The South China Sea Dispute:
How Geopolitics Impedes Dispute Resolution and Conflict Management

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Introduction

In May 2014 the state-owned China National Offshore Oil Corporation (CNOOC) deployed its largest and most modern oil rig, Hai Yang Shi You 981 (HS-981)—ominously described by CNOOC’s chairman at its commissioning ceremony in 2012 as China’s “mobile national territory and a strategic weapon”—into Vietnam’s claimed exclusive economic zone (EEZ). CNOOC’s action not only sparked the worst crisis in Sino-Vietnamese relations since the two countries re-established diplomatic relations in 1991—and arguably since their 1979 border war—but also raised tensions in the South China Sea to their highest point since the dispute first came to prominence in the late 1980s. The HS-981 Incident also reinforced negative trends which have dimmed the prospects of a negotiated solution to the dispute and highlighted the ineffectiveness, and perhaps even the irrelevance, of attempts to manage the conflict both by the Southeast Asian claimants (Vietnam, the Philippines, Malaysia and Brunei) and China, and by the Association of Southeast Asian Nations (ASEAN) and the People’s Republic of China (PRC).

After a period of relative tranquillity in the South China Sea in the first half of the 2000s, tensions began their current upward trajectory in 2008. Although rising tensions are the product of a complex interplay of domestic political and international factors, geopolitics perhaps provides the most plausible explanation of recent events. It is the contention of this paper that China seeks to dominate the maritime space within the so-called nine-dash line which covers almost 80 per cent of the South China Sea. To achieve this dominant position, Beijing is pursuing a strategy that not only incrementally advances its sovereignty and jurisdictional claims, but also, as Hugh White has argued, aims to undermine US power and credibility in Southeast Asia specifically, and the Asia-Pacific more generally (including in the East China Sea where China contests Japan’s sovereignty claims to the Senkaku/Diaoyu Islands). In particular, China challenges Philippine claims in the South China Sea and calculates that its US ally will not respond militarily. In response to increased Chinese assertiveness America faces a difficult dilemma: if its response is perceived as being too weak, its security commitments to allies and partners will be undermined; but too strong a response could lead to an escalation of tensions, both in the South China Sea and between Washington and Beijing.

The Chinese leadership under President Xi Jinping has repeatedly stated that while China remains committed to “peaceful development” and a policy of good neighbourliness towards Southeast Asia, it will not compromise its territorial and jurisdictional claims and will respond assertively to “provocations” by the other claimants as they seek to uphold their sovereignty claims. It is unlikely, therefore, that China will revert to a more accommodating stance in the near future. Moreover, Beijing seems prepared to absorb the reputational costs associated with its more hardline policy. Accordingly, a resolution to the dispute will be much harder to achieve, conflict management efforts will be stymied and the South China Sea will increasingly become a source of contention, and possibly even overt rivalry, between China and the United States.

Rising Tensions: The Blame Game
Few serious observers of the long-running dispute in the South China Sea would disagree that since 2008 the situation has deteriorated significantly. Who is to blame for rising tensions is, however, subject to competing narratives.

According to Chinese leaders, diplomats and the state-run media, the PRC is blameless for the upswing in tensions and that responsibility lies squarely with the Southeast Asian claimants—particularly the Philippines and Vietnam—as well as “certain major powers”, principally the United States but also its ally Japan. A common theme in China’s narrative is that Beijing exercises “restraint and patience” in the South China Sea. Even during the HS-981 crisis, the Xinhua news agency argued that China was “maintaining utmost restraint”, despite the fact that the oil rig was dispatched, unannounced, into disputed waters and protected by a flotilla of over 100 ships including civilian patrol vessels, fishing trawlers, CNOOC-chartered ships and, according to Vietnam, Chinese warships. At the first high-level meeting to discuss the crisis, Chinese State Councillor Yang Jiechi blamed the Vietnamese for the tense situation and told Vietnamese Foreign Minister Pham Binh Minh to stop harassing the oil rig and “hyping” the issue. Over the past few years, Chinese media commentaries have repeatedly accused the Philippines and Vietnam of “plundering” China’s resources in the South China Sea and raising tensions through their “aggressive actions”. President Xi Jinping’s assertion during the oil rig crisis that “We will never stir up trouble, but will react in the necessary way to the provocations of countries involved” puts the onus for rising tensions on the other claimants.

In addition, the Chinese media has also regularly castigated the United States for “meddling” in the dispute, exaggerating tensions and threats to freedom of navigation, using the dispute as a pretext to “rebalance” its military forces to Asia, and hypocrisy for criticizing China for not abiding by the United Nations Convention on the Law of the Sea (UNCLOS) when America itself has not ratified the agreement. China has also challenged the US position that it is a “neutral” party in the dispute and accused Washington of emboldening the Philippines and Vietnam to undertake “provocative actions”. China’s Foreign Ministry has also chastised Japan for “interfering” in the dispute.

There is validity in some of China’s claims, as even US officials themselves have admitted. Although senior Obama administration officials have been at pains to assure Beijing that the “Asia pivot” is not aimed at China, few doubt that the rise of China is the organizing principle of the rebalance. And as James Clapper, the Director of National Intelligence, told the US Senate, China’s behaviour in its territorial and maritime boundary disputes was partly in response to the new policy which “Chinese leaders believe is aimed at undermining China’s position in the region”. In an interview with the Singapore press in September 2012, Vice Foreign Minister Fu Ying noted that as the main emphasis of the rebalance seemed to be an increase in America’s military presence in Asia, this prompted the question “Who is the target?”. On UNCLOS, then Secretary of State Hillary Clinton conceded that the United States would have “greater credibility in invoking the convention’s rules and a greater ability to enforce them” if it ratified the agreement, while President Obama told West Point graduates in 2014 that it was difficult for America to try and resolve problems in the South China Sea without ratifying UNCLOS. China also makes a valid point on US claims to neutrality in the dispute when it has increased military aid to the Philippines so that it can better defend its claims in the Spratlys. As for America “emboldening” Manila, Michele Flournoy, former Under Secretary of Defense for Policy, warned that the Philippines might risk mistaking US support as an “opportunity to be much more assertive in staking their claims”. And was not
the United States revealing its biases in November 2011 when, on a US destroyer anchored in Manila Bay, Clinton referred to the “West Philippine Sea”, the Philippines’ designation of the South China Sea?16

The leaders of the Philippines and Vietnam have, unsurprisingly, laid the blame for rising tensions firmly at China’s door. Philippine Foreign Secretary Albert del Rosario has been a particular sharp critic of China, accusing it of raising tensions due to its “excessive and expansive” maritime claims and “aggressive patterns of behaviour” which threaten regional peace and stability.17 His boss, President Benigno Aquino, has even drawn parallels between China’s behaviour in the South China Sea and Nazi Germany’s in Europe in the 1930s.18 At his keynote speech at the Shangri-La Dialogue in 2013, Vietnamese Prime Minister Nguyen Tan Dung criticized China’s behaviour without directly naming the country; but during the HS-981 crisis, the gloves came off, and Dung declared China’s deployment of the oil rig posed a threat to “peace, stability, security, safety and freedom of navigation, cooperation and development in the region and the world”.19 Dung and Aquino reiterated this missive at a joint meeting a few weeks after the drilling rig had entered Vietnam’s waters.20 The Philippines and Vietnam’s fellow ASEAN members have been more circumspect in their comments, but most have been perturbed by China’s actions.

As the situation in the South China Sea has deteriorated, the United States has not only become more vocal in expressing its concerns, but also more willing to point the finger of blame at the PRC. US policy towards the South China Sea dispute has been consistent since the mid-1990s: America does not take a position on competing territorial claims; opposes the use of force or coercion to resolve it; and supports a negotiated settlement in accordance with international law. When tensions began to ratchet up from 2008, senior US officials began to express concern at “coercive diplomacy” but without naming China specifically —though it was clear to all which country was being referred to.21 At the July 2010 meeting of the ASEAN Regional Forum (ARF), then Secretary of State Clinton upped the ante when she declared that the South China Sea was “pivotal” to regional security and that America had a “national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea”.22 US officials have continued to stress America’s national interests in the South China Sea, but their criticism of China’s behaviour has become more explicit. In August 2012, for instance, the US State Department expressed concern at China’s actions at Scarborough Shoal and over the upgrading of the administrative status of Sansha City, but without really naming the PRC.23 However, by February 2014, Danny Russel, Assistant Secretary of State for East Asian and Pacific Affairs, was blaming China directly for raising tensions and also challenging the legal validity of the nine-dash line.24 Several months later, the US government described China’s decision to send HS-981 into Vietnamese waters as “provocative and unhelpful to the maintenance of peace and stability in the region” and later as “aggressive”.25 America has also moved to openly criticising China for undermining international norms through its actions in the South (and East) China Sea. For example, the US State Department described China’s attempts to block the resupply of Filipino Marines on Second Thomas Shoal in March 2014 as “inconsistent” with freedom of navigation, while William J. Burns, Deputy Secretary of State, has highlighted that how the South China Sea dispute is handled “reveals whether the threat of force or the rule of law will govern disputes and whether the same rules will apply to big and small countries alike”.26 According to Russel, China should hold itself to “a high standard of behaviour” and not “wilfully disregard
diplomatic and other peaceful ways of dealing with disagreements” in favour of “economic and physical coercion” which is “destabilizing and dangerous”.27

China’s Game Plan in the South China Sea

China’s more assertive behaviour in the South China Sea and elsewhere is somewhat puzzling. As Brad Glosserman observes, by “picking fights with most of its neighbors” China has “upset the international legal order” which has helped facilitate its rising power, damaged its international reputation and pushed some Asian states into closer strategic partnerships with the United States.28 Some analysts have argued that Chinese assertiveness is caused by the absence of a centralized policy on maritime disputes resulting in inter-agency competition.29 Others have posited that China has adopted a policy of “non-confrontational assertiveness” in response to the provocative activities of the Philippines and Vietnam, a view that, as noted earlier, dovetails with China’s official line.30

Recent events, however, suggest that China’s policy in the South China Sea is coherent, centralized and proactive, and that it aims to advance the country’s territorial and jurisdictional claims while simultaneously undermining US power and credibility in Asia but without provoking overt American military intervention. The HS-981 Incident provides a good illustration of China’s strategy: the presence of a large flotilla of civilian patrol boats, warships, trawlers and CNOOC-chartered vessels indicates a high-degree of inter-agency cooperation; Beijing must have known that the presence of a Chinese drilling platform in Vietnam’s EEZ would spark a crisis in Sino-Vietnamese relations, therefore the operation must have been sanctioned at the highest levels of the Chinese government; no Vietnamese incident “provoked” China’s actions; and coming so soon after President Obama’s trip to Southeast Asia, HS-981 was intended to highlight America’s limited options in responding to China’s moves in the South China Sea.

But what exactly is China claiming in the South China Sea? In a protest note following a joint submission by Vietnam and Malaysia to the United Nations Commission on the Limits of the Continental Shelf in 2009, China declared it had “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”.31 Attached to the note was a map showing the “nine-dash line”, a U-shaped discontinuous line that encompasses approximately 80 percent of the South China Sea. The Chinese government, however, has studiously avoided clarifying what the line actually means. This has given rise to four possible interpretations.32 First, China is claiming sovereignty over all of the features within the line and the 12 nautical mile territorial seas and 200 nautical miles EEZs generated by the atolls. Second, China is claiming the area inside the line as its “historical waters”. Third, China claims the area inside the line as an EEZ and continental shelf generated by the Paracel and Spratly Islands. Fourth, China claims sovereignty of the islands, EEZs and continental shelves generated by those features as well as “historical rights” to maritime resources inside the nine-dash line.

While the first interpretation is comparable to the territorial and jurisdictional claims of Vietnam, the Philippines and Malaysia (Brunei has never formally made a territorial claim to features in the South China Sea), the second, third and fourth interpretations are more
problematic as few non-Chinese legal experts believe they are compatible with UNCLOS. Increasingly, however, through its actions and the views of Chinese legal scholars, it is the fourth interpretation that seems to be gaining ground as China’s official position. In 2013, for instance no less than Gao Zhiguo, China’s judge on the International Tribunal on the Law of the Sea (ITLOS)—the dispute resolution mechanism established under UNCLOS—, and Bing Bing Jia argued in an American law journal that the nine-dash line was “synonymous with a claim of sovereignty over the island groups that always belonged to China and with an additional Chinese claim of historical rights of fishing, navigation, and other marine activities (including the exploitation of resources, mineral or otherwise) on the islands and in the adjacent waters”. And in the same year, Foreign Minister Wang Yi stated that the “proper solutions” to the dispute should be found through “dialogue and negotiation” (and not through legal arbitration) on the basis of “fully respecting historical facts and international law” (emphasis added) —a striking order of priorities.

No government outside of China accepts that the nine-dash line —and hence Beijing’s claim to “historic rights” within it— are valid under UNCLOS. Vietnam’s leaders have stated categorically that they do not believe the nine-dash line has any legal foundation, while the Philippines, as will be examined later, mounted a legal challenge to China’s expansive claims at the UN in 2013. Three years beforehand, Indonesia had become the first country to officially challenge the nine-dash line when it sent a letter to the UN Secretary-General stating that it had no basis under international law and was in contravention of UNCLOS. Several of Singapore’s leading maritime law experts have questioned the legality of the nine-dash line: former government minister and law expert Professor S. Jayakumar has called the map “puzzling and disturbing” as it could be “interpreted as being a claim on all maritime areas within the nine dotted lines”, while Professor Tommy Koh notes that “the majority view is that UNCLOS prevails over customary international law and UNCLOS does not recognize claims of historic rights and jurisdiction in the EEZ of other states”. States outside of Southeast Asia have also questioned the legitimacy of China’s claims. While the United States does not take a position on competing territorial claims, it does take a position on how maritime boundaries are delimited. But it was not until February 2014 that the US directly queried the map when Danny Russel stated that “all maritime claims must be derived from land features” and that the use of the nine-dash line by China to claim maritime rights not based on land features would be “inconsistent with international law”. Japan has not officially rejected the nine-dash line, but the government of Prime Minister Shinzo Abe’s support for the Philippines’ legal case is a strong indication that it does not accept it.

China rejects these views, and over the past few years it has stepped up efforts to strengthen its territorial and jurisdictional claims within the nine-dash line, through, inter alia: upgrading the administrative status of the Sansha authority (which China created to govern its territorial claims in the South China Sea) in 2012; the more stringent enforcement of an annual fishing ban that China has imposed in northern parts of the South China Sea since 1999; new fishing regulations introduced by the Hainan authorities in January 2013; invitations to foreign energy companies to jointly develop nine offshore blocks at the outer edge of the nine-dash line but within Vietnam’s EEZ in 2012; the issuing of new maps in 2013, and images of the nine-dash line in PRC passports; high-profile naval exercises in 2013 and 2014 near James Shoal, the southern-most point of the line (and only 80 kilometres from the Malaysian coast); and the deployment of HS-981 and other drilling platforms. China is also considering...
establishing an Air Defence Identification Zone (ADIZ) similar to the one it declared over the East China Sea in November 2013. There can be little doubt that China’s attempts to push its claims have damaged its international image and created anxiety across the region. A poll conducted by the Pew Research Center during March to June 2014 found that in the Philippines 93 percent of respondents were concerned about conflict with China, 85 percent in Japan, 84 percent in Vietnam and 66 percent in Malaysia — even in China 62 percent of respondents were concerned. And yet China seems prepared to absorb the reputational costs, presumably because it considers that the benefits outweigh the costs and that eventually regional states will come to accept the “facts on the grounds” it has created.

Several countries have concluded that China’s ultimate aim is to enforce its claims within the nine-dash line, and thereby achieve dominance within it. US State Department officials have expressed concern at the “incremental effort by China to assert control over the area contained in the so-called ‘nine-dash line’”. According to Philippine Foreign Secretary del Rosario, China’s aim is to “unilaterally impose its so-called nine-dash line as a basis for claiming sovereignty over the whole of the South China Sea” and that if Beijing is successful it will become “a Chinese lake”. Prime Minister Abe has also warned of the South China Sea as a “Chinese lake”.

As China grows stronger, it seems immune to international criticism and less willing to be beholden to legal norms enshrined in UNCLOS, an agreement China itself ratified in 1996. According to Yun Sun, some Chinese legal experts have argued that since China’s “historical rights” predate UNCLOS, “it cannot retroactively be applied to supersede China’s sovereignty, sovereign rights and maritime administrative rights formed throughout history”. When a state accedes to UNCLOS, any prior claims to “historical rights” are extinguished. But as the former Prime Minister of Singapore, Lee Kuan Yew, has ominously warned, “A rising China is seeking to assert its sea boundary claims. It is naïve to believe that a strong China will accept the conventional definition of what parts of the sea around it are under its jurisdiction.”

Undermining US Credibility and Power

In pressing its claims in the South China Sea, Beijing not only secures its national interests within the nine-dash line, but also undermines US credibility in Asia, which in turn allows it to advance its power and influence across the region more broadly. Consequently, therefore, the maritime disputes in the South and East China Seas represent the locus of Sino-US competition in the Asia Pacific.

As Hugh White has argued, America’s preeminent position in Asia owes much to its alliance and partnership relations with many of China’s neighbours, and the confidence they have that “America is able and willing to protect them from China’s power”. The best way to undermine that confidence, he goes on, and hence weaken US power, is to “press those friends and allies hard on issues in which America’s own interests are not immediately engaged – like a string of maritime disputes in which the US has no direct stake”. That China has resolved to pursue this strategy stems from a number of factors. One is the country’s growing self-confidence, bolstered by its emergence, largely unscathed, from the financial crisis of 2008-09, at a time when the United States was preoccupied with economic recovery and ending its military intervention in Iraq and Afghanistan. Another factor is that the rapid modernization of
the PLAN, and, crucially, the expansion of its civilian maritime law enforcement agencies, has provided China with the capabilities to increase its presence at sea, and bring coercive pressure to bear on the other claimants, particularly Vietnam and the Philippines. In fact in pressing its claims China has mainly used civilian vessels, a much less contentious approach than employing heavily-armed warships, and one that deprives the US of a rationale to intervene militarily —what James Holmes has dubbed China’s “small stick diplomacy”. The leadership transition from President Hu Jintao to Xi Jinping in 2012-13 may also have contributed to a more assertive posture in the South China Sea as the latter seeks to project a strong foreign policy so as to strengthen his domestic power base. The Chinese leadership must also have taken note of the Obama administration’s more cautious foreign policy and reluctance to employ military power in response international hotspots such as Syria, Iraq and the Ukraine.

Beijing’s attempts to weaken US power in Asia by demonstrating the limitations of its security commitments in Asia, and its unwillingness to intervene militarily over disputed atolls and risk a clash with the PLA, helps explain increased Chinese pressure on the Philippines over the past few years. Since the late 2000s, a series of incidents have led to a sharp deterioration in Sino-Philippine relations. In 2011 Chinese patrol boats prevented Philippine-chartered survey ships from exploring for natural gas at Reed Bank which lies within the Philippines’ EEZ. A more serious incident took place in April-May 2012 when the two sides engaged in a tense stand-off at Scarborough Shoal following Philippine attempts to detain Chinese fishermen alleged to be working illegally at the reef. Tensions erupted again in March 2014 when Chinese patrol ships tried to prevent Philippine vessels from resupplying military personnel on Second Thomas Shoal. And in June 2014, the Philippines accused China of undertaking extensive reclamation work at several reefs within its EEZ.

The US-Philippine Mutual Defense Treaty (MDT) of 1951 calls on both parties to recognize that an “armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes”. However, whether America’s commitment to defend its Philippine ally if conflict were to occur in the South China Sea is less than clear cut. According to Article IV of the MDT “an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific”. But as the Philippines did not formally make a claim to the Spratlys until 1978, does the 1951 agreement cover these “island territories”? According to the Philippines, in 1979 the US confirmed in a diplomatic letter that it considered the South China Sea as part of the “Pacific Area”. Nevertheless, as it faces an increasingly assertive and militarily powerful China, Manila wants Washington to clarify its obligations under the MDT —as it has done with Tokyo over the Senkaku/Diaoyu Islands, which it says are covered by the 1960 US-Japan security treaty. US officials, however, have consistently refused to be drawn on “hypotheticals”, preferring instead to remain purposefully ambiguous. Instead, America has repeatedly endeavoured to reassure the Philippines of what President Obama called, during a visit to the country in April 2014, its “ironclad commitment” to the Philippines’ security. As part of that commitment his administration has stepped up military assistance to the Philippines —including the transfer of three refurbished coastguard cutters— and pledged to increase its military presence in the country on a rotational basis. Yet none of these initiatives seem to have deterred China from acting aggressively towards the Philippines. Indeed during the
Scarborough Shoal crisis, China refused to honour a US-brokered agreement which called on both sides to withdraw their vessels; America’s anaemic response may have simply emboldened it.\(^5^8\) Recent reports suggest that in response to increased Chinese activities in the Spratlys the United States will increase military surveillance activities in the South China Sea.\(^5^9\) Whether this influences China’s behaviour remains to be seen.

**Dispute Resolution? Joint Development? Conflict Management?**

If China’s aim is to achieve dominance within the nine-dash line, what are the implications for dispute resolution and conflict management? Simply put, it severely impedes both processes.

In a very candid response to a group of Asian journalists in September 2013, Singapore Prime Minister Lee Hsien Loong judged that the South China Sea dispute “cannot be resolved”.\(^6^0\) In theory, of course, no international dispute is insoluble. In practice, however, a number of factors render the dispute particularly intractable —the most important of which is China’s intransigence.

International legal adjudication provides an obvious solution to the problem. The International Court of Justice (ICJ) could examine competing claims to sovereignty of the atolls and issue a binding ruling. But the ICJ could only examine the case with the consent of all parties. China, however, has consistently ruled out international legal arbitration as a means to resolve its disputes with other countries, be they border, territorial or maritime boundary disputes. This means that the ICJ option is currently not an option —nor is Beijing likely to change its position. China’s steadfast rejection of legal mechanisms to address the South China Sea dispute was made apparent in January 2013 when the Philippines asked ITLOS to issue a ruling on whether the nine-dash line was compatible with UNCLOS.\(^6^1\) Unlike ICJ cases, submissions to ITLOS do not require the consent of both parties (provided they have both ratified UNCLOS). Unsurprisingly, however, China immediately refused to participate in the proceedings citing its “indisputable sovereignty” over all the atolls in the South China Sea, its decision in 2006 to exclude itself from compulsory dispute resolution procedures involving maritime boundaries (even though Beijing has never officially described the nine-dash line as a maritime boundary) and because the Philippines’ case was “factually flawed” and contained “false accusations”.\(^6^2\) China also declared the Philippines submission to be a violation of the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DoC) even though in that agreement all parties agree to resolve their territorial and jurisdictional disputes by peaceful means “in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”.\(^6^3\)

Despite China’s refusal to participate, the case is proceeding and a five-judge Arbitral Tribunal has been established under the Permanent Court of Arbitration (PCA). On 30 March 2014, the Philippines met a deadline to submit legal arguments and evidence—known as a Memorial—in support of its submission. Afterwards the PCA gave China until 15 December to submit a counter-Memorial, but Beijing immediately reiterated that it would not participate.\(^6^4\) If the PCA accepts jurisdiction, it is expected to issue an award in 2015. If the Tribunal rules that the nine-dash line is incompatible with UNCLOS, that ruling is binding on China because it is a signatory of UNCLOS. However, because UNCLOS lacks enforcement
mechanisms, the Tribunal’s decision cannot be enforced. In all likelihood, therefore, China will simply ignore the ruling.

Why does China eschew legal adjudication? Implicit in China’s assertion that it has “indisputable sovereignty” over the atolls is the belief that arbitration is wholly unnecessary. This is particularly true in the case of the Paracel Islands on which China does not recognize that a dispute exists (much as Japan does over the Senkaku/Diaoyu Islands and South Korea over the Dokdo/Takashima Rocks). China may also reason that Western-created and dominated bodies such as the ICJ and ITLOS are inherently biased against the PRC. Moreover, Chinese legal experts must also recognize that the legal justifications for the nine-dash line are very weak and that the government cannot risk a nationalist backlash that would inevitably follow an unfavourable ruling. Instead of legal avenues, China’s stated preference is to resolve the South China Sea dispute bilaterally—that is between China and each of the claimants on a one-on-one basis. However, due to power asymmetries, the Southeast Asian claimants have been reluctant to pursue this option, particularly as China has grown stronger economically, politically and militarily.

In the late 1970s, China’s paramount leader Deng Xiaoping stated that while China had “indisputable sovereignty” over the atolls it was prepared to put aside the sovereignty issue in order to pursue joint development of maritime resources with the other claimants. Joint development has remained a Chinese mantra ever since, though Chinese officials have never explained how or where such an arrangement would work in practice. There are numerous examples of joint development projects in disputed areas around the world. However, almost all involve only two countries; none are as complex as the South China Sea dispute which involves six claimants (one of which, Taiwan, is not recognized by the other five as a sovereign state). Moreover, as Singapore’s Professor S. Jayakumar has correctly noted, while joint development in the South China Sea is a worthwhile aspiration, one of the essential preconditions for such an arrangement to work is a climate of trust and confidence. Yet recent developments have, in his words, “betrayed a profound lack of trust and confidence among the parties.” Since Professor Jayakumar made those comments in 2012, the trust deficit between China and the other claimants—particularly between China, and Vietnam and the Philippines—has deepened. The prospects of joint development have thus receded.

As both dispute resolution and joint development are currently out of reach, the focus is firmly on conflict management. However, the dramatic uptick in tensions over HS-981 has highlighted the ineffectiveness of efforts by ASEAN and China to better manage the dispute. While there are faults on both sides, the burden of responsibility for the lack of progress mainly rests with China.

In 2002 China and ASEAN signed the DoC, and three years later agreed to establish a Senior Officials Meeting (SOM) and Joint Working Group (JWG) to implement it. Due to a lull in tensions in the first half of the 2000s, the JWG met only infrequently and by 2009 its work on drafting a set of implementation guidelines had become paralyzed over a minor procedural point: China insisted that no mention be made of ASEAN’s requirement, as per its 2008 Charter, that officials from the member states would consult among themselves prior to meeting with their Chinese counterparts, on the grounds that not all members were claimants. Widely seen as a stalling tactic by China, the impasse was not broken until 2011 when ASEAN finally conceded the point and the offending clause was dropped. The subsequent implementation guidelines were, however, very vague. The JWG is currently discussing joint
cooperative projects in the five areas identified in the DoC: search and rescue; marine ecosystems and biodiversity; marine hazard prevention and mitigation; marine ecological and monitoring technique; and combatting transnational threats. China has agreed to finance these projects from a fund it established to promote “connectivity” between ASEAN and China. When these projects will be operationalized, and whether they will mitigate tensions, remains to be seen.

The non-binding DoC calls on the parties to negotiate a Code of Conduct (CoC) generally described as “binding”. Since the upsurge in tensions, and especially following the issuing of the implementation guidelines, ASEAN has called for an “early conclusion” to the CoC. China, however, has demonstrated a marked lack of enthusiasm for the code. After initially agreeing to begin discussions with ASEAN on the CoC in late 2011, China reversed position in mid-2012 by declaring that the time for talks was “not ripe”. China’s rationale was that it saw no reason to proceed with the CoC when Vietnam and the Philippines were repeatedly violating the DoC. Since it was signed in 2002, all of the parties have, to varying degrees, violated the spirit, if not the letter, of the DoC. Yet China’s behaviour has been particularly egregious: the cable-cutting incidents off the Vietnamese coast in 2012, harassment of survey ships at Reed Bank in 2011, attempts to block supplies reaching the Philippine Marines on Second Thomas Shoal, the dispatch of HS-981, and the reclamation works in the Spratlys all contravene the “self-restrain” clause in Article V. And while China can technically argue that it has not “inhabited” any “uninhabited” reefs, events at Scarborough Shoal in May 2012 amount to a de facto occupation. If the CoC is designed to prevent such incidents from occurring, then it is clearly at odds with China’s strategy to achieve dominance within the nine-dash line. Little wonder that Chinese Foreign Minister Wang Yi declared his government was in “no rush” to conclude the CoC.

Another tactic China has used to delay negotiations on the CoC is its insistence that talks begin with a blank slate. This is not ASEAN’s preferred approach. Following agreement on the implementation guidelines, the ASEAN members had, by mid-2012, drawn up a set of “proposed elements” for the code. Indonesia subsequently issued a “zero paper” which built on those elements and added some new proposals. However, China rejected both the proposed elements and the zero paper as a starting off point. As Vice Foreign Minister Fu Ying argued, the CoC discussions should be “held among all the participants as equals” and “not be one side imposing its views onto the other”. While Fu Ying’s point on equality is well taken, it means that while China has accepted ASEAN “centrality” in principle, in practice it has rejected it.

Recent meetings of the SOM and JWG—in Suzhou in September 2013, Singapore in March 2014 and Pattaya in April 2014—have yielded little progress. China seems resolved to draw out the talks for as long as possible. The final result will, in all probability, be a symbolic agreement that does little to prevent China from continuing its assertive strategy in the South China Sea. As del Rosario has observed, “We think China is trying to stay ahead of the CoC. We think that they have an assertion agenda that they are trying to complete before they are able to sit down and negotiate a CoC.” And as Indonesian Foreign Minister Marty Natalegawa has argued, if the CoC cannot be drawn up in time to mitigate existing tensions, it will be redundant.

The conflict management process in the South China Sea has also been hindered by divisions within ASEAN—divisions that China has been adept at exploiting. Unanimity among the ASEAN states on the dispute is difficult to achieve given that its members include
both claimants and non-claimants. Even among the claimants there is a sharp dichotomy: Vietnam and the Philippines view China’s strategy as a serious national security threat while Malaysia and Brunei down play tensions. Among the non-claimants, Indonesia and Singapore—both of which have vital economic and strategic interests in the South China Sea—have been quite vocal in expressing their concerns at rising tensions, while Thailand, Myanmar and Laos—which have close economic, political and security ties with China—have been close-mouthed. China’s closest partner in Southeast Asia, Cambodia, has been the most sympathetic towards Beijing’s claims, though it has stopped short of explicitly endorsing them. However, as ASEAN Chair in 2012, Cambodia was accused of acting at Beijing’s behest when it refused to allow Vietnam and the Philippines’ concerns at developments in the South China Sea in the first half of the year to be reflected in the concluding statement. As a result, for the first time in its 45-year history, ASEAN failed to issue a final communique at its July summit. This embarrassing fiasco raised concerns within ASEAN that the lack of unity over the region’s most critical security problem would render the organization geopolitically irrelevant. Outgoing Secretary-General Surin Pitsuwan warned that “ASEAN must be united and must speak with one voice, otherwise no one will respect or take us seriously”, while Singapore Foreign Minister K. Shanmugam emphasized that it was “important that ASEAN remains credible, united and cohesive if we are to play a central role in determining the regional architecture”. A semblance of unity was subsequently restored and in May 2014 ASEAN survived another test of that unity when, a week after tensions surged between Vietnam and China over HS-981, it issued a stand-alone statement which, for the first time since 1995, expressed “serious concerns” at the situation in the South China Sea. However, the statement did not single China out for criticism, and did nothing to ease the Sino-Vietnam crisis.

Conclusions

An analysis of China’s assertive behaviour in the South China Sea since the upsurge in tensions in 2008—and especially since 2012-13—enables us to draw ten conclusions. First, China’s primary aim is to achieve dominance within the nine-dash line by incrementally advancing its territorial and jurisdictional claims. Second, to achieve that aim, and increase its power and influence in Asia more broadly, China seeks to undermine confidence in America’s security relationships with its allies and partners thereby weakening US power. Third, China’s hardline policy reflects in part a growing sense of national self-confidence and a belief that US pre-eminence is on the wane. Fourth, domestic politics increasingly influences China’s policy, especially growing nationalist sentiment over sovereignty of the Paracels and Spratlys. Fifth, China’s policy is proactive, coordinated and top-down—it is not driven by inter-agency rivalry nor is it in reaction to the behaviour of the other claimants. Sixth, the modernization of the PLA-Navy and the expansion of civilian maritime law enforcement agencies has provided China with the hard-power assets to increase its presence in the South China Sea and press its claims more vigorously. In particular the use of civilian patrol boats lowers the threshold of conflict. Seventh, China’s policy to achieve dominance within the nine-dash line challenges freedom of navigation and maritime governance norms established under UNCLOS. Eighth, Beijing’s policy derails efforts at conflict resolution (because China consistently rejects legal adjudication), joint development (because a climate of trust would be extremely difficult to achieve now) and conflict management (because a binding, effective, comprehensive CoC would prevent China from achieving dominance). Ninth, China’s increasing use of coercion
raises the risk that an incident at sea could escalate into a serious diplomatic and/or military crisis especially when crisis management mechanisms are weak. Tenth, as China’s policy is deliberately designed to undermine US interests in Asia, the South China Sea, together with the East China Sea, is likely to become one of the principle points of contention between Washington and Beijing over the next decade.

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