# ISSUES AND INTERESTS IN THE SOUTH CHINA SEA

*by Rodolfo C. Severino*

The issues involved in the South China Sea disputes and clashes of interests in it are extremely complex. They include legal, technical, domestic political, international political, strategic, and economic considerations. Unfortunately, in their effort to make things understandable to their readers, viewers or listeners, or out of their own ignorance, or both, the mass media contribute to the confusion, primarily by oversimplifying what is inherently complicated. The confusion is compounded by government officials, who should know better, and whose pronouncements, no matter how erroneous, are then picked up by the media, and so on. (I shall be using the phrase "South China Sea" throughout this paper, because it is neutral, having been created by now-distant powers, although Vietnam prefers to refer to it as the East Sea, the Philippines as the West Philippine Sea, and China/Taiwan as Nan Hai, or southern sea.)

The first issue is the need to make the distinction between land and water, between claims to land features in the South China Sea and those to the waters that those features may or may not generate. Here, it is important to remember that land begets maritime jurisdictions and not the other way around. There are genuine disputes over claims to land features in the South China Sea – between China/Taiwan and Vietnam over the Paracels and among China/Taiwan and Vietnam, and partially the Philippines and Malaysia, over the Spratlys. As far as I know, Brunei Darussalam does not lay claim to any land features in the South China Sea but to an expanse of sea as its exclusive economic zone, continental shelf or "fisheries zone" projected from its territory, an expanse that, nevertheless, overlaps with those claimed by others. However, no claimant has defined the extent of the waters that it claims. At the same time, to assert "undisputed sovereignty" over the South China Sea, as Beijing does, flies in the face of the fact that large swaths of that sea, as well as many land features, are disputed.

Being a law for the oceans, the 1982 United Nations Convention on the Law of the Sea has nothing to say about the disputes over jurisdictional claims to land features. There have been and are many such disputes around the world, most, if not all, of them involving only two parties each and hence can be resolved, although with much difficulty in some cases, through bilateral negotiations or agreed referral to an international adjudicating body. However, the 1982 UNCLOS does have something to say about the waters generated by land features without, of course, passing judgments upon disputed claims.

This brings us to another issue pertaining to the South China Sea, the issue of islands versus rocks. Article 121 of the 1982 UNCLOS says, "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." It goes on to provide that an island so defined can generate its own territorial sea, contiguous zone, exclusive economic zone and continental shelf like any other land territory. On the other hand, according to the same Article 121, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Up to this point, none of the claimants to the land features in the South China Sea has designated which of those that it claims are islands and which are rocks, as defined

by Article 121 of the 1982 UNCLOS, presumably preferring to retain for itself a measure of "strategic ambiguity".

The confusion arising from the failure, inability, refusal or reluctance to distinguish between islands and rocks and between land and water is compounded by the tendency to conflate "territory" and the exclusive economic zone and continental shelf. The 1982 UNCLOS assigns different and specific rights and duties to coastal states and to others in each of these jurisdictions. However, the mass media and even government officials, for self-serving reasons or out of ignorance, continue to refrain from making these all-important distinctions.

***The Rule of Law and the South China Sea***

All claimants to land features in the South China Sea and their "adjacent waters" are parties to the 1982 UNCLOS. All documents concluded in the context of the Association of Southeast Asian Nations, or ASEAN, on the South China Sea call for adherence to international law, including the 1982 UNCLOS. Those documents include the 2002 Declaration on the Conduct of Parties in the South China Sea, to which China, as well as all ASEAN states, is a signatory. The Declaration refers twice to the "universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea". But what happens if a state finds the requirements of international law to be incompatible with its vital or "core" national interests or inimical to its chosen tactics?

A case in point is the infamous nine-dash line encompassing practically all of the South China Sea on Chinese official maps. Such a map was first issued in 1947 by the Nationalist government then leading China and officially submitted to the UN Commission on the Limits of the Continental Shelf by the People's Republic in 2009. Despite questions by several ASEAN countries, claimants and non-claimants alike, Beijing has so far refused to define precisely what the nine-dash line signifies. Does it mean that China/Taiwan lays claim to all the waters that the line encompasses? Or only to the land features within it and the waters that they legally generate? Neither China nor Taiwan has answered these questions. Indeed, the line, running from somewhere between Taiwan and Luzon, along and close to the western coast of Luzon and Palawan and East Malaysia, then up along the eastern coast of Vietnam, is not precisely located by coordinates and thus is a mere drawing on a map without any legal standing. Is the refusal to define the precise location of the nine-dash line and to indicate what it encompasses an attempt at "strategic ambiguity" or a sign that policy-makers in Beijing – and Taipei – have not reached agreement on the matter, or both?

In any case, the absence of clarity as to the significance of the nine-dash line for the claim of China/Taiwan leaves undecided the questions of what is disputed and what is not in the South China Sea, where joint development is to take place, and others.

On the other hand, I am given to understand that the Reed Bank, or, as the Philippines prefers, Recto Bank, is constantly under water and thus is part of the Philippines' western continental shelf. The 1982 UNCLOS has rather precise definitions of the extent of the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf and of the rights and duties of coastal states and of others in territorial waters, archipelagic waters and continental shelves, as well as in contiguous

and exclusive economic zones. In accordance with these definitions, Recto Bank does not have quite the same status under international law as Recto Avenue, a major land thoroughfare in Manila.

Scarborough Shoal, named by the Philippines as Panatag and by the Chinese as Huangyan Dao, is actually a group of land features claimed by both the Philippines and China/Taiwan. In my book, "Where in the World is the Philippines?" (Singapore: Institute of Southeast Asian Studies, 2011, pages 72-73), I wrote of the Philippine claim to Scarborough Shoal:

> Although it is outside the limits set by the Treaty of Paris and other international agreements governing Philippine territory, the Philippines considers Scarborough Shoal, a group of islands, reefs and rocks in the South China Sea about 200 kilometers west of Subic Bay in Luzon, as part of the main Philippine archipelago. It has been the scene of much Philippine activity. For centuries, Filipino fishermen have used its waters for fishing and its lagoon for shelter. When the U. S. was still in control of large military bases in the Philippines, the U. S., as well as the Philippine, Air Force used Scarborough for target practice. Media reports state that the Philippines constructed a lighthouse and raised its flag on the shoal in the 1960s. The Philippine Navy has operated in the area and occasionally arrested or chased away foreign fishermen, particularly those engaged in illegal fishing methods. Scarborough's official Philippine name, Bajo de Masinloc, meaning "below Masinloc" in Spanish, refers to Masinloc, a town in Zambales province, the Spanish-language name of Scarborough obviously dating it back to Spanish times.

Both China and Vietnam contest this Philippine claim.

Many scholars and government policy-makers have called for "joint development" as a tension-reducer and confidence-builder in the South China Sea, as well as for developmental reasons, pending the resolution of the jurisdictional and sovereignty disputes there. However, these calls beg the questions of where the "joint development" would take place and under whose laws. These questions cannot be answered, and, therefore, "joint development" carried out, until the nature and extent of the respective claims are further clarified.

The Southeast Asian claimants have recently brought their claims closer to the requirements of the 1982 UNCLOS. In March 2009, the Philippines passed legislaation that adjusts its archipelagic baselines so as to conform to the 1982 UNCLOS and, explicitly citing Article 121 of the Convention, proclaims a "regime of islands" for the land features in the South China Sea. The May 2009 joint submission by Malaysia and Vietnam of their extended continental shelf to the UN Commission on the Limits of the Continental Shelf projects their continental shelf from their mainlands' coastlines and not from the land features that they claim in the South Chiina Sea. Brunei Darussalam and Malaysia seem to have settled their overlapping claims to a part of the South China Sea. Although the text of their agreement has not been made public, Abdullah Ahmad Badawi confirmed its existence in May 2010, acknowledging that he had signed it in March the year before, when he was Prime Minister. On the other hand, neither Beijing nor Taipei

has made any move to clarify, much less modify, the nine-dash line on its maps or other claims that contravene the 1982 UNCLOS.

***Bilateral vs. Multilateral?***

Beijing has repeatedly expressed its preference for bilateral negotiations in dealing with the situation in the South China Sea and its opposition to the "multilateralisation" or "internationalisation" of that situation. This has been interpreted as Beijing's desire to deal with rival claimants individually rather than with ASEAN as a whole, as a counter to ASEAN's attempts to involve such bodies as the UN and the Non-aligned Movement in the issue, and, perhaps, most importantly, as a way of keeping the U. S., the only power deemed capable of challenging it militarily, out of the matter altogether.

It is true that the jurisdictional and sovereignty questions can and should be addressed by the claimant-states alone. In fact, it is only in the Paracels that not more than two parties have claims; most of the Spratlys are subject to multiple, that is, more than two, claims. What is so "bilateral" about those? Others in trade-dependent East Asia or have extensive trade with it – Japan, Korea, most of Southeast Asia, the U. S., the oil exporters of the Middle East, Taiwan, Hong Kong, and the eastern and southern coasts of China itself – all have an interest in the peace and stability of the South China Sea region and in freedom of navigation and overflight there. All of them, therefore, including non-claimants, need to have a voice in the situation involving these points of interest in the South China Sea. Moreover, the entire international community has an interest in seeing that the use of dynamite, cyanide and other destructive ways of fishing and the practice of trafficking in endangered species, both so rampant in the South China Sea, are stopped or reduced.

Beijing has been opposing consultations among ASEAN claimants prior to discussions with China on the South China Sea. Although the "guidelines" apparently hurriedly adopted by ASEAN and Chinese ministers and senior officials in July 2011 do not mention such consultations, there is nothing to stop ASEAN as a group or several of its members from consulting on any subject of their choice. After all, the Asian delegations to the Asia Europe Meeting, or ASEM, including the Chinese, carry out informal consultations before meeting their European counterparts. Within ASEAN, consultations are regularly undertaken by Cambodia, Laos, Myanmar and Vietnam on matters pertaining to them as new members or as states located on the Southeast Asian mainland. On the South China Sea itself, all ASEAN foreign ministers issued the 1992 ASEAN Declaration on the South China Sea. The South China Sea is a regular subject in the ASEAN-China ministerial and other dialogues. The 2002 Declaration on the Conduct of Parties in the South China Sea was negotiated by all ASEAN countries, claimants and non-claimants alike, first among themselves and then with China. It was issued on the occasion of the 2002 ASEAN-China Summit meeting. The Declaration's implementation has been under regular discussion among all ASEAN officials concerned, from both claimant and non-claimant countries, and with their Chinese counterpart. The recent "guidelines" themselves are totally based on an ASEAN draft and were adopted by the ASEAN and Chinese foreign ministers at the ASEAN-China Post-Ministerial Conference in July 2011 upon the recommendation of their senior officials.

The chairman's statement on the ASEAN-China PMC in July 2011 has this to say:

> The Meeting reaffirmed the importance of the Declaration on the Conduct of Parties in the South China Sea (DOC), which embodies the collective commitment of the ASEAN Member States and China in promoting peace, stability and mutual trust and ensuring the peaceful resolution of disputes in the South China Sea. In this regard, the Meeting welcomed the progress of the implementation of the DOC and formally endorsed the Guidelines on the Implementation of the DOC as agreed upon and recommended by the ASEAN-China Senior Officials' Meeting on the DOC on 20 July 2011 in Bali, Indonesia. The Meeting shared the view that this was a significant outcome and a step forward in the implementation of the DOC, further contributing to the promotion of peace, stability and prosperity in the region, especially on the occasion of the 20th anniversary of the ASEAN-China Dialogue.

***The "Guidelines"***

The "guidelines" have been hailed as a breakthrough, a milestone, historic, important and/or significant. I believe that their significance lies not in the document's contents, which are, all one page of them, vague and general, even more so than the Declaration itself, but in the fact that it was issued at all, close to nine years after the issuance of the 2002 Declaration. Its very issuance indicates some incremental progress and could thus serve to reduce tensions arising from the disputes and overlapping claims, the aim, it seems, of everybody all around. Whether it actually does so remains to be seen.

Many in policy circles, including in ASEAN, have encouraged ASEAN and China to go beyond the 2002 Declaration on the Conduct of Parties and conclude a Code of Conduct pending the final settlement of the disputes. It has never been clear to me what the difference is between a political declaration and a supposedly "legally binding" code in terms of enforceability. And it has never been explained how parties to a code would somehow overcome the factor – namely, the uncertainty of where such a code would apply – that forced the watering down of the original notion of a legally binding code to a "mere" political declaration in the first place. Would it not be better if the energy and time spent on calling for a code of conduct were devoted to elaborating the concept of "restraint", urged on all parties by the 1992 ASEAN Declaration on the South China Sea, the 2002 Declaration on the Conduct of Parties in the South China Sea and other statements, to include, say, refraining from reinforcing or fortifying facilities already set up in occupied land features?

***National Interests and the South China Sea***

Most states and most nations have an interest in the rule of law and its expansion, for these would increase certainty in inter-state relations, certainty that would be beneficial for peace, stability, commercial advancement, and economic development.

However, some states and nations find or pretend to find, at one time or another, that they have national interests equal to or greater than adherence to international law. Nevertheless, in every case, they invoke international law in promoting what they see or pretend to see as their larger national interests. The question is: will such states pursue their proclaimeed national interests even through force and thus in defiance of international law and their other commitments? In any case, the pursuit of claims in the South China Sea is invariably wound up with the national interest as well as with international law.

For example, in the Pacific War, the Philippines was invaded by Japan from military platforms in the South China Sea and thus insists on controlling its western flank so as to reduce its vulnerability to another attack from the west. Moreover, there are the hydrocarbon resources thought to be locked in the seabed beneath the South China Sea that the country is desperately searching for in its attempt to liberate itself from its perennial dependence on imported oil and the enormous dent that that makes in its balance of payments. Then, there are the Philippine fishing fleets that scour the waters of the South China Sea for the fish wirh which to feed the fish-eating Filipinos – and the politicians whose constituents those fishermen and/or fish-eaters are. There are also the obligations of the Philippine Government, pressed upon it by increasingly active environmental groups, to protect the environment, including fisheries resources, from being ravaged by fishing with dynamite or cyanide and other destructive ways and endangered species like turtles from being poached in the Philippines' claimed exclusive economic zone and even in its undisputed archipelagic or territorial or internal waters.

A part of the South China Sea not only separates West and East Malaysia from each other; it also connects those two wings of the country. Malaysia can thus be expected to insist on controlling the expanse of the South China Sea between its Western and Eastern components by holding on to its claims in the area, although theyl overlap with those of the Philippines, Vietnam, China/Taiwan and Brunei Darussalam.

While Brunei Darussalam has not explicitly claimed any land features in the South China Sea, it does have an interest in projecting an exclusive economic zone, a continental shelf and a "fisheries zone" from its coastline and has done so.

China, too, has, in the term widely attributed to senior Chinese officials, "core" national interests in the South China Sea. Beijing seems bent on ensuring that China will not be attacked or invaded again from the South China Sea, as she was by European powers in the 19th and early 20th centuries. Its claims to "indisputable sovereignty" over all or part of the South China Sea may also be part of its determination to reduce, if not eliminate, the dominance of the seas of the Asia-Pacific by the United States, which some Chinese policy-makers seem to perceive as seeking to prevent China's "peaceful rise" and surround and "contain" it. The leaderships in China and in Taiwan can have their legitimacy shaken by any move to compromise on the extent of their claims. At the very least, the government in Taipei, which originally issued the Chinese map bearing the nine-dash line and has the same positions as Beijing on territorial questions, cannot politically afford to be seen, especially by the Taiwanese people, as being any less assiduous than Beijing in pursuing territorial and maritime claims.

It will be recalled that (South) Vietnamese troops had been occupying one half of the Paracels, and China, first Nationalist and then Communst, the other half, until Communist Chinese forces drove the Vietnamese away early in 1974. This happened just

before the reunification of Vietnam under the Communist North and at a time when South Vietnam's U. S. allies were determined to extricate themselves from their Indochinese entanglement. The South Vietnamese forces retreated to the Spratlys. The North forcibly took over the land features in the Spratlys occupied by their fellow-Vietnamese in April 1975, even before the fall of Saigon and Vietnam's reunification.

In March 1988, China engaged Vietnamese forces in a naval battle near Johnson Reef in the Spratlys, killing more than 70 Vietnamese, sinking one Vietnamese vessel and damaging two others. The Chinese victory directly led, for the first time, to Beijiing's occupation of land features in the Spratlys. (Taiwanese forces had been occupying the largest – Itu Aba or Tai Ping.)

While Beijing and Hanoi concluded treaties on their land borders in December 1999 and on the delimitation of their maritime boundary in the Gulf of Tonkin (Beibu Gulf in Chinese and Bac Bo Gulf in Vietnamese) in December 2000, they have not reached agreement on the land features, and their waters, either of the Paracels or of the Spratlys in the South China Sea; nor are they likely to do so in the near future. In any case, unless China moved its claims to alignment with the requirements of the 1982 UNCLOS, Vietnam, in addition to being haunted by the memory of its military defeats by the Chinese, would be almost completely surrounded by the land and waters of China or those claimed by it, something that no Vietnamese government could tolerate on pain of its legitimacy, and thus could not be expected to give in on any of its claims in what Vietnam calls the East Sea.

***Clash between Chinese and U. S. Interests***

Viewed in the larger context of the rivalry between China and the U. S. for regional, if not global, supremacy, the clash between Chinese and U. S. interests, couched in some cases in differences in interpretation of international law, is one of the factors for considering the South China Sea as a flashpoint for conflict.

In early April 2001, an EP3, a U. S. "signals intelligence" aircraft, flying 70 miles from China's Hainan island, collided with a Chinese J-8 fighter airplane, one of two that had scrambled to intercept it. The collision killed the Chinese pilot and forced the EP3 to make an emergency landing on Hainan. The American crew of 24 was subsequently released and the broken aircraft returned. In March 2009, the U. S. naval vessel *Impeccable*, an "ocean surveillance" ship, was "shadowed" – "harassed" was the Pentagon's term – by five purportedly civilian Chinese vessels 75 miles south of Hainan and driven away, prompting an exchange of harsh words between the Chinese and U. S. governments.

These two episodes took place well within China's exclusive economic zone, a circumstance that the U. S. does not deny. They arose apparently from differences in interpretation of the 1982 UNCLOS. Article 58 provides that "all States . . . enjoy . . . the freedoms . . . of navigation and overflight", but that "States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part" (Part V). China interprets this provision as allowing other nations only "innocent passage" and permitting the coastal state to prohibit military activities within its EEZ. The U. S., on the

other hand, maintains that the Convention allows free navigation for all countries' aircraft and ships, including military ones, on the high seas, including the EEZs of coastal countries.

More fundamentally, the U. S. feels the need to deploy reconnaissance aircraft and vessels close, in the case of the EP3 and *Impeccable* incidents, to the coast of Hainan, the location of a major Chinese submarine base, partly because of the alleged lack of transparency in Chinese military activities. The Chinese, on the other hand, insist on their right to protect their military from prying foreign eyes and ears.

***Dilemmas in China-Southeast Asia Relations***

At the same time, claims to the land features and waters of the South China Sea and the conflicts between and among them confront Southeast Asian countries and China/Taiwan with several dilemmas.

China has become a leading trading partner of all Southeast Asian countries, as well as a high-profile source of investments and official assistance for some of them. It is a well-known fact that much of China's vaunted exports to the developed countries is made up of components from Southeast Asia. China is the largest trading partner of ASEAN as a whole. It is a voracious consumer of Southeast Asian commodities. All ASEAN members, therefore, have a crucial stake in China's continued rapid economic rise. At the same time, being located in close geographic proximity, China is a permanent presence in Southeast Asia's neighbourhood. Southeast Asians are acutely conscious of the power that grows out of China's military, as well as econonic, capability. They are wary of, at least, the potential for Chinese regional hegemony. They reject, and are wary of, being possibly dominated by other powers, includiing China.

In any case, in the rivalry between China and the United States, global or regional, the Southeast Asian states have explicitly stated that they wish to avoid being forced to choose between the two sides. In fact, in all security-related, ASEAN-centred regional schemes – the ASEAN Regional Forum, ASEAN Plus Three, the East Asia Summit, the ASEAN Defence Ministers Meeting Plus – ASEAN, in compliance with its posture of being friend to all and enemy to none, has always insisted on the inclusion of China as an indispensable interlocutor in regional-security matters, even as several ASEAN members seek reassurance that the U. S. would remain militarily engaged in Southeast Asia.

On the other hand, China considers Southeast Asian countries as its close neighbours and, therefore, seeks to have good relations with them. Those relations are generally good, marred only by the disputes in the South China Sea. How to balance its desire and need for continued good relations with Southeast Asia with the interests that it sees in its positions in the South China Sea is a challenge for Beijing. Where and how Taipei figures in all this continues to be murky.

***Summar***y

The issues pertaining to the South China Sea remain numerous. They include the distinctions between land features and waters and between islands and rocks as defined in Article 121 of the 1982 UNCLOS. Another question is how to square China's claim to

"indisputable sovereignty" over the South China Sea with the fact that its claim is disputed. The nine-dash line on Chinese maps needs definition and clarification. China's stated preference for bilateral negotiations with individual rival claimants and opposition to the "multilateralisation" or "internationalisation" of South China Sea issues remain a source of disagreement. The difference, if any, in the enforceability of a Code of Conduct and a political declaration needs to be examined.

Finally, the question ought to be asked: What if a claimant-country finds that the rule of law, to which all are committed, clashes with what it perceives as its vital – or "core" – national or regime interests?

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