

REVIEW

Is There a Best Practice for a Peaceful Resolution of the South China Sea Disputes?

Sukjoon Yoon

Senior Research Fellow, Korea Institute for Maritime Strategy, Korea

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Ji, You (2013, October). *Policy Brief: Deciphering Beijing's Maritime Security Policy and Strategy in Managing Sovereignty Disputes in the South China Sea*. Singapore: S. Rajaratnam School of International Studies.

Lee, Kun-Chin & Andres Villar Gertner (2015, July). Maritime security in the Asia-Pacific China and the emerging order in the East and South China Sea. Research paper, The Royal Institute of International Affairs, London.

Li, Mingjiang (2013, October). Chinese debates of South China Sea policy: Implications for future developments. RSIS working paper, S. Rajaratnam School of International Studies, Singapore.

Permanent Court of Arbitration (2015, October 29). Award on jurisdiction and admissibility, Republic of Philippines v. The People's Republic of China, Case No 2013-19. The Hague, Netherlands: PCA.

Till, Geoffrey & Jane Chan (2014). *Naval Modernisation in South-East Asia: Nature, Causes and Consequences*. Oxford, UK: Routledge.

I.

These six very important recent publications pertaining to the South China Sea (SCS) include institutional policy briefs, research papers and a legal judgment. They analyze the arguments about how to find peaceful and legitimate solutions to the ongoing problems, and represent a variety of hardline and moderate stances. They are mostly concerned with regional maritime security and take a generally pessimistic tone. The main issues addressed are Chinese claims in the SCS where bitter historical legacies still linger; incompatible ideas about how international law and legal principles should be interpreted; mistrust between countries about neighbors' intentions; China's reluctance to accept the Westphalian notion of statehood or to exercise constructive statesmanship; and the impact of great power politics on the region.

They concentrate on the worst what-if scenarios, with China becoming a major maritime power and seeking to dominate rival territorial claimants through military force (Ben Dolven et al., p. 5; Kun-Chin Lee, pp. 5-8), thus igniting a full-blown naval arms race from the naval modernizations in progress throughout the region, which would have serious ramifications for the 'Rise of Asia' and 'Maritime Asia' (Till & Chan, chapter 4). Ultimately, China's claims need to be scrutinized by the international legal system, as addressed by the Permanent Court of Arbitration (PCA).

The SCS disputes are a popular topic for armchair political scientists and legal experts on regional security affairs, who are engaged in arguments on day-to-day developments. The four main questions are: Will China conquer the East Asian seas by force? What can the US do to deter Chinese maritime expansionism and to promote the rule of law? What should the regional nations do? Can the international legal system offer any protection for weak and vulnerable parties? There has been some development on the last question, with the PCA deciding that it does have jurisdiction under Part VII of the United Nations Convention on the Law of the Sea (UNCLOS) in the SCS dispute between China and the Philippines (PCA, p. 256). However, China's brusque rejection of the judgment suggests that the judgment may, rather than present promising resolution, actually add further layers of complexity to an already intractable problem. Of course, legal options should be a last resort, but unfortunately there are diverse interpretations possible for the UNCLOS, with important ambiguities on the issues of maritime sovereignty and the national jurisdiction rights over the disputed waters.

II.

At numerous conferences, seminars and other forums, there have been robust discussions on how the region should respond to China's assertive unilateral actions and bellicose attitude in the SCS, as China's obsessive focus on its national sovereignty is disrupting the regional maritime balance of power (Kun-Chin Lee, pp. 19-21). Such debates have sought to find a way to engage China within systems and protocols based on the rule of law, and encourage China to become a more responsible party committed to international law and legal standards rather than continue to rely on military options to pursue its maritime sovereignty disputes in the SCS. Some scholars and maritime security experts more sympathetic to the Chinese position have emphasized that regional maritime security has been seriously contaminated and compromised by the regional maritime rivalry between China and the US. Certainly it is time for maritime order and stability to be established in the region by following through with rules-based approaches such as the UNCLOS, rather than by tit-for-tat games of maritime chicken (Kun-Chin Lee, p. 28).

Given China's recent land reclamation work on disputed reefs and shoals in the SCS, and the assertive US response in sending a warship to insist on freedom of navigation, the arguments of Prof. You Ji and Dr. Li are not very convincing. These authors consider that China has been restrained in its use of force to implement unilateral measures against rival claimants from ASEAN and to deter third-party involvements in SCS issues. Prof. You emphasizes his notion of a 1+half counter-response (You Ji, p. 16.) and Dr. Li argues that China is only copying similar projects by Taiwan, Malaysia, Vietnam and the Philippines, which have also been used to station ships and troops. Thus any third party involvement (US involvement) would constitute unwarranted interference and likely cause a needless increase in tension (Li Mingjiang, pp. 5-13). These analyses imply that China is not the only party responsible for escalating the situation, and points a finger at other countries as well. They also insist that the two great regional powers, the US and China, should restrict their maritime interests in the SCS to avoid causing a strategic burden for their allies and partners.

Now that China's vast construction project to build artificial islands in the SCS is apparently nearing completion, a US Congress Research Service report on this issue has been published, one which takes a very hardline and hawkish posture (Ben Dolven et al., p. 23). It roundly criticizes China's unilateralism, accusing China of converting the disputed reefs and shoals into artificial islands in order to establish military bases from which it can project its superior naval power to intimidate the navies of its weak and vulnerable neighbors. The authors make some bold and provocative recommendations, including arms sales to Taiwan and the

establishment of a Southeast Asia Maritime Partnership and Cooperation Scheme to bolster the ASEAN navies (Ben Dolven et al., pp. 12-13).

Kun-Chin Lee, of the Centre for Rising Powers at Cambridge University, UK, has argued that the SCS standoff is an emerging risk to global maritime security, and should be managed through dispute management and policy coordination, rather than through Westphalian preconceptions of maritime sovereignty (Kun-Chin Lee, p. 28). Although China is arguably claiming historical and legal maritime jurisdiction, rights and interests in opposition to the legal claims of others in the SCS, the Chinese approach is also delivering a thinly veiled warning to all the other claimants in the SCS that China insists on restoring its historical dominance in the East Asian seas, come what may. For the time being, the hottest issue in the Asia-Pacific region is China's attempt to claim 12 nautical miles of territorial sea around its newly-constructed artificial islands (despite the fact that submerged features do not qualify for such territory, and their disputed sovereignty notwithstanding), and the US military's decision to respond by sending an Arleigh Burke-class destroyer (the USS Lassen) to conduct so-called "freedom of navigation operations" within 12 nautical miles of one of the artificial islands. This confrontation was anticipated in 2014 in *Naval Modernisation in South-East Asia* (Till & Chan, chapter 1).

III.

Unfortunately, it remains unclear whether a legalistic approach can contribute toward a peaceful resolution of the SCS disputes. On October 29, 2015, PCA based in The Hague released a unanimous ruling confirming that it is competent to decide on some aspects of the dispute between China and the Philippines. In what would seem to be a victory for the Philippines, the court ruled that it does have jurisdiction over seven of the 15 claims made by the Philippines, deferred judgment on a further seven claims, and asked for clarification on the fifteenth claim. However, despite being a party to the UNCLOS, China has declared the ruling "null and void," insisting that it will not be bound by any judgment the PCA subsequently makes. Thus, at present, it is hard to see how the legal process can further the long-term interests of China or the Philippines.

The PCA's decision, however, is useful in clarifying the legal situation. It establishes that China's infamous "Nine-dashed line," originating in 1940s maps, and the basis of SCS claims China has made explicitly, though supposedly unofficially, since 2008, do in fact constitute a legal assertion. This is despite China's insistence that the line indicates national sovereignty rather than maritime jurisdictional rights and interests, so that it should not be considered as part of the

arbitrational proceedings. Furthermore, the PCA's ultimate decision will surely impact ASEAN's effort to establish multilateral political agreements, such as the 2002 Declaration on the Conduct (DOC) of Parties in the SCS, and their hopes to set up a binding and mandatory Code of Conduct (COC) on the SCS between China and ASEAN members.

Understandably, ASEAN members feel they need to pursue legal as well as political options. But the existing legal framework seems unlikely to offer any ultimate resolution of their SCS disputes with China, and should certainly not be regarded as the exclusive or even the preferred approach. Although the PCA's decision that it does have jurisdiction in this case is a blow for China, it does not mean that the Philippines has won, since China has sought to have the case dismissed. But at least China's SCS claims and activities will now be carefully scrutinized by the court.

IV.

Only by establishing greater policy coordination and improved maritime governance is there any prospect that regional maritime stability can be achieved. Several policy recommendations follow:

First, China clearly has a long-term geostrategic plan that relies on a kind of salami-slicing approach to ultimately restore its historical dominance in the SCS and present it as a *fait accompli*. China needs to cease this provocative strategy. China is going against the spirit of the DOC agreed with ASEAN in 2002, and naturally this has produced huge distrust about China's intentions, even though there is supposed to be an ongoing process to make the DOC binding through implementing the COC. China's neighbors feel China is negotiating in bad faith. Furthermore, the recent large-scale construction of artificial islands in disputed areas where sovereignty has not been unequivocally established appears to directly contravene the UNCLOS. Specifically, China is violating UNCLOS by using living coral reefs as building materials, which is causing severe environmental damage. In this respect, at least, China is clearly in the wrong. As I argued in an RSIS commentary in May, China will not be able to obtain any practical military benefit from operating such facilities on the artificial islands because of the impact of bad weather and the lack of logistical and maintenance capacities for the ships and aircraft deployed there. This would seem, then, to be an unnecessarily provocative act on the part of China.

Second, the US should stop provoking China with its intrusive military presence, which threatens to drive China even further from abiding by the UNCLOS. It is surely preventing its adaptation for effective application to the confined wa-

ters of Northeast Asia, as the PCA observed in its judgment. Many commentators are concerned about the militarization of the SCS disputes, and feel the US is exacerbating the situation by unilaterally dispatching warships so close to Chinese military bases on the new islands in the SCS, with their radar installations, anti-aircraft artillery, airstrips and port facilities.

Third, given the profound distrust among the claimants, and the interwoven issues of national identity and traumatic historical antagonisms, any negotiated resolution based on the rule of law needs to be flexible, which means there must be greater policy coordination. There is no best legal practice in maritime governance, only a diverse set of references drawing on common challenges and on the options that have been tried so far. In particular, the ASEAN experience with the DOC and the proposed COC, together with other pragmatic cooperative mechanisms, provide a rich resource for consideration. When exploring such policy options, the importance of harmonization should be kept in mind from the outset, thus joint development agreements will be helpful. Also, there should be stronger incentives to encourage countries to make use of the UNCLOS International Tribunal Law of the Sea and the International Court of Justice to manage their disputes. This will mean recognizing the problems of the current maritime law regime, and trying to fix them, rather than simply insisting on its universality. All the regional nations, especially China, need to be brought into a rules-based framework based on the evolution of the UNCLOS principles.

In conclusion, the rule of law is ultimately the only route to the peaceful resolution of the SCS disputes, and all parties need to be involved in negotiating the legal structures necessary to secure regional maritime stability. The immediate issue is China's land reclamation activities in the SCS, which are of dubious legality, and it is hard to see how they truly represent China's broader long-term interests. All the nations of the region, no matter how different their individual perspective is, need to come together to agree on a more coherent and decisive response to China's actions.