi also applied restrictions on foreign vessels' navigation through its territorial waters and contiguous zones. UNCLOS defends innocent passage, which is defined as traversing or proceeding to and from internal waters that is not prejudicial to the peace, good order or security of the coastal state.⁵ However, Vietnam adopted a number of rules that denied the right of innocent passage for warships not only in the territorial sea but in many circumstances also in the contiguous zone. Vietnam's Decree No. 30-CP dated 29 January 1980 on Regulations for Foreign Ships operating in Vietnamese Maritime Zones ruled that all foreign military vessels needed to apply for permission 30 days before traversing its territorial sea and contiguous zones.⁶

Though these claims were made prior to the signing of UNCLOS in December 1982, the Vietnamese were obviously aware of the consensus reached at UNCLOS negotiations at related points of time. Hanoi's radical interpretations of the law of the sea primarily reflected its national security concerns in the post-war period. Because of Vietnam's elongated mainland territory, the maritime corridor provides a platform from which to maintain the cohesion of the north and south, thereby helping to retain national unity. The longstanding history of struggles for national independence clearly shaped its self-defensive apprehension of international affairs. Vietnam's limited naval capabilities and the lack of a hinterland created a critical consciousness of its coastal vulnerabilities. Vietnamese leaders seized the opportunity created by the emerging oceanic order to create a buffer zone around its coast. It should be noted that the Vietnamese notion of international law at that time was heavily influenced by socialist ideology and Soviet scholarship, which highlighted socialist and capitalist confrontation. Thus, international law was seen as a tool to further sovereignty rather than a means of regulating relations among nations; there was no regret for not being strictly loyal to legal texts. Last but not least, Hanoi clearly deferred to its alliance with the Soviet Union in protection of its territories.

Shifts in Vietnam's maritime interests after *Doi Moi*

Since the mid-1980s, economic development had become the highest priority for the Vietnamese leadership. Amid a severe socio-economic crisis, the Communist Party of Vietnam (CPV) initiated a package of reforms, known as *Doi Moi*, intended to transform the crippled, centrally planned economy into a market economy. Economic reform was followed by foreign policy reorientation. Departing from traditional advocacy of socialist internationalism and the deliberate use of force, Hanoi asserted its new foreign policy of diversification and multilateralisation in order to create a peaceful and stable external environment favourable to economic development. To this end, Vietnam decisively moved to improve its relations with neighbouring countries. These changes delineated the contours of Vietnam's maritime interests.

In the first place, as peace and stability in all the frontiers became a pressing need, Hanoi grew increasingly interested in maintaining the status quo and self-restraint, and in promoting settlement of the offshore islands disputes. Though convinced that its claims had a better historical and legal basis than those of others, Hanoi was not in the position to press its territorial claims forcefully, given its modest naval and air capabilities as compared with China, and the absence of a counterbalancing ally. Also, overt competitive strategies – such as the aggressive pursuit of territorial integrity or offensive military capacity – could derail its focus on economic development and its efforts to expand cooperation with its neighbours. Therefore, the disputes over the island groups were viewed as historical differences that should be resolved peacefully.

In addition to this, because Vietnam's top priority shifted to economic development, physical control of the remote, barren islets became less pressing while the rights to maritime resources and safety at sea gained importance. For the initial phase of *Doi Moi*, in the face of the US-led embargo offshore crude oil was Vietnam's major source of hard currency and the key attraction for foreign investment. The marine fishing industry also grew quickly, providing an important source of protein and a livelihood base for many communities inhabiting the 3260 km coastline, as well as products for export. Moreover, Vietnam's increased trade with the world's markets has made maritime transportation more important. As a result,

5 Article 18 and 19, United Nations Convention on the Law of the Sea, signed in 1982.

6 Article 3 (c), Vietnam's Decree No. 30-CP dated January 29 1980 on Regulations for Foreign Ships operating in Vietnamese Maritime Zones.

Vietnam has become increasingly interested in freedom and safety of navigation.

The shifts in Vietnam's maritime interests have been manifest in key documents regarding maritime development. On 22 September 1997, the CPV Politburo issued Directive 20-CT/TW on the industrialisation and modernisation of the Vietnamese maritime economy. On 9 February 2007, the CPV Central Committee adopted Resolution 09-NQ/TW on Vietnam's maritime strategy to 2020. The details of these documents remain classified, but the key principles were mentioned in the media. The goal was to develop Vietnam into a major maritime power to better exploit and control its maritime domain. The idea was that the development of a maritime economy would lay a strong foundation for national defence, maritime security and international cooperation. In this vein, a strong maritime economy was regarded as of paramount strategic importance to the defence of the country.

Changes in Vietnam's law of the sea claims

After *Doi Moi*, Vietnam maintained its longstanding claim to the Paracels and Spratlys in their entirety, and on a historical basis. There has been no indication that Hanoi would move to clarify the limits of its claim to the archipelago and specific islands, or would be willing to make any compromise on these offshore territories. The Vietnamese leaders would resist any call to reveal their bottom line before China, the biggest claimant, clarifies its sovereignty claims and before the legal regimes which could be applied to these features are decided. However, commentators have observed that Vietnam has prudently adopted some important changes to make its law of the sea claims more consistent with UNCLOS. The sequence of events demonstrates that this behaviour is more the product of strategic and economic necessity than anything else. China's legally unjustifiable claims and its assertive actions figured significantly in this shift in Vietnam's approach.

First, Vietnam dropped its claim to a regime of 'historic waters' in the Gulf of Tonkin. On 25 December 2000, Vietnam and China signed an agreement that mapped out a single line defined by coordinates for both EEZ and continental shelf boundaries. The coordinates defined in the

agreement showed that an equidistant line with slight modifications that reflect the impact of the coastal and mid-ocean islands was used as a boundary line. It is apparent that Vietnam's claim to 'historical waters' would set a precedent legitimising China's so-called U-shaped line claim, which encompasses 80 per cent of the South China Sea. China also argued that the red line in the 1887 Franco-Chinese Treaty was intended to divide the islands and was not a maritime boundary. China's arguments prompted Hanoi to keep to the UNCLOS text closely in order to identify a more reasonable way to divide the gulf.

Second, Vietnam also moved to clarify the outer limits of the maritime zones it claimed. In a joint submission with Malaysia to the Commission on the Limits of the Continental Shelf (CLCS) in May 2009, Hanoi provided precise coordinates for the limits of the EEZ and extended continental shelf – beyond 200 nm – measured from the baseline of its mainland coastline. No EEZ or continental shelf was delineated for the Spratly and Paracel features. Supposedly, Vietnam implied that the South China Sea offshore islands might be rocks that were not entitled to an EEZ and continental shelf, or may have very limited weight in maritime delimitation. Clearly, if Vietnam was of the view that the Spratly and Paracel features had EEZs and continental shelves of their own, it could negatively influence the CLCS's work. This positional change dates to China's contract with US Crestone Energy Cooperation in 1992. In this contract China offered the right to Crestone to explore the Vanguard Bank area (Tu Chinh in Vietnamese), which is 700 nm from mainland China but only 135 nm from the Vietnamese coast, or 84 nm from Vietnamese coastal islands. China brazenly argued that this area was part of the 'adjacent waters' of the Spratlys, which it claimed, while Vietnam maintained that Tu Chinh lies fully in its continental shelf.⁷ This contract created tensions throughout the 1990s. Despite its signature of the Declaration on Conduct of the Parties in the South China Sea in 2002, China carried out a wide range of unilateral measures to establish de facto control over the area within the nine-dash line. On many occasions China harassed and seized Vietnamese fishing vessels, prevented Vietnamese ships from carrying out exploration activities, and exerted pressure on foreign companies involved. China's

7 Thao, Nguyen Hong. 'Vietnam and the Code of Conduct for the South China Sea.' *Ocean Development and International Law*, vol.32, no. 2, 2001, p.106.

unreasonably expansive claim and muscling actions pushed Vietnam into formulating a clearer position on its claimed maritime zones. Though anticipating that China would protest against its submission, Vietnam persisted with survey and data collection and submitted CLCS reports as an assertion of its rights under UNCLOS.

Vietnam also modified its controversial position regarding the right of innocent passage. The right is recognised in the Law of the Sea of Vietnam, adopted by the National Assembly in June 2012. The law was adopted in the context of increased tension resulting from China's illegal seizure of Vietnamese fishing boats and cable-cutting incidents relating to Vietnamese survey ships. In its previous legal instruments Vietnam demanded that the military vessels proceeding through its territorial sea and contiguous zone must have its authorisation 30 days before passage. The new maritime law stipulates that for these vessels to traverse its territorial sea, they must provide prior notification to competent authorities in Vietnam:⁸ no specific timeframe is mentioned. The change indicated Vietnam's compliance with international law – in contrast to China – particularly UNCLOS 1982.

However, to the disappointment of many legal experts – and after considerable debate among Vietnamese experts on this issue – the new law does not entail any revisions to the baseline models proposed in the 1982 Declaration. The law also stipulates that 'in case of differences between this law and international treaties to which the Socialist Republic of Vietnam is a party, the provisions of these international treaties will be applied.'⁹ Seemingly, this provision was designed to leave the door open for changes resulting from negotiated agreements in the future.

In short, Vietnam's claim to sovereignty over the Paracel and Spratly archipelagos in their entirety as based on justifications of historical use remains unchanged. However, after Doi Moi, Hanoi has carefully redefined its claims to maritime zones and jurisdictions to make them more consistent with international law, particularly UNCLOS 1982. Specifically, the Vietnamese government has clarified the limits of its EEZ and continental shelf claim measured from the baseline of its mainland,

the implication of which is that the Spratly and Paracel features do not qualify as fully fledged islands. It abandoned its claim to 'historic waters' in relation to the Gulf of Tonkin, paving the way to the conclusion of the Vietnam–China agreement on maritime delimitation in the gulf on the basis of UNCLOS in 2000. Vietnam also modified its stance to recognise the right of innocent passage of foreign military vessels in its territorial sea. These cooperative changes on the part of Vietnam have been shaped by two important developments. First, Vietnam has been increasingly interested in exploring and exploiting maritime resources for its own development. Second, China's expansive claims and its assertive actions to enforce these claims may have made the Vietnamese leaders aware that the costs of radically bending international law to Vietnam's own advantage were greater than the benefits gained. Consequently, Hanoi has gradually moved from an approach that seeks to maximise its gains at the expense of international law to a strategy that minimises Vietnam's potential loss.

8 Article 12 (2), Vietnam Law of the Sea, Adopted in June 2012.

9 Article 2 (2), Vietnam Law of the Sea, Adopted in June 2012.



Australian
National
University

National Security College

The Philippines in the South China Sea dispute

Renato Cruz De Castro

Professor, De La Salle University, Manila, The Philippines

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Legal basis of Philippine claim in the South China Sea

The claim of the Philippines to sovereignty of the Spratlys was originally based on a private claim asserted by Captain Thomas Cloma, who declared in 1956 that he had discovered a group of islands in the South China Sea which he called *Kalayaan* (Freedom) Islands. Since 1971, the Philippines has occupied six islands in the Spratlys. In 1978 the Philippine government laid formal claim to the islands it controlled through the issuance of Presidential Decree No. 1599, which established the Philippines' Exclusive Economic Zone (EEZ) to a distance of 200 miles from the country's baseline.¹ On 10 March 2009 the Philippines strengthened the legal basis of its claim through the passage of the *2009 Baseline Law*, which defines the country's archipelagic baseline according to the United Nations Convention on the Law of the Sea (UNCLOS) provisions pertaining to archipelagos. In January 2013 the Philippines sought to boost its legal claims over the Spratlys and other land features in the South China Sea when it filed a statement of claim against China in the Arbitral Tribunal of the UNCLOS. In its Notification and Statement of Claim to the Arbitral Tribunal, the Philippines laid its claims to the Spratly Islands, Scarborough Shoal, Mischief Reef, and other land features within its 200-mile EEZ on the basis of the UNCLOS, and specifically to its rights to a Territorial Sea and Contiguous Zone under Part II of the Convention, to an EEZ under Part V, and to a Continental Shelf under Part VI.² Unfortunately, since 2009 China has challenged the Philippines legal claim to these numerous islands, reefs and banks by relying on growing naval prowess backed by coercive diplomacy. To date, this challenge has led to a tense two-month standoff between Philippine and Chinese civilian vessels in the Scarborough Shoal.

1 Lowell Bautista, 'International Legal Implications of the Philippine Treaty Limits on Navigational Rights in Philippine Waters', *Australian Journal of Maritime and Ocean Affairs* 1, 3 (2009), 7. <http://search.proquest.com/printviewfile?accountid=28547>.

2 Department of Foreign Affairs, 'Notification and Statement of Claim to the United Nations Convention of Law of the Sea (UNCLOS) Arbitral Tribunal,' (Manila, 22 January 2013), 12-14.

The 2012 Scarborough Shoal standoff

The Philippines has the weakest navy in the region, and its air force is unable to patrol and monitor its vast maritime territory. In 2012, China targeted the Philippines in naval brinkmanship. The Scarborough Shoal standoff began on 8 April 2012, when a Philippine Air Force (PAF) reconnaissance plane spotted eight Chinese fishing boats around the shoal. In response to this, President Aquino directed the AFP (Armed Forces of the Philippines) and the Philippine Navy to step up its monitoring activities in line with its enforcement of the country's fisheries and maritime environmental protections laws. On the morning of 10 April, the Philippine Navy's flagship, BRP Gregorio Del Pilar confirmed the presence of eight Chinese fishing vessels anchored inside the lagoon. After monitoring the vessels, the Philippine ship, in accordance with its established rules of engagement, dispatched a boarding team to inspect the fishing vessels. The team reported that large amounts of illegally collected corals, giant clams, and live sharks were found inside the compartments of the first fishing vessel boarded.

Instead of allowing the Philippine vessel to apprehend the fishing vessels at the shoal, however, two Chinese marine surveillance vessels positioned themselves between the arresting Philippine warship and the Chinese fishing vessels, effectively preventing the Philippine ship from arresting the Chinese fishermen. The following day, Manila realised that it was engaged in a potentially dangerous standoff with an emergent and assertive China. President Aquino decided to withdraw the BRP Del Pilar and replace it with a smaller coastguard vessel in an effort to lower the tension generated by the standoff. Instead of reciprocating Manila's gesture, Beijing announced that it would deploy its most advanced fishery patrol ship, the Yuzheng 310 – an advanced large patrol vessel equipped with machine guns, light cannon, and electronic sensors – to join the two civilian patrol vessels already present. The Chinese foreign ministry announced that 'the Philippines' attempt to carry out so-called law enforcement activities in the waters of Huangyan Island has infringed upon China's sovereignty, and runs counter to the consensus reached by both

sides on maintaining the peace and stability in the South China Sea.' It further warned the Philippines 'not to complicate and escalate the situation.'³

Clearly, at the beginning of the standoff, China immediately gained the upper hand as it forced the Philippines to back away from confronting the Chinese civilian presence. With its growing armada of armed civilian maritime vessels at its disposal, China was able to place the onus of escalating the dispute on the Philippines, forcing its representatives to reconsider before using force to resolve a matter of maritime jurisdiction. China sent an additional patrol ship; consequently, three Chinese ships confronted a lone Filipino coastguard vessel in the shoal. In response to a diplomatic protest filed by the Philippines, the Chinese embassy contended that the three Chinese surveillance vessels in Scarborough Shoal were 'in the area fulfilling the duties of safeguarding Chinese maritime rights and interests', adding that the shoal 'is an integral part of the Chinese territory and the waters around the traditional fishing area for Chinese fishermen.'⁴ The incident demonstrates the extent of China's development of naval brinkmanship as a means of handling territorial disputes in the South China Sea.

The end of the standoff and its aftermath

During the 2012 Philippines–US Bilateral Strategic Dialogue in Washington D.C., Philippine Foreign Secretary Albert del Rosario made an unprecedented but honest remark regarding the Philippines' vulnerability and utter desperation in its incapacity to confront a militarily powerful China at the Scarborough Shoal, north of the disputed Spratly islands, 124 nautical miles from Luzon, and well within the country's exclusive economic zone (EEZ):

It is terribly painful to hear the international media accurately describing the poor state of the Philippine armed forces. But more painful is the fact that it is true, and we only have ourselves to blame for it. For the Philippines to be minimally reliant upon a US regional partner...it therefore behooves us to resort to all possible means to build at the very least a most minimal credible defense posture.⁵

In the interim, through the pretext of the forthcoming typhoon season, the two countries were able to ease the level of tension over the two-month standoff. On 16 June President Aquino ordered all Philippine vessels to leave the shoal for this reason.⁶ On 18 June, the Chinese foreign ministry announced that Chinese fishing boats near the disputed Scarborough Shoal were returning to port. The following day, the China Maritime Search and Rescue Centre announced that it had deployed a rescue ship to the Scarborough Shoal to provide assistance to Chinese fishing boats returning from the area due to 'rough sea conditions.'⁷ The coordinated withdrawal of Filipino and Chinese civilian vessels from the shoal came amid ongoing consultations between the two countries and reduced political tension over the shoal.

Despite the easing of tensions over the matter, both countries continue to claim sovereignty, and the prospect for resolution of this territorial row remains slight, with the unresolved two-month standoff providing a basis for a possible regional flashpoint in the future. The underlying suspicion and antagonism between the Philippines and China over the disputed shoal in the South China Sea are still very much intact. Further, this incident underscores an international reality: Chinese economic and naval

3 Thai News Service Group, 'China/Philippines: China Seeks Preservation of Over-All Friendly Relations with Philippines as Tension over Scarborough Shoal Ebbs Momentarily,' *Asia News Monitor* (12 April 2012), 1. <http://search.proquest.com/docview/993552886/138B64F7C71082>.

4 James Hookway, 'Philippine, China Ships Square Off,' *The Wall Street Journal Asia* (12 April 2012), 2. <http://search.proquest.com/docview/993221572/fulltext/1368A3AE>.

5 Agence France Press, 'Philippines Sends SOS to the International Community,' *Philippine Star* (2 May 2012), 1-20.

6 Jane Perlez, 'Stand-off over South China Sea Shoal eases: Beijing and Manila pull their ships from area, but the dispute is not settled,' *International Herald Tribune* (19 June 2012), 4. <http://search.proquest.com/docview/1020884288/1386FC0C1134>.

7 Teddy Ng, 'Stand-Off Eases as Sides Withdraw Ships from Shoal: Beijing Follows Manila in Pulling Vessels out of Disputed Area because of Bad Weather,' *South China Morning Post* (19 June 2012), 1. <http://search.proquest.com/docview/1020927910/139091870A75BB1E5FF/15?accounti=2>.

power casts a dark and long shadow over the Philippines and Vietnam, which are at the forefront of the South China Sea dispute with China.⁸

Conclusion

The 2012 Scarborough Shoal standoff between the Philippine and Chinese civilian vessels constitutes an arch-typical international incident. Three years before the incident, China had already become more assertive in pursuing its expansive maritime claims in the South China Sea. Since 2009 it has built a powerful and formidable navy to back its territorial claims. It has also actively challenged the littoral states' EEZ claims and threatened them with various military exercises aimed at demonstrating its readiness and capacity to exert coercive military pressure to effect control over the islands and waters within its nine-dash map.

These developments coincided with a major political change in the Philippines – the election of Benigno Aquino III to the presidency. After a few months in office, President Aquino began to challenge China's claim in South China Sea by shifting the focus of the AFP from internal security to external defence and seeking US diplomatic and military support for a balancing policy against China. The Obama Administration responded by extending additional military and diplomatic assistance to its southeast ally as it, in turn, had been concerned about China's growing naval power and assertiveness with regard to its maritime claims.

These developments, together with the strategic pivot of the US to the Pacific, have strengthened the resolve of the Philippines and Vietnam to protect the regions they claim sovereignty over. President Aquino's balancing policy against China and US support for this policy led, in turn, to a dramatic deterioration in Philippine–China relations. This fuelled the two-month long standoff between Philippine and Chinese civilian vessels in Scarborough Shoal. While the deadlock ended when both the Philippines and China withdrew their civilian vessels at Scarborough Shoal in the middle of June

2012, the fuel that ignited the impasse remains. Such potential for hostility will persist as long as China continues to increase its efforts to control the region and as other claimant countries, such as the Philippines and Vietnam, remain firm in asserting their right to control their respective claims in the South China Sea.

8 William Chong, 'Path to Scarborough Far from Fair: South China Sea Rivals no Match for China's Economic, Military Clout', *The Strait Times* (21 April 2012), 1. <http://search.proquest.com/docview/1008636649/fulltext/1368A3A>.



The role of ASEAN

Gary Collinson

PhD candidate, National Security College, Australian National University

Christopher B. Roberts

Senior Lecturer and Research Convenor, National Security College, Australian National University

Recent diplomacy by the Association of Southeast Asian Nations (ASEAN) over the South China Sea disputes has been the subject of significant international focus. However, a deeper understanding of the factors informing ASEAN unity and the potential for an effective response also necessitates an analysis of the association's long-term diplomacy on the subject. Consequently, this brief paper is divided into two sections. The first section examines the historical basis for a relatively unified ASEAN position over the South China Sea during the 1990s. It then examines the various factors that led to a deterioration of ASEAN solidarity by the time of the 2002 *Declaration on the Conduct of Parties in the South China Sea*. The second section examines the more assertive diplomacy and sometimes coercive behaviour exhibited by Beijing since 2007. The examination of these two periods provides a more nuanced understanding of the feasibility of a unified ASEAN position in the future and the extent to which ASEAN solidarity may have a tangible impact in resolving or reducing tensions over the dispute.

ASEAN's early role – the transition from solidarity to disunity

In 1992, China claimed exclusive sovereignty over the bulk of the South China Sea by passing its *Law of the Territorial Sea and Contiguous Zone of the People's Republic of China*. The area claimed by China conflicted with the claims of four of the then six ASEAN members – Brunei, the Philippines, Malaysia and Indonesia. Further, China had authorised the US Crestone Energy Corporation to conduct exploration for hydrocarbon reserves within Vietnam's continental shelf. Given a history of tenuous relations between Beijing and many of the then ASEAN members, the association was able to respond quickly through its 1992 *Declaration on the South China Sea*. The declaration referred to the association's core principles, as elaborated in the Treaty of Amity and Cooperation, and urged 'all parties concerned' to resolve 'sovereignty and jurisdictional issues' over the dispute via 'peaceful means' and 'without resort to force'. The most significant clause concerned a call to establish a binding 'code of international conduct over the South China Sea'.¹

1 'ASEAN Declaration on the South China Sea (Manila),' ASEAN Secretariat, <http://www.aseansec.org/1196.htm>.

While China was unenthusiastic in its initial response, Vietnam's foreign minister, Nguyen Manh Cam, almost immediately issued a statement fully backing the declaration, stating that it was 'in conformity with the principles and policies that Vietnam has been pursuing'.² Given Hanoi's own claims to the South China Sea, the shift from a previously hostile position towards ASEAN was unsurprising. Hanoi's position was also informed by its own history with China, including the 1979 border war and a 1988 skirmish in which the Chinese People's Liberation Army Navy (PLAN) clashed with Vietnamese forces at Fierly Cross Reef, leading to the loss of three Vietnamese vessels and 77 crew members.

ASEAN's collective diplomacy regarding the South China Sea was further crystallised by China's occupation of Mischief Reef in November 1994 – discovered in 1995. Based on the United Nations Convention on the Law of the Sea (UNCLOS), the Philippines appears to have a clear legal claim to the natural resources in the area of the reef, e.g., fishing, as it is well within its 200 nm Exclusive Economic Zone – i.e., 127 nm from the Philippine territory of Palawan. From Marvin Ott's perspective, the occupation of 'Mischief Reef was significant, not as a military asset, but as a tangible demonstration of China's determination to project its power and presence into the South China Sea'.³ The timing of this occupation was within a few years of the withdrawal by the United States of its armed forces from the Philippines. In this sense, the end of the Cold War and associated perceptions of an incremental withdrawal from Southeast and East Asia by the US military since the 1970s – i.e., the Nixon Doctrine – appear to have contributed to a sense of empowerment within both the Chinese Communist Party (CCP) and the People's Liberation Army (PLA).

The Philippine government responded in early 1995 by providing the international press with photos that revealed 'clusters of octagonal-shaped concrete structures on steel pylons' constructed by Beijing at Mischief Reef. Despite these photos, Beijing initially denied that it had constructed anything other than shelters for Chinese fishermen. While the Philippine

2 'Southeast Asia: International Code of Conduct Urged for Spratleys', *Inter Press Service*, 22 July 1992.

3 Marvin Ott, 'Asean and the South China Sea: A Security Framework under Seige', Center for Strategic and International Studies, <http://csis.org/publication/asean-and-south-china-sea-security-framework-under-seige>.

government first resorted to military action by sending several naval vessels and – as stated by Colonel Felipe Gaerlan – its ‘entire force of F-5s ... , five of them’⁴ – the weakness of its armed forces soon forced the government to focus on diplomatic means, including its membership in ASEAN. ASEAN quickly responded through a mix of diplomatic sticks and carrots.

In March 1995, the ASEAN foreign ministers censured China through a joint statement expressing serious concern over developments in the South China Sea; the association referred to the spirit of the 1992 ‘ASEAN Declaration on the South China Sea’ in reiterating its call for restraint from destabilising actions. Meanwhile, ASEAN encouraged China to participate in ‘a network of regional organisations’ and workshops or, what Michael Leifer termed, an ‘embryonic structure of good citizenship’.⁵ Despite these efforts, Beijing maintained its long-held position that it was willing to enter into bilateral discussions with other claimant states but that it would not enter into multilateral negotiations with ASEAN. Nonetheless, China started to view the ASEAN states and their institutional modalities through a different lens and devoted more resources towards the exercise of greater soft power, or what Kurlantzick depicted as China’s ‘Charm Offensive’.⁶

The period between 1992 and 1995 represented the height of ASEAN solidarity over the South China Sea disputes. However, while ASEAN unity de-escalated public and official tensions over the dispute, China continued its ‘creeping assertiveness’ and by 1999 it had further fortified its structures in disputed territories, including Mischief Reef. Thereafter, ASEAN’s capacity to exercise a collective ‘diplomatic voice’ over the issue weakened considerably. This incapacity was not only complicated by intra-ASEAN divisions over their contradictory claims, but was also compounded by ASEAN membership expansion and the simultaneous impact of the East Asian financial crisis on both regional relations and confidence in ASEAN. Consequently, the

Philippines was unable to acquire the level of unity necessary to undertake a new attempt (1999) at finalising a binding Code of Conduct (COC). The final compromise was the non-binding *Declaration on the Conduct of Parties in the South China Sea* (DOC), signed in 2002. Within a year, Beijing demonstrated the ineffectiveness of the DOC when it negotiated an agreement for joint exploration with the Philippines – and later Vietnam – that alienated the remaining ASEAN claimant states.

Unilateral and multilateral responses amid escalating tensions

A notable shift in China’s approach to the South China Sea dispute has occurred since 2007. For example, in July 2007, Chinese paramilitary vessels forced Vietnamese fishing vessels away from the Spratly islands and sank three of them. A British-American-Vietnam oil consortium was also forced by Beijing to abandon its gas field development off southern Vietnam. Then, in 2009, Malaysia and Vietnam provided a joint submission regarding the southern parts of the sub-region to the United Nation’s Commission on the Limits of the Continental Shelf. This initiative angered Beijing, which responded with its own submission that included a new nine-dash map claiming sovereignty over almost the entire South China Sea.

Beijing’s response was indicative of a shift away from seeking a collective ASEAN position and towards a more instrumentalist use of multilateral institutions; some analysts believe that Hanoi applied its leverage as the Chair of ASEAN to internationalise the South China Sea issue. If true, and despite frequent warnings from Chinese officials against any such action, Hanoi sought a statement of support from the United States at the July 2010 ASEAN Regional Forum (ARF) meeting. Consequently, the US secretary of State Hillary Clinton declared that ‘the United States has a national interest in freedom of navigation, open access to Asia’s maritime commons and respect for international law in the South China Sea’, noting also that the issue was a ‘diplomatic priority’ for the United States, offering to help to mediate the dispute. China was so incensed that it reportedly declared, behind closed doors, that it had elevated the South China Sea issue to one

4 Michael Richardson, ‘Chinese Gambit: Seizing Spratly Reef without a Fight,’ *International Herald Tribune*, 17 February 1995.

5 Cited in Barry Wain, ‘China Nibbles, Asean Dithers,’ *The Wall Street Journal*, 10 March 1995.

6 Joshua Kurlantzick, ‘China’s Charm Offensive in Southeast Asia,’ Carnegie Endowment for International Peace, <http://carnegieendowment.org/2006/09/01/china-s-charm-offensive-in-southeast-asia/979>.

of its 'core interests'.⁷ Beijing was also concerned about any actions designed to contain China's military rise and these concerns were reinforced when the United States announced the much-publicised 'pivot' back to Asia shortly after the ARF meeting.

As chair, Vietnam also resumed the sessions of the ASEAN-China Joint Working Group to implement the 2002 DOC. These efforts resulted in the conclusion of a vague set of guidelines in July 2011. However, this was only possible when ASEAN agreed to Beijing's request, supported by Cambodia, to remove a reference that required consultation between the ASEAN states prior to any agreement with Beijing. An additional guideline also required that any activity or project based on the DOC be reported to the ASEAN-China Ministerial Meeting.⁸ Thus, even within ASEAN's formal multilateral framework, China had effectively institutionalised a bilateral process of negotiation that would secure its capacity to divide and rule and maintain its asymmetrical primacy.

The 'Guidelines to Implement the DOC' had little impact as China's relations with both Vietnam and the Philippines continued to deteriorate and, in 2011, Vietnam alleged that Chinese vessels had twice cut oil exploration cables. In July 2012 more than a dozen Chinese fishing vessels, two Chinese law enforcement vessels, and a single Filipino naval vessel were involved in a standoff over Scarborough Shoal. Moreover, China also invited foreign tenders for oil and gas blocks in disputed waters (July 2012). The Scarborough Shoal development was further complicated by a Chinese frigate that ran aground on a nearby shoal. Contrary to previous reports, this demonstrated that China's paramilitary forces were operating in coordination with the PLAN and that Chinese operations in the South China Sea were far more centrally planned than some reports had contended.

Alarmed by these developments, several of the ASEAN members sought to reinforce the institutional constraints to coercion by Beijing through a renewed pursuit of a binding COC and further progress with

the implementation of the DOC guidelines. In the case of the latter, an agreement was reached in January 2012 concerning the establishment of four expert committees on maritime scientific research, environmental protection, search and rescue, and transnational crime. However, ASEAN and China failed to agree to an expert committee concerning 'safety of navigation and communication at sea as it was deemed too contentious'.⁹ In the case of the COC, Beijing maintained that the DOC guidelines should first be implemented and only then, with 'appropriate timing' and 'appropriate conditions', would China consider negotiations regarding the DOC.¹⁰

Despite Beijing's formal objections, the Philippines government drafted a preliminary COC and circulated it between the ASEAN members. However, ASEAN's intramural negotiations were hindered by the non-claimant members and a continued divergence of perceptions concerning the potential threat of Beijing's rising power. For example, the ASEAN members became divided over Articles 1 to 6, as these covered issues such as 'joint exploration', the application of UNCLOS, and the establishment of a regional Dispute Settlement Mechanism. Meanwhile, at the twentieth ASEAN Summit (Phnom Penh 3–4 April 2012), China adopted a new position and requested a seat at ASEAN's intra-mural negotiations over the COC. As the then Chair of ASEAN, Cambodia supported this request, but the Philippines and Vietnam strongly objected. Compromise was reached whereby the ASEAN members would alone draft the COC, but Cambodia would regularly update Beijing about the negotiations.¹¹

Progress over the draft COC continued through intra-ASEAN deliberations at a Working Group (April 2012), followed by a Senior Officials Meeting (June 2012): these meetings resulted in the redrafting of

7 'Asia-Pacific,' *Strategic Survey* 111, no. 1 (2011): 355.

8 Interview by Christopher Roberts with scholar, Diplomatic Academy of Vietnam (Hanoi), January 2011.

9 Carlyle A. Thayer, 'ASEAN's Code of Conduct in the South China Sea: A Litmus Test for Community Building?' *The Asia-Pacific Journal: Japan Focus* 10, no. 34 (2012): 3.

10 *Ibid.*

11 'A New Wave of Chinese Assertiveness: Roping Off Scarborough Shoal, Oil Leases in Vietnam's EEZ, Military Garrison on Land and Fishing Armada at Sea,' in *2nd MIMA South China Sea Conference: Geo-Strategic Developments and Prospects for Disputes Management*, Kuala Lumpur: Malaysian Institute of Maritime Studies, 2012.

the key principles for a COC. The new draft was submitted at the 45th ASEAN Ministerial Meeting (AMM) on 9 July 2012. However, aside from references to two dispute settlement mechanisms under the Treaty of Amity and Cooperation and UNCLOS (both voluntary), the more contentious aspects of the initial Philippine draft had been removed or significantly reduced in their scope and level of enforceability.¹² The ASEAN foreign ministers then became embroiled in a dispute over a request by the Philippines and Vietnam to include a reference to Chinese aggression – e.g., the Scarborough shoal incident – and Beijing’s award of hydrocarbon exploration leases within Vietnam’s EEZ.

As the Philippines and Vietnam were not willing to withdraw this paragraph, Cambodia refused to issue the joint statement. Reports soon emerged that Cambodia had been simultaneously consulting with Beijing during the negotiations.¹³ Indonesia’s Foreign Minister, Marty Natalegawa, interpreted this as a significant setback for ASEAN and stated that ‘I think it is utterly irresponsible if we cannot come up with a common statement on the South China Sea’.¹⁴ Cambodia was willing to sacrifice the collective interests of ASEAN over the South China Sea, as China is now Cambodia’s principal source of investment and foreign aid.

Marty Natalegawa then attempted to resolve this disunity by embarking on a course of shuttle diplomacy to Cambodia, Vietnam, and the Philippines. Following these discussions, and in order to reduce the level of intra-mural tension between the ASEAN claimants, he personally drafted a ‘six-point plan’ which was publicly released in late July 2012. According to one analyst, all the ASEAN countries provided their ‘approval to the six principles of ‘ASEAN’s Common Position” on the South China Sea’, in particular a commitment to the DOC, and an ‘early adoption of a Code of

Conduct’.¹⁵ However, the six-point plan did not introduce anything new, and at best it may serve to shelve the dispute temporarily. For example, the limitations of this diplomacy were evident when the ASEAN members declined a request by the Philippines to renegotiate a unified position regarding the South China Sea at the November 2012 ASEAN Summit. Consequently, the Philippines has returned to unilateral diplomacy and sought recourse to international arbitration through the UN’s International Tribunal on the Law of the Sea (ITLOS).

The most common solution advocated by South China Sea analysts concerns setting aside sovereign claims to agree to mechanisms for joint exploration and exploitation. However, China has only indicated a willingness to consider this on a bilateral basis. Problematically, the absence of a multilateral arrangement would render it difficult to reconcile competing intra-ASEAN claims. Here the key difficulty concerns the inability of the ASEAN claimants to garner a common position while, in the case of China, it continues to insist on a bilateral approach to the dispute.

A further complicating factor involves the idea that for a number of claimants the South China Sea issue can be considered to be a ‘status quo dispute’. At one level, this is because a number of the claims are weak under international law and this explains the unwillingness of China, for example, to seek recourse to international arbitration. At another level, some countries have determined that any change to the status quo will not be in their favour given considerations such as China’s military power. For example, one senior military official from Vietnam stated that that ‘if anything changes regarding the dispute, it will not be in Vietnam’s favour, the best we can hope for is to maintain the current status.’¹⁶

12 ‘ASEAN’s Code of Conduct in the South China Sea: A Litmus Test for Community Building?’

13 ‘Cambodia’s Foreign Relations; Losing the Limelight,’ *The Economist*, 17 July 2012.

14 ‘Asean Struggles for Unity over South China Sea,’ *Agence France Presse*, 12 July 2012.

15 ‘The Tyranny of Geography: Vietnamese Strategies to Constrain China in the South China Sea,’ *Contemporary Southeast Asia* 33, no. 3 (2011).

16 Interview by Christopher Roberts with Senior Defence Official, Hanoi, January 2012.

Conclusions

The potential for a meaningful ASEAN consensus concerning the South China Sea remains low. The ASEAN states have not yet demonstrated a capacity to sacrifice 'national interests' for the 'collective interests' of ASEAN, even when the latter outcome would result in the most optimal – absolute – gain for all. The economic and strategic interests of some ASEAN countries are also highly interdependent with China. One option that may help to reduce this dilemma is the establishment of a sub-ASEAN working group, e.g., ASEAN-X, involving only the claimant states. While this would reduce the potential for disunity in broader ASEAN forums and protect the credibility of ASEAN's regional centrality, it would weaken the association's collective diplomatic voice. Nonetheless, should such an approach be adopted, it would also need to combine a willingness to pursue joint exploration in the areas that are more ambiguous regarding the application of UNCLOS. However, China is still likely to resist any initiative that it perceives to multilateralise or internationalise the dispute.



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The US rebalancing strategy: Impact on the South China Sea

Ralf Emmers

Associate Professor and Coordinator of the Multilateralism and Regionalism Programme at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University (NTU), Singapore

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Introduction

The United States is the predominant economic and military power in the world; it refers to itself as a 'resident Pacific power'. In recent years the Obama administration has reinvigorated its strategic influence in the region through a pivot or rebalancing strategy towards the Asia-Pacific. In 2010, Secretary of State Hillary Clinton declared in a speech at the East-West Centre in Hawaii that 'America's future is linked to the Asia-Pacific and the future of the region depends on America'.¹ The new policy announcements emanating from the Obama administration are meant to sustain a long-term strategic presence in the Asia-Pacific, especially through a strong maritime focus.

Since the terrorist attacks on 11 September 2001 the United States has been focused on fighting terrorism and the wars in Iraq and Afghanistan. Nonetheless, the Obama administration has refocused its diplomacy and military forces towards the Asia-Pacific. At the East Asia Summit (EAS) in 2011, Obama declared that the United States would not merely maintain but also increase its military presence in the region. Besides deepening its military ties with the Philippines, the United States announced in late 2011 the rotational deployment of 2,500 US Marines in Darwin, Australia, and the deployment of up to four of its littoral combat ships (LCS) in Singapore. In June 2012, US Secretary of Defence Leon Panetta also stated that the United States would commit 60 per cent of its naval capabilities to the Pacific Ocean by 2020.

Traditional American position on the South China Sea

It is important to stress that the United States has never entirely left Asia, either strategically or economically. The Obama administration has nonetheless paid increased attention to the geographical area expected to generate most economic growth in the next twenty years, which is also where the greatest geopolitical challenge to US global predominance is to be found. In an influential *Foreign Policy* article, Hillary Clinton explained that a 'strategic turn to the region fits

logically into our overall global effort to secure and sustain America's global leadership.'² The American decision to pivot its diplomacy and military forces towards the Asia-Pacific has therefore been viewed, especially in Beijing, as a response to China's growing regional ambitions. It is too soon to say, however, whether the United States will be able to afford its long-term ambitions in Asia and whether Washington and Beijing will be persuaded that their interests lie in cooperation rather than competition. This paper assesses specifically how – and the extent to which – the US rebalancing strategy has impacted the South China Sea disputes. The United States is not a party to the sovereignty disputes, but it has declared a vital interest in the freedom of navigation in the South China Sea and repeated its commitment to peaceful resolution of the disputes in accordance with the principles of international law.³

The only power capable of countering rising Chinese naval capabilities in the South China Sea has been the United States, particularly through use of its Seventh Fleet.⁴ Yet, Washington has traditionally been unwilling to become involved in territorial disputes over the semi-enclosed sea. The absence of an external source of countervailing power in the disputed waters has not resulted from an American strategic retreat from the area. Instead, it has arisen from unwillingness on the part of the United States to involve itself in the question of sovereign jurisdiction.

Though following closely the developments in the South China Sea, the United States has consistently limited its interest to the preservation of the freedom of navigation and the mobility of its Seventh Fleet. The United Nations Law of the Sea Convention (UNCLOS) ensures the freedom of navigation, the right of innocent passage, and passage through straits. It is important to note that in the context of the South China Sea the freedom of navigation principle is mostly associated with the freedoms of navigation and flight of military ships and aircraft, as no restriction to commercial shipping is feared

2 Hillary Clinton, 'America's Pacific Century', *Foreign Policy*, November 2011, 58.

3 Clinton, 'America's Pacific Century', 58.

4 Lee Lai To (2003) 'China, the USA and the South China Sea conflicts', *Security Dialogue*, vol. 34, no. 1, 27.

1 Secretary of State of the United States, Hillary Clinton, East-West Center, Honolulu, Hawaii, 14 January 2010.

in the disputed waters.⁵ Due to its own economic interests, the People's Republic of China (PRC) is not expected to interrupt the shipping lanes that cross the South China Sea.

Should conflict occur in the South China Sea, the extent to which the United States will support either Taiwan or the Philippines remains unclear. It should be noted that one area of tentative agreement between Beijing and Taipei exists regarding the issue of the Paracel and Spratly Islands. Both parties acknowledge that the islands are in Chinese territory, putting them in contention with claimants in Southeast Asia. Washington has repeatedly stated that the Philippine-claimed territories in the South China Sea are not covered by the Mutual Defence Treaty of 30 August 1951, which ties the Philippines to the United States. For instance, on 8 February 1995, the Philippines discovered Chinese nationals occupying Mischief Reef, located in Philippine-claimed waters. The Mischief Reef incident did not lead to a strong US diplomatic reaction, however, except for a statement concerning the freedom of navigation. Joseph Nye, at the time US Assistant Secretary of Defence for international security, declared on 16 June 1995 that the United States would ensure the free passage of ships in the case of a conflict in the Spratlys that would affect the freedom of navigation. Likewise, Vietnam has not reached a formal or tacit alliance with the United States over the South China Sea despite significant improvement in bilateral ties since the establishment of diplomatic relations between the two countries on 11 July 1995.

Shift in recent years?

In recent years the US position has not fundamentally changed. Washington still refuses to take a position on the sovereignty dispute and continues to limit its core interest to freedom of navigation in the disputed waters. Regardless of this, the United States has become increasingly concerned over the build-up of China's southern fleet, even though it is gradual, and is uncertain as to China's commitment to the freedom of navigation principle in disputed waters. The People's Liberation Army Navy (PLAN) is also constructing an

underground nuclear submarine base near Sanya on Hainan Island. The base will significantly expand China's strategic presence in the South China Sea by enabling increased Chinese submarine activity in the disputed waters.

A major development occurred in 2009 that deepened American concern over rising Chinese assertiveness. The incident, involving the harassment of the ocean surveillance vessel USNS *Impeccable* by Chinese navy and civilian patrol vessels south of Hainan Island in March 2009, caused alarm in Washington and most Southeast Asian capitals. While Beijing claimed that the *Impeccable* was involved in marine scientific research in its exclusive economic zone, which requires Chinese consent, Washington argued that the activities of the surveillance vessel were legitimate under the freedom of navigation principle. Washington and the Southeast Asian claimants perceived the *Impeccable* incident as an example of rising Chinese assertiveness in the South China Sea.

Another significant escalation occurred in April 2012 with Chinese and Philippine vessels involved in a stand-off at Scarborough Shoal in the South China Sea. Significantly, these events coincided with the Philippines and the United States holding their annual military exercises on Palawan Island.⁶ Philippine naval authorities had discovered several Chinese fishing vessels anchored at the Shoal disputed by both China and the Philippines. A Philippine navy ship attempted to arrest the Chinese fishermen allegedly accused of poaching and illegal fishing. Two Chinese maritime surveillance ships intervened, however, and prevented the arrest from occurring. This resulted in a tense stand-off between the Philippine navy ship and the Chinese maritime vessels, and eventually caused severe tension between Beijing and Manila that lasted for several weeks.⁷ In the instance of a clash of arms involving the Philippine Navy and Chinese vessels, the United States would have been obliged to consult with Manila as a treaty ally and possibly involve itself in the dispute. The risks involved with such a scenario were carefully considered in Washington.

6 *The Economist* (28 April 2012) 'Shoal mates: America's navy riles China in its backyard'.

7 Matikas Santos (11 April 2012) 'Poaching triggers Scarborough stand-off', *Philippine Daily Inquirer*, (available HTTP < <http://globalnation.inquirer.net/32493/illegal-poaching-activities-of-chinese-vessels-cause-standoff->>); M. Valencia (14 May 2012) 'Current spat may be a sign of future tensions', *Straits Times*.

5 S. Bateman (16 August 2010) 'The South China Sea: when the elephants dance', *RSIS Commentaries* (Singapore: S. Rajaratnam School of International Studies).

US rebalancing and multilateral diplomacy

At the 2010 Shangri-La Dialogue, US Secretary of Defence Robert Gates declared that while the United States would not take sides in the sovereignty disputes, it would oppose any action that could threaten freedom of navigation in the South China Sea. A statement made by US Secretary of State Hilary Clinton at the ASEAN Regional Forum (ARF) in July 2010 declaring that the United States has a national interest in freedom of navigation in the South China Sea further angered China. Her comments were perceived by Beijing as a form of external interference. Discussing her intervention at the 2010 ARF meeting, Clinton later wrote in her *Foreign Policy* article that 'the United States helped shape a region-wide effort to protect unfettered access to and passage through the South China Sea, and to uphold the key international rules for defining territorial claims in the South China Sea's waters.'⁸

Besides the United States, 11 other ARF participants, including all the Southeast Asian claimant states, mentioned the disputes in their statements. China had managed until 2010 to keep the South China Sea off the ARF agenda.⁹ Yet, as the acting Chair of the Association of Southeast Asian Nations (ASEAN) and host of the ARF, Vietnam sought in 2010 to internationalise the discussion on the South China Sea. The latter was again mentioned by Clinton at the ARF meeting held in Bali in July 2011.

US President Barack Obama himself raised the South China Sea question at the East Asian Summit (EAS) in Bali in November 2011. He restated that the United States takes no sides in the disputes but that its interests include freedom of navigation and unimpeded international commerce in the region. Sixteen of the 18 leaders present at the summit mentioned maritime security in their remarks.¹⁰ Chinese Premier Wen Jiabao responded by reaffirming the freedom of navigation principle and calling for peaceful resolution of the disputes.

However, after the Vietnamese and Indonesian chairmanships of ASEAN, it was expected that the next three annual chairs, Cambodia, Brunei and Myanmar, would seek to appease Beijing by minimising international exposure of the South China Sea issue. This had already occurred under the Cambodian chairmanship in 2012. At the ASEAN Ministerial Meeting held in Phnom Penh in July 2012, the Southeast Asian states failed to issue a joint communique due to differences over the South China Sea question. The Philippines had insisted on a reference to the stand-off between Manila and Beijing at Scarborough Shoal earlier in 2012 but Cambodia, acting as the ASEAN Chair and a close economic partner of Beijing, refused on the grounds that the territorial disputes with China are bilateral. While present at the ARF meeting that followed, Hilary Clinton did not interfere in this intra-ASEAN issue. The ASEAN states and China also failed to commence negotiations for a code of conduct at the ASEAN Summit in November 2012 as Beijing declined to support the action.

Overall, the South China Sea issue continues to divide ASEAN. This is due partly to lack of consensus among the member states on how to address the sovereignty disputes, but also more generally to the rise of China. ASEAN's disunity arguably undermines the regional impact of the US rebalancing strategy. The strategic benefits provided by US involvement are reduced by the absence of cohesion among the Southeast Asian states.

Regional responses to the US rebalancing

The distribution of power in the South China Sea is still in a state of flux, which contributes to the fragility and potential volatility of the situation in the region. Since 2010, there has been a significant increase in the number of incidents all over the South China Sea involving harassment of survey vessels, cutting of cables and repeated arrest of fishermen. In response, the Philippines and Vietnam have sought to strengthen their own naval capabilities as well as the military structures on the reefs and islands they occupy. For instance, in April 2009 Hanoi announced the purchase of six Russian Kilo-class submarines.

Vietnam has upgraded its defence relations with the United States and welcomed the rebalancing

8 Clinton, 'America's Pacific Century', 58.

9 I. Storey (27 July 2010) 'Power play in S. China Sea stirs up tension', *The Straits Times*.

10 C. A. Thayer (25 November 2011) 'South China Sea two-step', *The Wall Street Journal*.

strategy. Both countries have conducted joint naval activities and Hanoi has opened its commercial repair facilities at Cam Ranh Bay to all navies. Panetta visited Cam Ranh Bay in June 2012 and the US navy has already sent Military Sealift Command ships for minor repairs. Likewise, Manila has publicly supported the US rebalancing strategy.¹¹ Manila has reinforced its defence arrangement with the United States, holding an increased number of joint naval exercises, and asking the United States to deploy spy planes in the South China Sea area. The Philippines has also offered greater access to its military facilities in exchange for increased US military assistance.

Hanoi and Manila have responded positively to the US rebalancing strategy due to their growing concerns over China's renewed assertiveness in the South China Sea. The United States is keen to preserve the freedom of navigation principle in the disputed waters in light of China's rising naval capabilities. This has provided the Philippines and Vietnam with additional diplomatic leverage in their respective sovereignty disputes with the PRC, boosting their own activities in confrontation with Beijing in the South China Sea.¹² Nonetheless, questions remain in the Philippines and Vietnam over whether the United States can sustain its strategy in light of budget cuts at the Pentagon. Moreover, while welcoming the US rebalancing strategy, the two Southeast Asian countries do not want to be forced to choose between Washington and Beijing.

How has Beijing reacted to the US rebalancing strategy? The latest US initiatives have generally caused concern in Beijing. In particular, there is a strong perception in the PRC that the United States is enhancing its involvement in the South China Sea and that Washington is thus interfering in what it considers to be a bilateral issue with the four Southeast Asian claimant states. As Beijing and Washington compete for regional influence, there is 'little doubt that the two are engaged in a struggle for the "hearts and minds" of Southeast Asia.'¹³ Overall, increased Sino-US competition in East Asia has affected the South China Sea disputes. Rising

great power rivalry and competition in the South China Sea should be expected further to complicate conflict management in the disputed waters.

The PRC perceives the US rebalancing strategy and its focus on the South China Sea as an attempt by the United States to contain its peaceful rise in Asia. From a Chinese point of view the United States is containing the PRC by strengthening its bilateral alliances and allocating more troops and means to the region. Beijing also considers recent Philippine activities in the disputed waters – for example, in Scarborough Shoal – to have been orchestrated by Washington. For China, the United States has created an issue over the freedom of navigation to justify an enhanced military presence in the region to contain China. However, Beijing also realises that the rebalancing strategy, with its limited military troop deployments, does not significantly affect the distribution of power in Asia.

At the diplomatic level, China and the United States still adopt a non-confrontational approach towards the South China Sea and seek therefore to prevent the over-militarisation of the disputes. Beijing and Washington view the South China Sea as an issue that requires diplomatic rather than military resolution, and they are content for the present to relinquish leadership of the conflict management process to ASEAN.

Washington and Beijing do disagree, however, over where the South China Sea disputes should be discussed and how they should be resolved. While the United States wants the question to be highlighted at the ARF, the ASEAN Defence Ministerial Meeting Plus and the EAS, and ultimately to be resolved through international law, all this remains highly problematic for the PRC.¹⁴ Beijing remains concerned over any attempt to internationalise the South China Sea disputes, preferring instead to discuss these matters bilaterally with the smaller Southeast Asian claimants. In that sense, China undeniably considers the US rebalancing strategy to have had a negative impact on the South China Sea disputes.

11 M. Valencia (Fall 2012) 'High-Stakes Drama: The South China Sea Disputes', *Global Asia*, vol. 7, no. 3, 62.

12 M. Valencia (Fall 2012) 'High-Stakes Drama: The South China Sea Disputes', 59–60.

13 M. Valencia (24 July 2012) 'Is ASEAN becoming a big-power battleground?', *The Straits Times*.

14 M. Valencia (Fall 2012) 'High-Stakes Drama: The South China Sea Disputes', 62.



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Australia's interests in the South China Sea

Michael Wesley

Professor and Director Academic, Outreach and Research, National Security College, Australian National University

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College

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Introduction

The re-escalation of the disputes in the South China Sea in recent years has been met by a markedly hesitant stance on the part of the Australian government. Responding to a call by the Lowy Institute in 2012 for Australian diplomacy to be more creative in relation to the disputes, Foreign Minister Bob Carr told ABC Radio:

I don't think it is in Australia's interest to take on for itself a brokering role in territorial disputes in the South China Sea. I don't think that is remotely in our interest, I think we should adhere to the policy we have got of not supporting any one of the nations making competing territorial claims and reminding them all that we want it settled, because we have a stake in it – 60 per cent of our trade goes through the South China Sea.¹

Despite Carr's more positive comments subsequently,² it is not hard to argue that Canberra has chosen to take a highly risk-averse approach to the South China Sea, emphasising that it has no direct interests and urging all parties to find a peaceful solution. In trying to remain neutral, the Australian government has chosen to support ASEAN's call for a Code of Conduct, an approach opposed by one of the interested parties, China.

In some ways, Canberra's approach to the South China Sea is a metaphor for the growing pusillanimity of Australian diplomacy in the twenty-first century – a characteristic that may derive from the rising risk-aversion of its political culture as a result of the China boom.³ This is in marked contrast to past decades, when Australia's creative diplomacy has had a material impact on the resolution of disputes in which it had no direct material interest – but in which at the time it discerned broader interests at stake.

1 Radio Australia Transcript, 30 July 2012, <http://www.radioaustralia.net.au/international/radio/program/connect-asia/australia-should-stay-out-of-south-china-sea-dispute-says-carr/987932>

2 Edna Curran, 'Bob Carr: Australia Can Help Defuse South China Sea Tensions,' *Wall Street Journal*, 14 September 2012.

3 Michael Wesley, 'Australia and the China Boom' in James Reilly and Jingdong Yuan (eds) *Australia and China at Forty*, Sydney: UNSW Press, 2012.

In this paper I argue that Australia has much more at stake in the South China Sea than the 54 per cent of its trade that sails through those waters. Canberra needs first to show much greater creativity and imagination in conceiving Australia's interests; and second, to exercise a much more creative, less risk-averse approach in seeking to resolve the disputes.

The many faces of the South China Sea disputes

The beginnings of a new and more creative approach by Canberra to the South China Sea disputes must be a willingness to look at the disputes anew. The conventional view is that the disputes involve and are driven by three factors: overlapping territorial claims; rivalry over what may be significant hydrocarbon resources in the sea bed; and rivalry over the considerable fisheries of the sea. If this is the case, Australia's laid-back attitude is eminently justified; each of these three causes of contention are divisible and therefore should be resolvable in a rational negotiation among the directly concerned parties. Indeed, if these are the three drivers of the dispute it is hard to see why it remains unresolved for close to half a century after the disputes were first aired. There is considerable evidence that disputes over divisible commodities are much easier to resolve than those over absolute commodities.

However, there are at least four broader drivers of the conflict that make it unpredictable and extremely difficult to resolve through rational negotiation among the parties.

First, the disputes are a direct manifestation of Asia's changing power topography. The rise of China, a country with the size, wealth and internal unity that make a bid for regional leadership plausible – and the fear that this engenders in its neighbours – has led to a much more dynamic and fluid security environment in contemporary Asia than during the last quarter of the twentieth century.⁴ China's rapid emergence as the region's largest economy and new industrial heart has given rise to expectations that its smaller neighbours should show it greater deference.

4 Michael Wesley, 'Asia's New Age of Instability' *The National Interest*, November-December 2012

To its smaller neighbours, on the other hand, China's behavior in the South China Sea serves as an unpalatable example of what Beijing's regional hegemony would look like. For this reason, the South China Sea disputes are as much about prestige and national pride as they are about territory, resources or fisheries – and this makes them a very difficult problem to resolve.

Second, the disputes reflect the growing anxiety of China about its dependence on external supplies of energy and minerals and the vulnerability of these supplies to manipulation by strategic rivals. In many ways, these fears evoke the long-standing Chinese fear of containment by a coalition hostile to its rise.⁵

Contemporary discussion among Chinese strategic elites has raised the prospect of a 'mini-NATO' being created in the region, and Washington supporting the greater willingness of China's neighbours to check its influence. To this school of thought, Beijing can only gain the security of its supply routes by asserting a degree of control over them, or at least denying control to its strategic rival, the United States.

Third, the disputes also bring the United States and China into direct opposition in terms of their deepening rivalry over the regional order. In this sense, it is a manifestation of the broader problem of Washington and Beijing talking past each other: while the United States chooses to frame South China Sea issues in terms of general principles such as freedom of navigation, Beijing looks at the issue through specifics, such as its particular historical and territorial rights. The South China Sea tensions also stoke Washington's own sense of vulnerability in the Western Pacific: its *strategic* vulnerability in the context of China's maritime weapons systems; as well as its *diplomatic* vulnerability in terms of regional allies' trust in its willingness to support them.

Finally, the South China Sea dispute can be seen as a case study in the fragility in Asia of nomocratic norms – defined as the strong individual and collective commitment by states to liberal domestic and international rules and institutions governing

state behavior – and the ascendancy of teleocratic norms – the tendency to see rules and institutions as subordinate to the needs and prerogatives of the state.⁶ This is a situation that places Australia, with a strong commitment to the nomocratic approach to international relations, in a difficult situation. Particularly problematic for the nomocratic ideal is the vanishingly low prospect that either international law or regional institutions will play a role in resolving the conflicts, because neither is allowed by a teleocratic region to gain purchase on the disputes.

Australia's interests

If such a broader view of the South China Sea disputes is taken, Australia's interests are vitally affected – even if it were feasible to re-route the 54 per cent of its trade that currently passes through the sea's waterways. In taking such a low-profile approach to the disputes, Canberra appears to have confused its interests – or the ends of its foreign policy – with the means, and in particular its bilateral and multilateral relationships.

Although Australian foreign policy makers would never admit it, their approach to the South China Sea appears to be motivated first and foremost by the desire not to offend key relationships. On the one hand, the loud protestations that Australia has no role in resolving the disputes appears to be motivated by a fear of offending China, Australia's largest trading partner and an increasingly important regional actor. On the other, Australia's advocacy for a Code of Conduct demonstrates a desire to keep the countries of ASEAN on side.

Canberra must undertake some thinking from first principles regarding its interests in relation to the South China Sea disputes. If it did this it would realise that Australia has vital interests at stake that are ill-served by its current approach. To a first principles approach, Australia has four *structural* interests and two *relational* interests at play in the South China Sea disputes.

Australia's structural interests are: first, the existence of uncontested global commons – be they maritime, aerial, space, or cyber. As a small, relatively isolated,

5 Avery Goldstein, *Rising to the Challenge: China's Grand Strategy and International Security*, Stanford: Stanford University Press, 2005

6 Michael Wesley, 'The New Bipolarity' *The American Interest*, January/February 2013.

heavily trade-dependent country, Australia would be more affected than most nations by sustained competition over control of the global and regional commons. The maritime commons have been controlled since European settlement by Europe and its closest allies; but this situation may be coming to an end with the rapid build-up of maritime weapons systems among Asian states. Australia's second structural interest is an international economy oriented towards development and free trade norms – a natural corollary of the structure and trade-dependence of the Australian economy. Third, and perhaps most vital, Australia benefits from the ascendancy, vitality and continuing evolution of a rational, egalitarian, rules-based international order. Fourth, and more specifically, Australia has a structural interest in a benign strategic order in the Indo-Pacific Peninsula – the archipelago that extends from northern Thailand to northern Australia, along which an armed attack on Australia would most likely travel.

At least three of Australia's structural interests stand threatened by the South China Sea disputes. Primarily, this is due to the possibility that the global maritime commons will become permanently contested for the first time in Australia's post-European settlement history. There is growing agreement among maritime strategists that the days of American sea control are numbered, to be replaced by a fluid system of mutual sea deniability among the littoral great powers. What regime will develop in the place of the current high-seas doctrine is hard to predict – but there is little doubt that Australia will be vitally affected.

Of approximate significance are the circumstances by which the South China Sea disputes presage a rising tempo of challenges to the nomocratic, rules-based international order by rising powers that don't advance alternative general frameworks, but erode it with an escalation of specific claims. Added to this, the growing rivalry among several existing and rising great powers may well centre on the Indo-Pacific Peninsula. This archipelago divides the Pacific from the Indian Ocean and is traversed by several constricted sea lanes, which represent the ultimate southern egress points from the South China Sea. The ability of each of the great powers to attract the support of the states of the Indo-Pacific Peninsula will do much to ease its own strategic vulnerabilities

and heighten those of its competitors. Already there are signs of competition for the loyalty of key states of the Peninsula among China and the United States.

Australia has two relational interests involved in the South China Sea also, both of which are engaged by the South China Sea disputes. The first is its alliance commitment to the United States. Were Washington to become embroiled in a conflict in the South China Sea it is highly likely that Australia would be expected to fulfill its alliance obligations alongside US forces. The second is Australia's acceptance as part of the Asia-Pacific region, a status that has been contested in the past and could be again in the future. An Australia that stands aloof from one of the region's key flashpoints could well be an Australia whose commitment to regional issues is questioned in future international relations.

Australia's objectives

Furthermore, Canberra's approach to the South China Sea must include a serious analysis of the possible scenarios and outcomes of the disputes, and to divine which are the most and least desirable from the point of view of Australia's vital interests. Three possible outcomes suggest themselves. The first is the continuation of the status quo ante, in which the several parties continue to advocate their several overlapping disputes, but over which no one party wants to push their claims too firmly. Scenario two is a Chinese victory, in which Beijing is able to establish hegemony over the waterways and dictate its future administration. Scenario three is a moderate solution, in which specific claims are shelved and some sort of consensual joint management regime is developed.

Each scenario needs to be considered – not only on its own merits, but in terms of its implications for future disputes in the region. The third option is obviously the most desirable, not only because of the prospects it holds for moving beyond the immediate disputes in the South China Sea, but because of the principles it embodies for the evolution of the region in the future: the accommodation of the interests of all affected parties without endorsing the claims of some over others; and the priority of regional stability over particularist claims.

Australia's means

Australia's foreign policy tradition, stretching back over a century, offers five traditional foreign policy means. Yet each of these comforting traditions is likely to be found wanting should Canberra decide to become more activist and creative in its diplomacy towards the South China Sea disputes.

The original approach is *empire solidarity*, a belief that the British Empire represents a cultural example and a strategic public good to the world. This approach has been buried along with the British Empire and the failed hope of the Commonwealth; but elements of its rationale have been continued in the second Australian foreign policy tradition, *alliance commitment*. There are strong continuities here between the belief in the British Empire and the belief in the American alliance system as the essential stabiliser of global politics and the guarantor of the international rule of law and commons.

A partial alternative to Alliance commitment is *multilateralism*, an approach that is philosophically congruent with the American alliance system but which has always allowed Australia more initiative on a greater range of issues. Further along the philosophical spectrum is *regionalism*, an approach that has at times engaged American suspicions,⁷ but which in the Australian lexicon ultimately involves extending liberal multilateral principles into what had been, at the Cold War's end, one of the most under-institutionalised of the world's regions. Finally, there is the tradition of *pragmatic bilateralism*, an inductive approach to diplomacy which seeks to build a network of strong and trusted relationships on Australia's commonalities with other countries.⁸

None of these five traditional approaches holds particular promise should Canberra decide to be more ambitious in its approach to the South China Sea disputes. A new Australian creative diplomacy in the South China Sea could be the beginnings of a sixth foreign policy tradition: a *new plurilateralism*,

pragmatic and eclectic in drawing on the strengths of each of the five current foreign policy traditions, but flexible and creative in finding solutions.

Here there is a strong historical tradition to draw on. The Australian government's desire to promote a creative solution to the war in Cambodia in the early 1980s shows that Canberra can be coolly interests-driven. The early initiative by Bill Hayden regarding Cambodia drew the ire of China and the ASEAN states, but was motivated by a broad sense of Australian interests and was eclectic in trying a range of ways of bringing the contending parties together.⁹ Twenty years later, the Howard government's search for a way out of the regional impasse over unauthorised immigration led to an imaginative policy response in the form of the Bali process.¹⁰

Conclusion

In terms of both the vital interests affected and the historical activism of Australian diplomacy, the current quietism of Australian foreign policy on the South China Sea disputes is unsustainable. Canberra must become more ambitious on this issue – because ultimately its current small-target strategy carries with it substantial long-term opportunity costs. Ultimately, in promoting a sustainable solution to the South China Sea disputes Australia will be promoting a range of long-term interests as well as immediate objectives.

7 Michael Wesley, 'The Dog That Didn't Bark: The Bush Administration and East Asian Regionalism' in Mark Beeson (ed), *Bush and Asia: America's Evolving Relations with East Asia*, London: Routledge, 2006.

8 Michael Wesley, 'Australia and Asia' in Keith Windschuttle, David Martin Jones and Ray Evans (eds), *The Howard Era*, Sydney: Quadrant Books, 2009.

9 Frank Frost, 'Labor and Cambodia', in David Lee and Christopher Waters (eds) *Evatt to Evans: The Labor Tradition in Australian Foreign Policy*, Sydney: Allen and Unwin, 1997.

10 Michael Wesley, 'The New Diplomacy' in *The Howard Paradox: Australian Diplomacy in Asia, 1996–2006*, Sydney: BC Books, 2007.



The South China Sea: Stabilisation and resolution

Leszek Buszynski

Visiting Fellow, National Security College, Australian National University

Christopher B. Roberts

Senior Lecturer and Research Convenor, National Security College, Australian National University

Stabilisation

Stabilisation of the South China Sea means implementing conflict prevention measures to prevent accidental conflict in disputed areas, particularly as China increases deployments of patrol craft in the region. On 2 September 2002 ASEAN negotiated a Declaration on a Code of Conduct (DOC) with China regarding the South China Sea, which was intended to be preparatory to a Code of Conduct (COC). It was anticipated that the COC would obligate the claimants to resolve their disputes peacefully and observe rules of behaviour that would prevent clashes and conflicts from arising.

There are several difficulties with the COC, which have not yet been resolved; the major one being that ASEAN cannot agree on its content and extent. The first was whether it was to be legally binding. Some within ASEAN have called for a legally binding COC to ensure compliance with norms of good behaviour. Others point to the impracticality of the effort and argue that it should be voluntary. The second was the extent of the COC: Vietnam insists that the code should cover the Paracels, which it claims but others have demurred fearing that it would only provoke China's opposition and delay all prospect for its realisation. The third was how to obtain China's agreement. China has resisted the COC, since it would constrain its harassment tactics against the ASEAN claimants, and has demanded that ASEAN negotiate with it first. If ASEAN agreed to this demand the result would be an emasculated version of the code that would not meet the ASEAN claimants' purposes. Philippine President Benigno Aquino has resisted the Chinese demand, and with the support of Vietnam and Thailand has insisted that ASEAN agree on a COC first. Cambodia wanted to involve China in the negotiations, while Indonesia's Foreign Minister Marty Natalegawa sought a compromise position, suggesting that ASEAN at least ought to listen to China before negotiating the COC. China, however, now insists that it would negotiate with ASEAN over the drafting the COC 'only when conditions are ripe.' The fourth difficulty was that the Chinese interpretation of the COC refers to activities outside the Chinese claim area and cannot be applied to an area it regards as 'territorial waters.' At the present moment prospects for the COC are not bright.

Another useful stabilisation measure would be to negotiate an avoidance of Incidents at Sea Agreement (INCSEA) in order to prevent clashes, and to avoid accidental escalation into conflict when they occur. These agreements would detail procedures to avoid collision between patrol vessels; to require commanders to use caution in approaching other vessels and ensure a safe distance. They would also include procedures for communication between navies and governments in the event of a clash, and the establishment of a hotline between naval commands or coastguards in the area. The most notable example is the agreement between the United States and the Soviet Union concluded on 25 May 1972 after a series of incidents at sea involving harassment, simulated attacks and dangerous manoeuvres. On 19 January 1998 the United States and China concluded an agreement to ensure maritime safety, which called for consultations, measures to improve maritime practices, and the use of communications procedures when vessels encounter each other. Though a step in the right direction, this agreement was limited to consultation; something more concrete is required under the present circumstances.

China may be reluctant to consider an INCSEA, which would limit its freedom of action in what it considers its territorial waters, but its attitude might change if it faced the consequences of an accidental clash or a crisis. China's harassment tactics against Vietnam and the Philippines have had the effect of drawing in the United States which, as the Chinese complain, has emboldened the ASEAN claimants to resist. The danger is that an accidental clash might occur that could threaten escalation, particularly in instances in which the Chinese prolong their harassment activities. In this context, the main incentive for China to consider an INCSEA would be to stabilise the area and prevent accidental conflicts which would involve external powers.

Resolution

Second track diplomacy

Informal workshops have been used as a means of dispute resolution when formal diplomacy reaches a stalemate and the parties are searching for a way out of their difficulties. Often called interactive problem solving, this approach may be used to stimulate ideas and proposals which can be carried over into formal diplomacy. Indonesian Ambassador Hasjim Djalal promoted workshops on the South China Sea which were sponsored by the Indonesian Foreign Ministry and, until 2001, funded by the Canadian International Development Agency (CIDA). They have since continued with ad hoc funding. Entitled 'Managing Potential Conflicts in the South China Sea', they were held annually, beginning in Bali in January 1990. They involved government officials and technical experts on maritime cooperation and resource development from 11 countries, initially the ASEAN six, Taiwan, Cambodia, Laos, and Vietnam; China and Taiwan joined in 1991. Attempts were made to transform these second-track workshops into the first track by Indonesian Foreign Minister Ali Alatas in 1992 and 1994, but China objected. Since then ambitions have been scaled down and Hasjim Djalal declared that the intention was not to resolve the dispute but to devise cooperative programs, promote dialogue and develop confidence-building measures (CBMs).

What did the workshops achieve? Their organisers have claimed that the delegations got to know each other and their positions better, and in particular the Chinese were made more aware of the views of the other claimants. They pointed to the Declaration on the South China Sea, which was endorsed by both ASEAN and China in July 1992, and claimed that it was a product of discussions in the workshop. Similarly, the idea of a COC was often discussed at workshop meetings before the DOC was signed in November 2002. Nonetheless, whatever its merits, the workshop approach failed to achieve its primary goal, which raises questions about its efficacy. Second-track diplomacy may have made claimants in the South China Sea more aware of each other's positions, but it alone cannot bring about resolution.

Third party mediation

Article 287 of the United Nations Convention on the Law of the Sea (UNCLOS) enjoins parties to a maritime dispute to resort to four dispute resolution mechanisms: the International Tribunal for the Law of the Sea (ITLOS) in Hamburg; the International Court of Justice in The Hague (ICJ); ad hoc arbitration in accordance with Annex VII; or a 'special arbitral tribunal' constituted for certain categories of disputes. Compulsory mediation with binding authority is voluntary and UNCLOS stipulates that 'a state shall be free to choose' one of these methods of dispute resolution. UNCLOS has no immediate way of dealing with a situation in which the claimants have no intention to resort to binding mediation. The consent of the parties is required and China is unlikely to accept third-party mediation over an issue which it regards as a domestic concern involving Chinese territory. Some Chinese scholars nonetheless support the idea. Professor Ji Guoxing from the Shanghai Institute of International Studies has proposed that an ad hoc tribunal or non-official third party could play a role without 'institutionalising' the negotiating process or 'internationalising' the dispute. The only attempt to invoke third-party mediation over the issue occurred on 22 January 2013 when Philippine Foreign Secretary Albert del Rosario announced that the Philippines would invoke Annex VII and take the issue to a 'special arbitral tribunal'. Predictably, China opposed the move: without its consent the case is unlikely to be heard.

Legal resolution

A legal resolution means applying the principles of UNCLOS according to an agreed equitable formula that would take into account the claims of the littoral states. According to Articles 74 and 83 of UNCLOS—III, in the case of overlapping EEZs and continental shelves, delimitation will be effected by agreement on the basis of international law or the ICJ to 'reach an equitable solution.' Both articles mention that if no agreement is reached within a 'reasonable period of time', then the parties are required to refer to the dispute resolution procedures in Part XV. Article 279 of Part XV says that the parties have an 'obligation to settle disputes by peaceful means.' A logical approach would be to apportion maritime territory according to contiguous EEZs and

continental shelves where they have been declared, using coastline lengths to determine the maritime zones that occupied islands would be entitled to. Something similar was proposed in 1994 by Indonesian Foreign Minister Ali Alatas when he called for a 'doughnut' solution. This proposal would allow each state to claim a 320 km EEZ, leaving an inner hole, creating a South China Sea map resembling a doughnut. The inner area would then be subject to joint development, and the revenue would be divided according to an agreed formula. The proposal was promoted by Ambassador Hasjim Djalal when he visited the ASEAN countries in May and June 1994, but it was too ambitious to attract support.

A related proposal by Ji Guoxing is to allow Vietnam, the Philippines, Malaysia and Brunei to their declared EEZs and continental shelves, while China would surrender the U-shaped line and its claim to 'historic waters', and would be compensated by the doughnut section. In overlapping areas, bilateral or trilateral development would be adopted. Aside from the practical difficulties of arranging the apportionment, the major problem is that neither China nor Vietnam has defined their claim. China's U-shaped line has not been officially explained: whether it is a claim to islands or an exclusive claim to sea territory is unclear, and its exact boundaries remain undefined. Vietnam has issued declarations of sovereignty over the islands without specifying exactly what is included in the claim or what the coordinates are. Moreover, these proposals would significantly reduce the maritime area available to China, which would be stripped of its claim to the entire area with little compensation, particularly as the oil and gas fields of the South China Sea lie outside the centre area.

Joint development

For many years, joint development was regarded as a way of overcoming the sovereignty imbroglio. If claimants could be induced to cooperate over oil and gas extraction perhaps they would learn to overcome their differences over sovereignty in a cooperative solution. The idea was first broached by Chinese Premier Li Peng in Singapore on 13 August 1990 when he called upon claimants to set aside sovereignty to enable joint development to proceed. The Chinese premier wanted to improve relations

with ASEAN after the Tiananmen Square incident of June 1989 and the naval clash with Vietnam in the South China Sea in March 1988 which alarmed ASEAN. Joint development was then raised by various ASEAN leaders and Chinese officials but without further clarification. It may be a solution in bilateral disputes where the parties are willing to share resources but it may not apply in complex multilateral maritime disputes where there are unresolved claims to the entire disputed area.

Cooperative maritime regime

In the 1990s the idea of a cooperative regime was proposed by scholars. A maritime regime is a cooperative effort to regulate behaviour in a given area according to agreed rules and norms which give effect to the notion of a common good. Article 123 of UNCLOS stipulates that states 'bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.' The article adds that they should do so 'directly or through an appropriate regional organization.' Mark Valencia has championed this approach, arguing that regional maritime cooperation could proceed progressively from policy consultation to policy harmonisation, coordination and national policy adjustments. A maritime regime could involve the creation of a Spratly Resource Development Authority, or a Spratly Management Authority, which would grant permits for exploration and joint development; it would be an international organisation with a secretary general, a secretariat, and a council. It would direct the financial resources of claimants into a common fund to promote joint efforts to develop the area's oil and gas fields. The idea of a cooperative regime has appeal, but its implementation requires agreement between the claimants and a resolution of the claims. It is a product of a resolution of the issue, but not a means to bring about a resolution. The idea may act as an incentive to the claimants to resolve their claims, but its acceptance would require a political decision by China, in particular.

UN conference on the South China Sea

Proposals for a cooperative maritime regime could be endorsed by a UN-sponsored conference on the South China Sea, which would be convened to give effect to Article 123 of UNCLOS. This article urges states to 'cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention', either directly or through an 'appropriate regional organization.' UNCLOS has not provided sufficient guidance in regard to the procedures to be adopted to resolve the legal issues raised by a semi-enclosed sea such as the South China Sea. This could be the task of a special conference, which would involve China and the ASEAN claimants in the first instance, as well as external stakeholders. Such a conference would reveal the legal weaknesses of the claims, including the U-shaped line, and would seek their cooperative adjustment. The agenda would also include the formation of a regional body or cooperative regime that would adopt rules regarding fishing practices and quotas, oil and gas exploration, and the passage of naval vessels in the maintenance of freedom of navigation in the area.

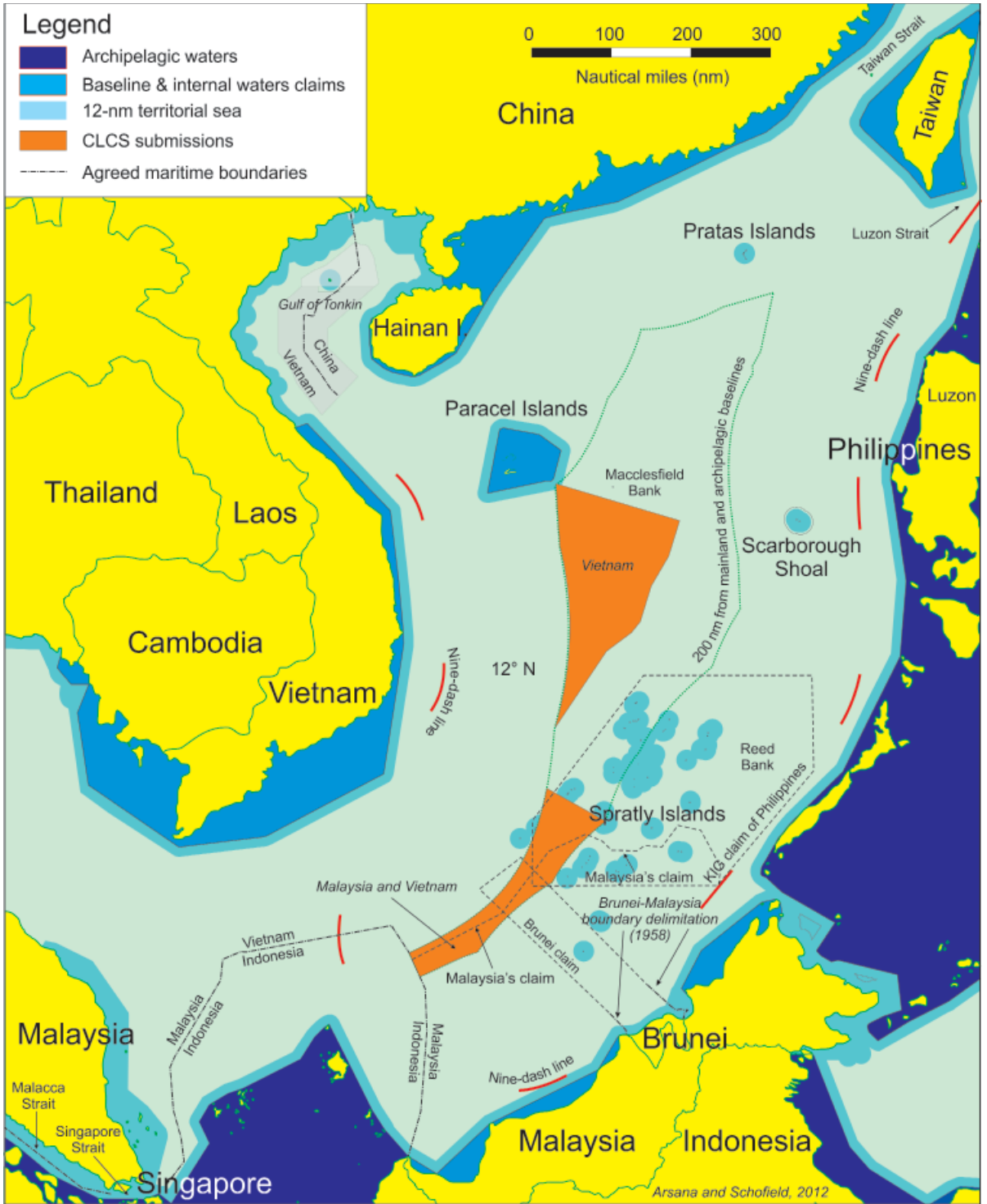
Philippine President Fidel Ramos in 1992 proposed an international conference on the Spratlys under UN auspices; it was raised again by his Foreign Minister Raul Manglapus at the ASEAN Foreign Ministers meeting in July 1992. China has rejected multilateral negotiations on the issue in the past and may continue to insist that the South China Sea is Chinese territory. However, the incentive for China to join this process of resolution is to legalise its position there and stabilise the area without the prospect of raising tensions or increasing the risk of conflict with external powers. China will not gain legal acceptance of its claim by power alone, and through a conference of this kind would at least gain shared access to the resources there. It would repair its relationship with ASEAN and would earn the gratitude of the organisation. It would ease the regional polarisation created by China's attempt to gain unilateral benefits in the sea by resorting to power. China would also avoid pushing the ASEAN claimants to the United States and Japan for support and would give external powers no cause to cooperate against it. It would also remove the main motive for America's pivot strategy, stimulating cooperation rather than rivalry with the United States. China's regional position would be enhanced and its international credibility elevated.

Conclusion

Neither China nor Vietnam may be ready for a resolution of this kind, which would demand that they surrender their extensive claims. The Chinese leadership has invoked nationalism over this and other issues, which would make it particularly difficult for it to accept a negotiated resolution of the issue. China may have locked itself into an uncompromising position when compromise and adjustment would be in its best interests and would further its policy goals in the region. In the past, governments have been locked into seemingly unyielding positions, but have been compelled to change them when faced with the prospect of conflict and escalation of a crisis. Indeed, crisis can have a shock effect upon decision-making systems, making political leaders aware of the dangers of continuing with familiar behaviour and demanding of them a major change of policy and attitude. A clash between naval or coastguard vessels caused by error or miscalculation by a local commander, or a deliberate move by China swayed by heady nationalistic spirit to remove one of the ASEAN claimants from the islands, cannot be excluded. At the present moment it appears that only crisis will trigger the necessary change of attitude over the South China Sea, particularly within China.

CONCLUDING REMARKS

The conference held in March 2013 at the Australian National University did not come to any specific conclusion in regard to Australia's regional security environment and the South China Sea, whether in terms of the future development of the dispute or a possible resolution. Many interesting ideas were raised during the course of the discussions. One was that institutions and economic ties should bind the protagonists and thereby prevent the issue from becoming unmanageable. Economic interdependence would have a constraining effect upon the parties and would ensure that escalation of existing conflict would not occur. Though the argument was accepted in principle, participants doubted that the restraining effect would be noted in every specific situation, and particularly in the South China Sea, where China has become increasingly insistent in its claim. A second concept proposed at the conference was that UNCLOS, international law, and the notion of sovereignty are not appropriate to Southeast Asia, which has historically arranged its affairs in other ways. Here, the countries of the region have traditionally deferred to China, while international law can be regarded as an external imposition that would only complicate the issue. One way or another, the ASEAN claimants will have to seek resolution of the issue in terms of their relationships with China. The response to this latter argument was that time has moved on and that sovereignty has become an essential feature of the modern Southeast Asian state, despite what may have been the case in pre-modern times. For the most part these states regard international law as a means of underpinning their sovereignty and protecting their territorial integrity, a process of managing their relationships for which there is no alternative in the modern states system.



Map of South China Sea Claims

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CONTACT US

National Security College

GJ Yeend Wing (Crawford Bldg #132a)
1 Lennox Crossing

The Australian National University

Canberra ACT 0200
Australia

T +61 2 6125 1544

E national.security.college@anu.edu.au

W nsc.anu.edu.au

CRICOS #00120C