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## Making mischief The return of the South China Sea dispute

by Carl Ungerer, Ian Storey and Sam Bateman

### 1 Introduction and summary

**Carl Ungerer**

Since 2007, competing territorial claims and the growing assertiveness of the Chinese military have returned the South China Sea dispute to the forefront of regional security concerns. Tensions this year have been particularly acute. Throughout 2010, much of the dialogue in official political/military talks has focused on diffusing potential trans-Pacific tensions following a *New York Times* report in March that suggested Chinese officials had elevated the South China Sea to a 'core national interest', similar to Taiwan or Tibet.<sup>1</sup> Although China has never officially defined what constitutes a 'core national interest' in terms of its defence policy, and appears to have backed away from that characterisation for now, the whole episode suggested that Beijing is now closer to contemplating the use of force to defend its sovereignty claims over the rocks, islands and atolls that make up the South China Sea.<sup>2</sup>

Recent military exercises conducted by the People's Liberation Army Navy (PLAN) in the South China Sea, which involved more than 100 ships and 1,800 marines, lend further weight to that assessment.

Both US Defense Secretary Robert Gates and Secretary of State Hillary Clinton have

directly addressed the issue in regional security forums. At the ASEAN Defence Ministers' Meeting Plus (ADMM Plus) in Hanoi, Gates described the South China Sea as 'a growing challenge to regional stability and prosperity'. At the subsequent AUSMIN talks in Melbourne, Clinton described China's recent actions as a 'test'—one that had put Beijing 'on notice' over its international legal obligations.

For scholars such as Robert Kaplan, 'the Chinese now approach the South China Sea in the way that Americans used to approach the Caribbean'—as a means to dominate regional balance of power calculations.<sup>3</sup> The Chinese strategy is deeply rooted in sensitivities over previous territorial intrusions and historical grievances, which is a difficult starting point for all concerned—emotion is a poor basis for rational action. Conflict over these waters isn't inevitable, but as Chinese military aspirations bump up against Western and allied security and economic interests in the region, the possibilities for miscalculation and mistake continue to grow.

Rising tensions in the South China Sea create a difficult set of questions for Australian strategic policy. Australia doesn't have a dog in this fight, and can't take sides between the claimant states. But we do have some direct interests—a prominent Australian

company, BHP Billiton, has exploration rights in a disputed area near the Spratly Islands. Much of Australia's trade with the Northeast Asian economies passes directly through the region. And the military build-up in and around the South China Sea, particularly the growth of submarine bases, is a cause for concern among defence planners. Australia also has a direct stake in the maintenance of international legal instruments, such as the UN Convention on the Law of the Sea, as the normative framework for resolving tensions among the claimant states.

In order to examine the origins and implications of this conflict further, ASPI commissioned two expert commentators to provide an analysis of the complex political/military and international legal issues that make up the South China Sea dispute.

In the next paper, Ian Storey from the Institute of Southeast Asian Studies in Singapore looks at the recent political and military developments in the region. He argues that the upswing in regional tensions is the result of several interlocking trends—rising nationalism in China and Vietnam, concerns about energy security, China's increasingly assertive use of military assets to protect sea lanes, and the lack of effective multilateral controls over the actions of individual states. Ian also examines China's military modernisation program, particularly for its navy, and how this is driving force structure considerations among the region's rising middle powers. Ian concludes with an assessment of how further confidence-building measures will be necessary to ensure that the South China Sea dispute doesn't boil over into a regional military confrontation.

In the last paper, Sam Bateman from the S. Rajaratnam School of International Studies in Singapore explores the legal and resource issues in the South China Sea. Since

the passage of the 1982 UN Convention on the Law of Sea, the legality of competing territorial claims has dominated this debate. Sam unpacks the various national claims to the continental shelf and examines how consistent those claims are against the international legal instruments already in place. His conclusion, which mirrors that of Ian's assessment, is that as long as the parties to the South China Sea dispute continue to view it as a 'zero sum' game, the prospects for a positive diplomatic or legal outcome remain negligible.

Throughout the 1990s, Australia worked closely with Indonesia on confidence-building measures in the South China Sea, particularly in the areas of marine science and technology, as part of the Jakarta Informal Meetings. At the recent ADMM Plus, Australia's Defence Minister, Stephen Smith, offered a new package of assistance, this time partnered with Malaysia, to focus on 'harmonising regional understanding of international maritime law, promoting mutual understanding of maritime capability development, and measures to reduce the risk of misunderstanding'. Australia and Malaysia will co-chair an experts working group on maritime security.

Australia's recent experiences in East Timor and the Pacific provide a great deal of experience in the type of functional cooperation that's required in the South China Sea. We could draw on that experience to promote other confidence-building measures, including cooperation on specific functional activities, such as search and rescue, marine scientific research, fisheries management, resources development and the prevention of marine pollution. Over time, the joint Australia–Malaysia maritime security working group could be used to promote cooperation on some of the 'harder' security issues in the region, including the rights and

responsibilities of claimant and non-claimant states in exclusive economic zones, freedom of navigation for naval ships and the security of offshore installations.

Such a program of activity would be consistent with a more active middle power approach to regional security and diplomacy. With a sufficient commitment of resources and political will, Australia would be well placed to make that contribution.

## Endnotes

- 1 Edward Wong, 'Chinese military seeks to extend its naval power', *The New York Times*, 23 April 2010.
- 2 See Carlyle A Thayer, *Southeast Asia: Patterns of security cooperation*, ASPI Strategy Report, September 2010.
- 3 Robert D Kaplan, Correspondence, *Quarterly Essay*, issue 40, 2010, p. 99.

## 2 Political and military developments

### Ian Storey

Over the past two years, tensions have been on the upswing over competing territorial and maritime boundary claims in the South China Sea, pushing the dispute onto the front burner as a regional security issue. If present trends continue, and the claimant countries and other stakeholders fail to effect concrete measures to reduce friction, the sovereignty dispute will become an increasing source of contention between Southeast Asian countries and China, as well as between China and the US.

Several interlinked factors account for the upswing in tensions.

First, the dispute has become a rallying point for nationalists particularly in China and Vietnam who have urged their governments to bolster their countries' jurisdictional claims and military presence in the disputed archipelagos.

Second, the desire of claimant countries to stake their claim to energy and fishing resources remains an important driver. Added to this is China's imperative to exercise greater control over its sea lines of communication (SLOCs) in the South China Sea, through which flow vital energy resources from the Middle East and Africa.

Third, conflict management mechanisms—specifically, the 2002 ASEAN–China Declaration on the Conduct of Parties in the South China Sea (DoC)—are doing a poor job of defusing tensions, building trust and fostering transparency.

Fourth, the increasing militarisation of the dispute, especially the rapid development of the People's Liberation Army Navy (PLAN), is shifting the regional balance of military power at sea and strengthening China's hand.

These factors have put China's relations with Vietnam and the Philippines under stress since 2007. Vietnam, in particular, has become greatly concerned at growing Chinese assertiveness in the area and has responded by trying to internationalise the dispute and by strengthening its air and naval forces. A more recent development is that the South China Sea has joined the growing list of problem areas between China and the US.

Maintaining stability in the South China Sea is crucial for the health of the global economy because the SLOCs that pass through it link the Pacific and Indian oceans, and hence the economies of Asia, the Americas and Europe. Due to the complexity of the problem and the multiplicity of actors, a legal solution to the dispute is out of reach. Accordingly, all parties should focus on the need to operationalise existing cooperative confidence-building measures (CBMs) and to implement new ones. Unless they do so, the dispute could take a serious turn for the worse.

At base, the dispute is an issue between the countries of Southeast Asia and China. Four members of ASEAN have overlapping claims with the People's Republic of China (PRC): Vietnam and China dispute sovereignty of the Paracel Islands and all of the Spratly Islands; the Philippines claims sovereignty over 50 atolls in the Spratlys, while Malaysia has staked its claim to a dozen more; and within Brunei's declared 200 nautical mile Exclusive Economic Zone (EEZ) lies Louisa Reef, which is also claimed by China, Vietnam and Malaysia.

During the 1990s, the most serious friction occurred between China and Vietnam and between China and the Philippines. In contrast, the issue did not overshadow relations between Kuala Lumpur and Beijing, principally because Malaysia's claims are the most geographically removed from China and also because the Malaysian Armed Forces are better able to defend the country's claims than either Vietnam or the Philippines.

Brunei was, and remains, a minor actor in the dispute. Taiwan is also a party to the dispute, and its claims are identical to China's.

Although ASEAN is composed of both claimant and non-claimant countries, the South China Sea issue became a source of concern for the organisation in the early 1990s. Thus, in 1992, ASEAN issued a declaration that called on all parties to exercise restraint, abjure force and resolve the problem through peaceful means and in accordance with international law. However, the declaration did little to ease mounting tensions in Sino-Vietnamese and Sino-Philippine relations, and so ASEAN proposed that a code of conduct aimed at lowering tensions and promoting cooperative CBMs be negotiated with China. Beijing was initially reluctant to discuss such a code with ASEAN, preferring instead to deal with each of the claimants on a bilateral basis. However, as Sino-ASEAN ties improved in the latter part of the 1990s, and China became more comfortable with multilateralism, Beijing eventually accepted ASEAN's proposal.

After several years of protracted discussions, the outcome was the 2002 DoC. The DoC was both a political statement of intent and a compromise agreement. All parties agreed to solve the problem peacefully, without recourse to military action, and to refrain from actions that would 'complicate or escalate disputes', including, most importantly, 'inhabiting' currently unoccupied features. The DoC also enjoined the parties to pursue a series of CBMs in areas such as scientific research, safety of navigation, search and rescue, and tackling transnational crimes.

Yet the DoC suffers from three major weaknesses: it isn't inclusive (Taiwan isn't a signatory); it's non-binding and contains no sanctions; and it's silent on its geographical scope (Vietnam wanted to include the Paracels but China objected).

Eight years after the DoC was inked, its success has been mixed, to say the least. On the positive side, none of the claimants has annexed any unoccupied features. On the downside, nearly all have undertaken activities that could be deemed to ‘complicate and escalate’ the dispute, including the strengthening of military and civilian infrastructure on occupied atolls.

Moreover, since 2002 the claimants have put into effect only one CBM: the 2005 Sino–Vietnamese–Philippine Joint Marine Seismic Undertaking, a joint three-year seismic survey to determine hydrocarbon reserves in disputed waters. However, in its third year, the constitutionality of the agreement was called into question in the Philippines following revelations that part of the survey work had been conducted in that country’s EEZ. The Joint Marine Seismic Undertaking quietly lapsed in 2008 and is unlikely to be renewed.

Part of the reason why the DoC has been so ineffective is that ASEAN and China have failed to agree on implementation guidelines. After it was signed, a joint working group (JWG) was established to draw up guidelines, but talks stalled in 2009 due to a disagreement between China and ASEAN over how to proceed. Although the DoC is a multilateral mechanism, the PRC informed ASEAN that it was only willing to discuss the issue bilaterally with each of the claimants and not with ASEAN as a group—an approach ASEAN rejected as ‘divide and rule’. In 2010, China hardened its stance when Vietnam took over ASEAN’s rotating chairmanship—Beijing seems to have been concerned that Hanoi would use its position to rally the other members to its cause and ‘gang up’ on China. The problem’s been compounded by the absence of a consensus within the organisation over how to deal with China. As noted, ASEAN is composed of both claimant and non-claimant states, and some members with close political and economic ties to the PRC see little reason to undermine bilateral

relations over an issue that doesn’t directly affect their security.

Earlier this year, Vietnam hosted a meeting of ASEAN leaders at which it sought to build consensus and break the impasse. Although the final communiqué didn’t explicitly mention the dispute, at a post-summit press conference Prime Minister Nguyen Tan Dung announced that ASEAN and China had agreed to ‘discuss solutions to push the implementation of the DoC’. Subsequently, in April, the JWG met to discuss ways to operationalise the CBMs outlined in the DoC. Another meeting of the JWG will take place in December in Kunming, but it remains unclear whether the process will yield concrete outcomes. Vietnam isn’t only keen to push the issue of guidelines, but also to move forward with a binding and formal code of conduct, which the DoC originally envisaged. Given the problems associated with actualising the DoC, it seems unlikely that a code of conduct can be agreed on any time soon.

Perhaps the most significant political development to affect the dispute over the past few years has been the increasing attention paid to it by the US. As with other major stakeholders, the US has important economic and strategic interests in the South China Sea. In the 1990s, the US was not particularly concerned at rising tensions between China and the ASEAN claimants, as long as freedom of navigation wasn’t endangered. Washington stated that it didn’t take a position on the competing claims, but urged the disputants to resolve their differences peacefully and in accordance with international law.

As tensions began to rise again in 2007, however, the US began to express unease. At the 2008 Shangri La Dialogue, for instance, Defense Secretary Robert Gates highlighted the growing competition for maritime resources and the inherent dangers of ‘coercive diplomacy’—a reference to Chinese

pressure on foreign energy companies (including US giant, ExxonMobil) to suspend work in waters off the Vietnamese coast. In mid-2009, officials from the Obama Administration provided Congress with a more detailed account of US concerns. Deputy Assistant Secretary Scott Marciel confirmed that ExxonMobil had been threatened with unspecified retaliatory action by Beijing; Deputy Assistant Secretary of Defense Robert Scher told congressmen that, while the US supported a negotiated settlement to the dispute, the shifting balance of military power in China's favour had prompted the Pentagon to increase naval patrols in the South China Sea so as to assert freedom of navigation rights, and increase capacity-building support to the ASEAN claimants to enhance stability and 'prevent tensions ... from developing into a threat to US interests'.

At the June 2010 Shangri La Dialogue, Gates described the dispute as an 'area of growing concern' for America. In particular, he reiterated that the US objected to 'any effort to intimidate US corporations or those of any other nation engaged in legitimate economic activity' and that Washington supported the 'concrete implementation' of the DoC. The latter point was clearly a signal to Hanoi that the US backed its diplomatic initiatives within ASEAN. The following month, at the ASEAN Regional Forum meeting in Hanoi, Secretary of State Hillary Clinton went a step further by offering to facilitate talks on implementing the DoC.

Describing the South China Sea as 'pivotal' to regional security and freedom of navigation as a core US interest, Clinton's intervention was widely interpreted as part of a campaign to push back against Chinese maritime assertiveness. Eleven other countries also raised their concerns about developments in the South China Sea. China's response was indignant: Foreign Minister Yang Jiechi

declared that Beijing was resolutely opposed to the 'internationalization' of the dispute, accused America of exaggerating tensions to justify an increased military presence, and rejected the implication that the PLAN had hindered freedom of navigation or used coercion against other disputants. Yet, to drive home the message that China was willing to uphold its territorial claims, the PLAN immediately conducted large-scale live-fire exercises in the South China Sea.

Gates's and Clinton's comments provided confirmation that the South China Sea dispute has been added to the list of problem areas in Sino-US relations. It also reflects growing US concern at what Pacific Commander Admiral Robert Willard called in January China's 'aggressive program of military modernization that appears designed to challenge US freedom of action in the region and, if necessary, enforce China's influence over its neighbours—including our regional allies and partners'. In reaction to these developments, the US military has stepped up surveillance of the PLAN, including at the new Sanya Naval Base on Hainan Island, home to some of China's most advanced submarines and surface warships. Such surveillance is deemed by the PRC to be illegal and provocative, and has resulted in a series of tense stand-offs between US and Chinese naval vessels, the most high-profile of which involved the USNS *Impeccable* in March 2009. Due to differing interpretations of international law, *Impeccable*-type incidents are likely to become more commonplace.

Since the ARF, the US and ASEAN have sought to tamp down tensions. At the 2nd US–ASEAN Summit in September, and at the inaugural ASEAN Defence Ministers' Meeting Plus (ADMM Plus) in October, the South China Sea was raised in general terms only. In October, the US back-pedalled on its offer to facilitate talks on the DoC when US Assistant Secretary of State Kurt Campbell stated that he did not

think it would be appropriate for the US to 'play a direct role' in the negotiations.

## Military modernisation

Regional military modernisation programs are changing the strategic context of the South China Sea dispute. In particular, China's rapid military build-up is shifting the balance of power in its favour and rendering the status quo unsustainable. The dispute has influenced the defence procurement plans of several Southeast Asian countries—especially Vietnam—but ultimately they cannot match the defence outlays and military capabilities of China.

China's defence modernisation efforts over the past decade and a half have been driven primarily by conflict scenarios in the Taiwan Strait. The PLAN has been equipped with a fleet of modern attack submarines, frigates, destroyers and amphibious landing vessels to deter Taiwan from declaring independence and, should deterrence fail, to invade the island while simultaneously preventing US military support from reaching the Taiwanese.

But modern warships are versatile platforms. They can be deployed for a variety of missions, including in the South China Sea, which Beijing in the Spring of 2010 reportedly elevated to a 'core' sovereignty issue alongside other sensitive areas such as Taiwan, Tibet and Xinjiang. Several reasons account for this development. First, for Chinese nationalists the issue has become increasingly emotive, based on the perception that the other claimants are expropriating maritime resources that rightly belong to China. In this context, China has complained about the 'illegal' detention of its fishing boats and about joint exploration and extraction activities between claimant states and foreign oil companies. Second, as China's dependence on imported oil deepens, Chinese security analysts are paying closer attention to the country's SLOC security in Southeast Asia.

Approximately 80% of China's oil imports are sourced from the Middle East and Africa, and can only reach their final destination by passing through the strategic chokepoints of Southeast Asia (the Malacca, Sunda and Lombok–Makassar straits) and then north through the South China Sea. Since the early 2000s, the PLA has been tasked with 'safeguarding the interests of national development', and for the navy that means protecting the country's vital energy supply lines. Third, attempts by the other claimants to buttress their jurisdictional claims through national legislation and in 2009 through submissions to the UN's Commission on the Limits of the Continental Shelf (CLCS) have been dismissed by China as a violation of its sovereignty.

In view of these developments, China has increased its military presence in the South China Sea. In 2010, in an attempt to address the problem of 'illegal' fishing and the arrest of Chinese fishing boats, China stepped up the frequency of patrols by its fishery administration and naval vessels, both to enforce its annual unilateral moratorium on fishing activities (which runs from May to August) and to protect Chinese trawlers operating in the Spratlys.

Other developments have strengthened China's hand in the area. The PLA has upgraded its facilities in the Paracels and Spratlys, including airstrips and defensive positions. The PLAN has acquired twenty-four SU-30MK2 fighters capable of long-range combat missions over water and armed with anti-ship cruise missiles. Both the navy and the air force have improved airborne early warning and control and aerial refuelling capabilities, allowing for extended missions over the South China Sea. The PLA has also established three airborne divisions, two amphibious infantry divisions, two marine brigades and seven special operations groups, all of which enhance its amphibious warfare



capabilities. According to the US military, by 2012 the PLAN will have commissioned an aircraft carrier—the 67,000-ton ex-Soviet flattop *Varyag*, currently undergoing an extensive refit in Dalian—which will provide it with organic air cover in the contested area. China is thus well on the way to becoming Asia's pre-eminent military power.

## The regional response

Defence spending is on the rise in Southeast Asia, and for some countries the South China Sea dispute is a contributory factor. This is particularly true of Vietnam, which has grown increasingly unsettled at perceived attempts by China to undermine its sovereignty claims and thwart its plans to exploit the maritime environment, including fishery and energy resources, for economic development. While Vietnam remains committed to peacefully managing the dispute with China through bilateral and multilateral discussions, it has sought to hedge against increasing Chinese assertiveness in three ways. First, as with the PRC, Vietnam has strengthened its military and civilian infrastructure on the twenty-one atolls in its possession in the Spratlys to include new defensive positions, airstrips, piers and barracks. According to a report in the *Straits Times*, Hanoi is in talks with Israel for short-range ballistic missiles—which can be used to accurately target surface ships—to be based in the Spratlys.

Second, to better defend its sovereignty claims, Vietnam has also accelerated the modernisation of its air and naval forces. Since 2000, the Vietnamese navy has taken delivery from Russia of two Tarantul-class corvettes and 10 Svetlyak-class missile patrol boats, and in 2006 placed an order for two 2,000-ton Gephard-class frigates (with an option to buy two more), due to enter service later this year. More importantly, however, according to press reports, in late 2009 Hanoi placed an order for six Kilo-class submarines from Russia. At

an estimated cost of nearly US\$2 billion, this is a very significant outlay for Vietnam, whose annual defence budget in 2008 was only US\$1.3 billion. As Vietnam currently operates only two mini-submarines, the Kilos would give Hanoi a quantum leap in anti-submarine and anti-ship warfare capabilities, and would serve as a powerful deterrent to the PLAN.

Third, Vietnam seeks to facilitate America's military presence in Southeast Asia as a counterweight to China. Vietnam's announcement in October that the Cam Ranh Bay naval base would be opened to foreign navies for repair and reprovisioning should be seen in this context.

The Spratlys dispute has been an important driver of Malaysia's defence modernisation plans since the late 1980s. In the 1990s, the Malaysian Armed Forces took delivery of frigates, corvettes, amphibious landing ships and F-18 and MiG-29 fighter jets, partly with Spratlys scenarios in mind. During the 1997–1998 Asian financial crisis, however, Malaysia was forced to postpone major new acquisitions. As the economy recovered in the early 2000s, defence spending more than doubled and, according to the Stockholm International Peace Research Institute, deliveries of conventional weapons increased 722% in 2005–2009 compared to 2000–2004. New capabilities include eighteen SU-30MKMs from Russia and six German-designed offshore patrol vessels. In 2006 Malaysia ordered two Lekiu-class frigates from the United Kingdom and, more significantly, two Scorpene-class submarines from France. The submarines—Malaysia's first—were commissioned in 2010 and homeported at the Sepanggar Bay Naval Base in Sabah, close to the country's territorial claims in the Spratlys. During a visit to Malaysian-occupied Swallow Reef in 2008, then Deputy Prime Minister Najib Razak declared that the presence of the Malaysian Armed Forces in the Spratlys would ensure



that ‘people will be apprehensive about undermining the sovereignty of our nation’. As with China and Vietnam, Malaysia has also expanded its military facilities on its five atolls in the Spratlys.

The military modernisation programs of the two other Southeast Asian claimants—the Philippines and Brunei—have not kept pace with those of China, Vietnam or Malaysia. The Philippines possesses one of the weakest armed forces in the region, and attempts since the mid-1990s—when tensions escalated with China over the Spratlys—to implement a meaningful defence modernisation program have stalled due to limited financial resources. Since 9/11, Manila and Washington have strengthened their alliance, and the US has become intimately involved in upgrading the Armed Forces of the Philippines’ capabilities, although the priority has been internal over external security challenges, and the Philippines’ ability to defend its claims in the South China Sea will remain weak for the foreseeable future.

Brunei puts great store on the protection of its maritime resources, especially the oil and gas on which the country’s economic growth depends. But at only 7,000 personnel, the Royal Brunei Armed Forces is a veritable minnow by regional standards, and to all intents and purposes Brunei is a very minor player in the South China Sea dispute.

## The way forward?

A legal settlement of the South China Sea dispute is highly unlikely. Quite apart from the difficulties of negotiating a solution to a problem that involves six parties—one of which, Taiwan, is not recognised by the others as a legal entity—none of the claimants has demonstrated the political will to compromise its sovereignty claims. This fact was brought into sharp relief in 2009 when China challenged Malaysian, Vietnamese and Philippine submissions to the CLCS, effectively

rendering the process moot because the commission can’t examine contested claims. With this reality in mind, the onus is now on the claimants to better manage the dispute through dialogue and the effective implementation of CBMs.

Various forums already exist for the South China Sea issue to be addressed. They include the ASEAN Regional Forum, ASEAN–China summits and the ADMM Plus, which met for the first time in October. China’s unwillingness to allow the Spratlys to be raised at multilateral forums shouldn’t dissuade other countries from bringing it up and explicitly linking it to Beijing’s ‘peaceful rise’ thesis. These forums should also be utilised to discuss and implement CBMs. While the DoC has been disappointing, the agreement does contain potentially very useful CBMs that could help to alleviate tensions. Article 5 calls on the claimants to hold ‘dialogues and exchanges of views’ among military officials and to notify each other of forthcoming exercises. Article 6 identifies a series of trust-building activities including ‘safety of navigation at sea’; given the increasing number of tense stand-offs at sea between fishing vessels and warships, the establishment of telephone hotlines between the claimants and the signing of an ‘incidents at sea’ agreement would be useful first steps in avoiding conflict. Combined exercises between the PLAN and Southeast Asian navies would also help build trust. Region wide, greater transparency over national military modernisation programs would help mitigate strategic mistrust and misperceptions.

Without such measures, tensions in the South China Sea will continue to simmer, raising the prospect of a military clash at sea. Conflict in one of the most important strategic waterways in the world is in no-one’s interests.

### 3 Legal and resource issues in the South China Sea

#### Sam Bateman

The Spratly Islands are a major feature of the South China Sea. They are claimed in full by China, Taiwan and Vietnam, while individual islands and reefs are claimed by Brunei, Malaysia and the Philippines. The islands are a key strategic feature of the South China Sea, but the interest in claiming sovereignty over them arises mainly from perceptions of the resource potential of the maritime zones that the islands may generate. Although assessments of the oil and gas reserves of the area have varied over the years, existing developments offshore from Borneo and Vietnam support the interest in greater efforts to explore disputed areas in and around the Spratly Islands.

Part VIII of the 1982 UN Convention on the Law of the Sea (UNCLOS) provides the 'regime of islands' under international law. In principle, islands can generate an exclusive economic zone (EEZ) and continental shelf, but there are two major qualifications. First, an island must be 'naturally formed' and 'above water at high tide'. A submerged or partially submerged reef can't be turned into an island by erecting structures upon it. Second, rocks that 'cannot sustain human habitation or economic life of their own' have only a territorial sea and cannot generate an EEZ or continental shelf. These are important issues in the South China Sea, where some reefs have been built up with manmade structures, and assessments of whether a particular feature is a 'rock' or an 'island' become critical.

#### National claims

The Chinese claim to the Spratly Islands is based mainly on historical occupation and use, although it is weakened by some lack of 'continuous and effective acts of occupation'.<sup>1</sup>

Vietnam similarly claims the whole of the Spratly group and all its continental shelf, as well as an extensive area of the South China Sea, on the basis of historical usage.

On balance, China's claim to the Spratly group usually finds some support in international law if the group is taken as a single territorial unit.<sup>2</sup> Vietnam's claim is weakened by consistent recognition of Chinese sovereignty over the Spratlys by North Vietnam during the period between 1951 and 1975.<sup>3</sup> Taiwan's claim over South China Sea islands is similar to the mainland's, and under the 'one China' concept is not opposed by China.

The Philippines' claim to particular features in the Spratly Islands is based on the so-called proximity principle and on 'discovery of the islands' concerned by a Philippine explorer, Tomas Cloma, in the 1950s. It's an unusual claim largely because of the bizarre nature of Cloma's original claim and the subsequent reaction of the Philippine Government.

The Kalayaan islands group lies outside the international treaty limits of the Philippines but was incorporated into Philippine territory through presidential decree in 1978.<sup>4</sup>

The Malaysian claim is clearly defined by coordinates showing the extent of its claim to continental shelf in accordance with international law. Malaysia claims those islands and reefs that it considers to be situated on its continental shelf. Brunei's claim is also to an area of continental shelf, although its boundary lines are simply drawn directly out as parallel straight lines from the end of its land boundaries. The claims by the Philippines and Malaysia lack a historical basis and may be 'too weak to have displaced Chinese title'; consequently, China's claim to several features in the Spratly group is 'probably superior to that of any other claimant'.<sup>5</sup> The former claims are also based on geographical contiguity, but that's not currently recognised as a valid basis for a claim of sovereignty.

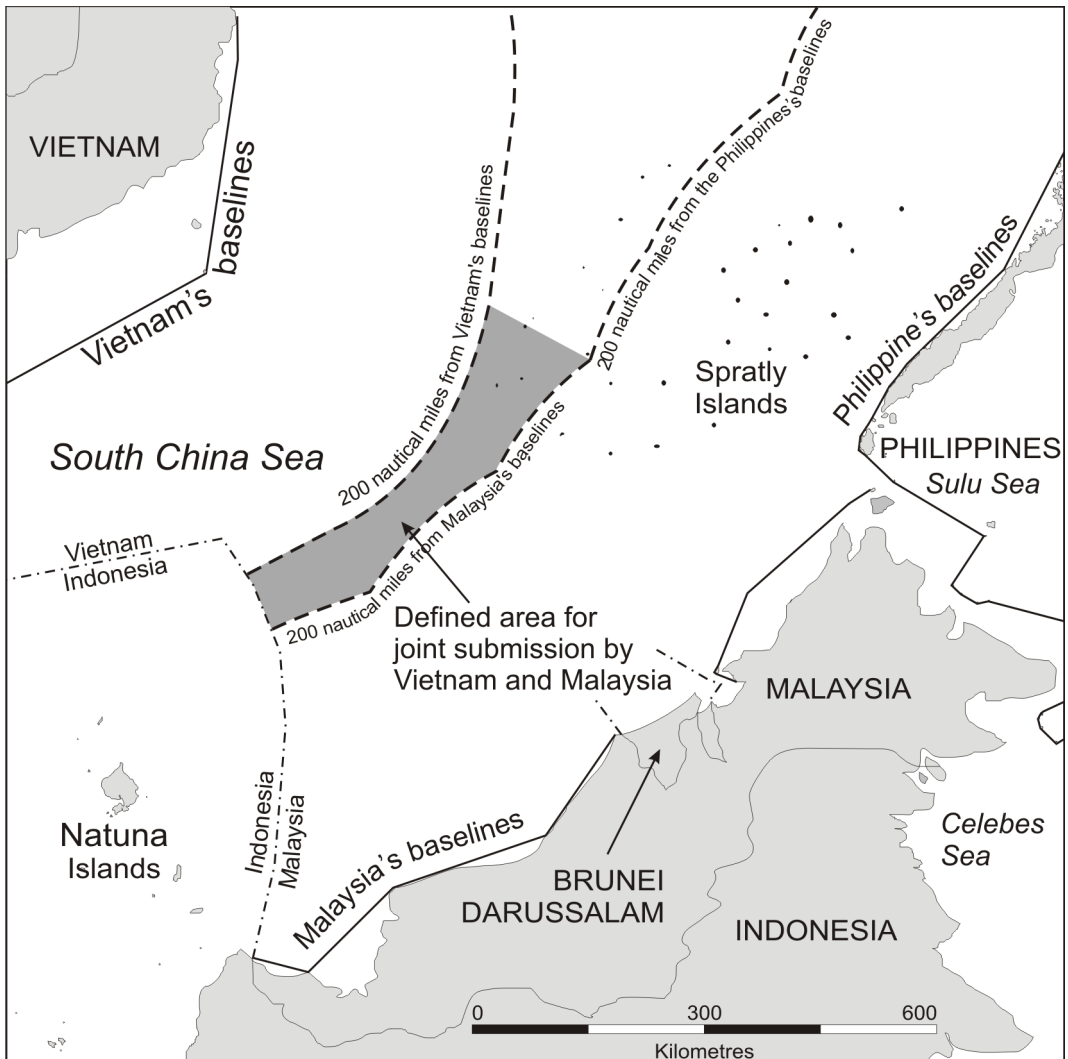
## Recent continental shelf submissions

Malaysia and Vietnam have lodged a joint submission at the UN's Commission on the Limits of the Continental Shelf (CLCS) for an extended continental shelf in the South China Sea (see Figure 1).<sup>6</sup> The submission was made in accordance with UNCLOS Article 76, which allows countries, under strict geological and bathymetric criteria, to claim sovereign rights over natural resources in an outer or extended continental shelf beyond 200 nautical miles from territorial sea baselines. Those rights

relate to the resources of the seabed and subsoil, including oil and gas reserves and living resources of a sedentary nature, such as clams and abalone.

In effect, Malaysia and Vietnam are seeking to divide all the seabed and subsoil resources of the part of the South China Sea lying between Vietnam and the Malaysian states of Sarawak and Sabah. They're saying they both have a full EEZ of 200 nautical miles in the area, in addition to which they have a continental shelf in the gap between their EEZs.

Figure 1: Extended Continental Submission by Malaysia and Vietnam



This was a provocative move. It denies any resource rights in this part of the South China Sea to China, Brunei and the Philippines, which also have claims over some or all of the area. It also denies that any of the islands of the Spratly group qualify under international law as the type of islands capable of generating a continental shelf or EEZ of their own.

Malaysia and Vietnam also claim some or all of these islands. By implying that the islands are not capable of generating a continental shelf or EEZ of their own, they could be jeopardising their position in any future negotiations on sovereignty and maritime boundaries in this part of the South China Sea. More realistically, however, if some of the features are in fact 'islands' rather than 'rocks', and due to the width of the South China Sea, there's no basis for any country claiming an extended continental shelf in the area.<sup>7</sup>

## Philippine claims

The Philippines stirred up the situation in the South China Sea with its new 'baselines' law in March 2009. The law declared archipelagic baselines around the main islands of the Philippines, but also provided that baselines around the Kalayaan islands group would be determined under the 'regime of islands' in UNCLOS Part VIII. This was followed by Manila's submission to the CLCS regarding an extended continental shelf.<sup>8</sup> While this claim ostensibly related only to the Benham Rise to the east of Luzon in the Pacific Ocean, the Philippines also reserved the right to make further claims to an extended continental shelf. This has been interpreted as referring to a possible submission covering the Kalayaan Islands and Scarborough Shoal areas in the South China Sea.

## China's response

Predictably, there was a furious response from China. The day after Malaysia and Vietnam made their joint submission to the CLCS, China lodged a strong protest with the UN Secretary-General alleging that the submission 'seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea'.<sup>9</sup> The protest stated that:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.

The Chinese protest went on to request that the CLCS not consider the Malaysian and Vietnamese submission. It included a map that showed the notorious U-shaped line (see Figure 2), sometimes referred to in Chinese literature as the 'traditional maritime boundary line', the 'southernmost frontier', the 'territorial limit', and so forth. However, the legal nature of the line has never been clarified, and it's been subject to considerable speculation. Some western writers have suggested that it's a claim to the whole sea as Chinese territorial waters or 'historic waters', but this seems not to be the case. Professor Zhiguo Gao, a leading scholar of China's marine policies and now a judge of the International Tribunal on the Law of the Sea (ITLOS), has observed that 'A careful study of Chinese documents reveals that China never has claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line', and that 'the boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense'.<sup>10</sup>

Figure 2: Notional EEZs and China's U-shaped line



Prepared by I Made Andi Arsana of the Department of Geodetic Engineering, Gadjah Mada University, Indonesia

In effect, China is saying that all the islands and reefs within the dotted line are Chinese, and that they then generate maritime zones as allowed by international law. Thus, the line isn't a full claim to the waters of the South China Sea. This appreciation is compatible with China's use of the phrases 'adjacent waters' and 'relevant waters' in its protest. It's also supported by the fact that China has never protested the maritime boundaries agreed previously in the area between Indonesia and Malaysia, and Indonesia and Vietnam. Those boundaries intrude into the area enclosed by the U-shaped line. Furthermore, China has never protested the extensive offshore oil and gas exploration and exploitation activities conducted by Brunei, Indonesia and Malaysia in the south-eastern part of the South China Sea within China's U-shaped line.

### Commission on the Limits of the Continental Shelf

The CLCS won't consider the Malaysian and Vietnamese joint submission while the area in question is the subject of dispute. The commission is the international body established to review submissions by countries to ensure that the bathymetric and geological evidence submitted to it meets the criteria prescribed in UNCLOS. It's a technical committee that has no charter to make judgments on sovereignty issues, or indeed on maritime boundaries. Submissions to it are recognised as being without prejudice to boundary negotiations. Many countries have already lodged their submissions, and the commission has completed its assessment of some, including that by Australia.

Increased concerns over energy security and interest in the potential hydrocarbon resources of the continental shelf have spurred countries on to progress their claims to an outer or extended continental shelf. The deadline for submissions was 13 May 2009, and there was much activity before that as countries raced to make submissions. Countries that aren't parties to UNCLOS, such as Cambodia, Thailand and the US, aren't entitled to make submissions to the CLCS. However, if they accede to the convention, they'll then have ten years from their date of accession in which to lodge one.

China hasn't made an extended continental shelf submission in the South China Sea. This may demonstrate restraint as well as a practical appreciation that, in view of the distances between continental China and the Paracels, and between the various groups of offshore islands (all less than 400 nautical miles apart), nowhere is an extended shelf possible. This is in contrast with the approach of Malaysia and Vietnam.

## Outlook

The joint submission by Malaysia and Vietnam covering an extended continental shelf in the vicinity of the Spratly Islands has seriously escalated sovereignty disputes in the area. It has added to the current acrimony in China–Vietnam bilateral relations, and will bolster Hanoi's plans to accelerate its military modernisation program. Those plans include the acquisition of six Kilo-class submarines and twelve SU-20 fighter aircraft from Russia. Russian Defence Minister Serdyukov has also announced that Russia will help build a submarine base in Vietnam.<sup>11</sup>

Under the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC), ASEAN members and China agreed to resolve their disputes through 'friendly consultations and

negotiations', and 'to exercise self-restraint in the conduct of activities that would complicate or escalate disputes'. Despite those provisions, the parties to the DoC have continued to construct structures on disputed features, increased patrols in the area, and passed new laws and administrative regulations covering their claimed features. Furthermore, the CLCS submission by Malaysia and Vietnam appears to go beyond the spirit of the DoC, particularly as it seems based on a rather unrealistic appreciation of geographical features in the South China Sea.

In addition to China's formal protest to the CLCS and Vietnam's response, there are other indications of the situation escalating. China has said it will send more patrol ships to the disputed islands, and the Philippines has announced it will improve military structures on the islands it claims, despite concerns that such action could be contrary to the 2002 DoC.

The countries claiming sovereignty over some or all of the Spratly Islands are still tending to see ownership of potentially rich maritime zones in 'zero sum' terms.<sup>12</sup> Tentative proposals for bilateral, or even trilateral, resource exploitation have invariably stumbled due to nationalistic objections. Unfortunately, recent developments suggest that resolution of the sovereignty claims in the Spratly Islands is as far away as ever. Meanwhile, as levels of energy self-sufficiency in East Asia fall and pressures on energy security increase, claimant countries may become even more assertive about their sovereignty claims.

Urgent action is required to move discussion back to preventive diplomacy and a cooperative management regime based on functional cooperation that exploits the common and pressing interests of claimant countries.

## Endnotes

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## Acronyms and abbreviations

ADMM	
Plus	ASEAN Defence Ministers' Meeting Plus
CBMs	confidence-building measures
CLCS	Commission on the Limits of the Continental Shelf
DoC	ASEAN–China Declaration on the Conduct of Parties in the South China Sea (2002)
EEZ	exclusive economic zone
JWG	joint working group
PLA	People's Liberation Army (China)
PLAN	People's Liberation Army Navy (China)
PRC	People's Republic of China
SLOC	sea lines of communication
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea



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