THE SOUTH CHINA SEA
TOWARDS A REGION OF PEACE, SECURITY AND COOPERATION

Edited by Tran Truong Thuy
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¹ East Sea or Bien Dong Sea in Vietnamese, West Philippine Sea in Philippine, here in the context of international workshop we use the internationally well-known name “South China Sea”
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INTRODUCTION

This book is the compilation of papers presented to the second international workshop themed “The South China Sea: Cooperation for Regional Security and Development”, co-organized by Diplomatic Academy of Vietnam and Vietnam Lawyers Association, from 11th to 12th November 2010 in Ho Chi Minh City, Vietnam. Following the success of the first one held in Hanoi, Vietnam, this workshop continued to highlight the strategic role of the South China Sea in this changing world, along with noteworthy developments in this area and their impact on regional security and prosperity. The participants also discussed legal issues of the maritime and territorial disputes in the South China Sea, the dispute settlement processes, confidence building and possible measures to foster regional cooperation. This body of work represents remarkable the collective accomplishment of many local and foreign distinguished scholars and experts who attended the workshop.

The South China Sea has long been considered as an area of significant economic, political and strategic interests, naturally blessed with many crucial sea lanes and abundant maritime resources. The importance of the South China Sea has been underlined by today’s integration and globalization to reach a level of attention and concern that can be considered global. However, there have been emerging signs of regional instability that could deteriorate the ongoing tensions in the East Asia. Indeed, the recent years not only witnessed the persistence of the latent hostility caused by territorial disputes but also a number of rising controversies over maritime security, and exploration and exploitation of maritime resources. Many of those issues have been discussed openly at meetings within ASEAN and between ASEAN and its dialogue partners, as well as during the meetings of the defense officials from East Asian countries, especially the Shangri-La Dialogue, the ASEAN Regional Forum (ARF), the ASEAN Defense Ministers’ Meeting (ADMM) and the ASEAN Defense Ministers’ Meeting Plus (ADMM+).

Acknowledging the indispensability of maintaining regional peace and stability, the Diplomatic Academy of Vietnam decided to publish this collection of multidisciplinary studies and updated analysis on the South China Sea that were presented to the workshop. The book is based on three main assumptions. First, the South China Sea can only be settled through peaceful means, not with any threat of force but on the basis of international law such as the United Nations Convention on the Law of the Sea of 1982. Second, due to the critical role of the South China Sea in world trade, all its users have the responsibility to preserve navigation safety, maritime security and freedom of navigation there. Lastly, the livelihood of many coastal communities, and indeed, the development of the ASEAN member countries and China depends much on the South China Sea being safe for use by all. Therefore, peace, stability, sustainable development and human security have been prioritized by both ASEAN and China. In fact, the two sides reached a common understanding and signed the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. However, numerous existing concerns have yet not been resolved. In
other words, the need for solutions to these issues and mutual cooperation of all concerned parties is undoubtedly imperative. This book, therefore, aims to figure prominently a comprehensive overview of the South China Sea’s disputes, its latest developments, and to present some prospects for regional security and development of the South China Sea.

The book has five parts. Part 1 features a number of perspectives on the South China Sea’s importance in this challenging global situation and the ongoing disputes among nations in this area. Although being viewed under various standpoints, the South China Sea remains extremely pivotal to the development of not only littoral countries but also many others states, including the US. That is also the reason why the South China Sea appears to be a considerably controversial issue. On the one hand, the US’ involvement in the South China Sea disputes is viewed by Chinese delegates as making the prospects for peace more uncertain and perturbing. On the other hand, there are opinions that a more assertive China and its recent declaration of “core interests” in the South China Sea are likely to violate the freedom of navigation.

Part 2 reviews the recent developments that directly impact the security environment in the South China Sea. In this part, a number of judgments about the perceived situation in this area are made. It is reckoned that since the signing of the DOC between China and ASEAN, little progress has been achieved to tackle the issue. Regional security over the past two years, on the contrary, had been put in an alarming state chiefly due to Chinese actions with regards to its territorial claim, and the US’ involvement in the issue. Indeed, scholars and experts from all around the world have voiced concerns about maritime security in the region. They also believed that a Code of Conduct in the South China Sea is needed to forestall the worst scenarios of instability, even war.

Part 3 discusses the legal perspectives of the South China Sea disputes, including the activities in the disputed areas, the artificial islands, and the “U-shaped line” of China. Scholars also analyzed the practical and legal basis of international maritime delimitation, then applied international contemporary law to prove that because of the tiny size of the geographical features of the Spratlys and the Paracels, their legal regime will only affect the doughnut area that is beyond 200 nautical miles from the baselines of coastal states. Therefore, scholars recommended that parties in the South China Sea dispute should shelve their sovereign claims and cooperate with each other to develop a joint development regime in the doughnut area. This part also looks at the efforts by littoral countries in South China Sea in dispute settlement and conflict management. Informal efforts to manage potential conflicts in the South China Sea should be continued, while the formal efforts by the countries, concerned to settle disputed issues, should also be encouraged.

While many people consider the South China Sea as a potential conflict area, Part 4 shows that there is still room for cooperation in this region. It highlights some examples of cooperative activities in the South China Sea, such as fishery agreements and joint development zones. The chapter then draws out lessons from the experiences that may be beneficial in promoting functional cooperation, suggesting that each claimant complies with the United Nations Convention on the Law of the Sea and arrives at further agreement on each of the elements of the Declaration on the Conduct of Parties in the South China Sea.
Introduction

Part 5 provides an overview of the future of regional security and development future in the South China Sea. The scholars imply that the recent developments in the South China Sea have changed the overall outlook and circumstances; rising tensions, as well as reckless action may raise suspicions and lead to strong protests from both claimant states and other concerned parties. Besides, the final part of the book makes several recommendations to push forward cooperation in the South China Sea for regional security and development, such as operationalizing some of the CBMs identified in the DOC, promote cooperation in “manageable areas”, and encouraging other relevant countries and international organizations to participate at a certain extent.

We are confident that the readers will find this book an important resource for research on the South China Sea.
Part 1

SIGNIFICANCE OF THE SOUTH CHINA SEA IN A CHANGING STRATEGIC LANDSCAPE
Introduction

US policy with regard to the South China Sea has remained consistent for at least fifteen years, but US interest in this area has waxed and waned. As the local strategic situation has evolved, the US has reacted pragmatically and in accordance with long-standing policy. Because the South China Sea had largely fallen off the mental map of the US government and policy community for most of a decade, it took new assertive actions in the area by China to rekindle US interest and provoke a reaffirmation of US policy.

The US views the South China Sea through several lenses, whose relevance varies for different sections of the US government and business communities. The dominant lens sees developments in the South China Sea in the context of trends in Sino-US relations. Those officials concerned with vital US strategic interests in East Asia and the growing capabilities of the Chinese navy tend to see developments in the area through this lens. A second lens focuses on the South China Sea as an element in US relations with ASEAN states, and stresses the need to be perceived by US allies and friends in Southeast Asia as reliable and supportive. A third – of growing influence in American policy circles – views the South China Sea as a crucial hinge in the overall US security structure in Asia as distinctions between East and South Asia are seen to be of diminishing relevance.

In addition, the South China Sea episodically attracts the attention of the US community concerned about consistency in US positions on international legal questions. Finally, the US has commercial interests, including the free flow of maritime trade between the Indian Ocean and Northeast Asia and the ability of US companies to compete on an equal basis to explore for and extract petroleum and other mineral resources in the South China Sea.

The three different elements of US policy are distinct. They are:

(i) The US “takes no position on the legal merits of the competing claims to sovereignty” in the South China Sea
(ii) Maintaining freedom of navigation is a fundamental US “national interest”
(iii) States may not legally restrict military survey operations within their Exclusive Economic Zone (EEZ)

Thus in 2009 US National Intelligence Director Admiral Dennis Blair called China’s harassment of the USNS *Impeccable* while conducting a military survey the most serious military dispute between China and the US since 2001. More recently, the US Secretaries of State and Defense have reacted to China’s perceived assertive actions on the South China Sea and its reluctance to clarify its aims by reaffirming freedom of navigation as a US “national interest” and proposing negotiations among all the claimants in the South China Sea.

American officials are stymied by ambiguity in China’s positions with regard to the “nine dash line” marking China’s claims in the South China Sea and by an alleged characterization of this sea as a “core interest.” The motivations for China’s actions are not clear. The internal factors driving Chinese policy are opaque. In American eyes, Chinese actions appear to be counterproductive for several reasons. First, they have compromised China’s decade-long campaign to portray itself as a benign partner to its southern neighbors. Second, they have, in part, accelerated America’s “return to Asia” under the current US administration. Third, after reduced tensions in the South China Sea over most of the past decade had permitted both China and the US to de-emphasize security as a component in their ties with Southeast Asia, they have given new prominence to traditional security considerations in Southeast Asian states’ relations with external powers.

Some American experts speculate that more confrontational policies in the South China Sea, including against Vietnam, have been part of a larger Chinese effort to test President Obama’s determination to defend US interests in Asia. After rising public acrimony this summer, Washington and Beijing appear to have made little progress in clarifying and resolving their differences, but they have now managed to dampen tensions.

**Background and History: US Policy Consistency on the South China Sea**

When Secretary of State Clinton publicly expressed concern about Chinese statements on and activities in the South China Sea at the 2010 ASEAN Regional Forum (ARF) meeting in Hanoi, she could have quoted the 1995 US policy statement on the South China Sea, drafted by mid-level US officials. That statement is worth quoting because senior government officials speaking in 2009 and 2010 reaffirmed many of the same points.

“US Policy in the South China Sea

US DEPARTMENT OF STATE
Statement by Acting Spokesperson, May 10, 1995

The US is concerned that a pattern of unilateral actions and reactions in the South China Sea has increased tensions in the region. The US strongly opposes the use or threat of force to resolve competing claims and urges all claimants to exercise restraint and to avoid destabilizing actions.

The US has an abiding interest in the maintenance of peace and stability in the South
The South China Sea: An American Perspective

China Sea. The US calls upon claimants to intensify diplomatic efforts which address issues related to the competing claims, taking into account the interests of all parties, and which contribute to peace and prosperity in the region. The US is willing to assist in any way that the claimants deem helpful. The US reaffirms its welcome of the 1992 ASEAN Declaration on the South China Sea.

Maintaining freedom of navigation is a fundamental interest of the US. Unhindered navigation by all ships and aircraft in the South China Sea is essential for the peace and prosperity of the entire Asia-Pacific region, including the US.

The US takes no position on the legal merits of the competing claims to sovereignty over the various islands, reefs, atolls, and cays in the South China Sea. The US would, however, view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law, including the 1982 United Nations Convention on the Law of the Sea.

However, as an issue either in US relations with China or Southeast Asian states, the South China Sea faded rapidly as US attention flagged in the late 1990s. The 2001 confrontation between a US surveillance aircraft and a Chinese fighter off the island of Hainan quickly but temporarily threatened to turn Sino-US relations into the central issue in the new Bush administration’s foreign policy. However, the terrorist attacks by al Qaeda on the US in September 2001 drew US attention away from Asia. Washington welcomed the easing of tensions between China and Southeast Asian claimants in the South China Sea following the issuance of the 2002 agreement between ASEAN and China on a Declaration on the Conduct of Parties in the South China Sea (DOC). However, the South China Sea had already largely disappeared from the US policy agenda in Asia, as Washington focused on Southeast Asia as the “second front” in the Bush administration’s Global War on Terror (GWOT). When US attention drifted away from Southeast Asia after apparently successful counter-terrorism programs in the region, the South China Sea did not re-emerge as a significant bilateral issue in US relations with China or Southeast Asian states.

In Washington in the first half of 2008, interest in the South China Sea began to revive in response to rumors circulating about attempts by an unidentified part of the Chinese government to intimidate ExxonMobil and another petroleum company to suspend their activities in Vietnamese waters under contracts with the government of Vietnam. It was not clear whether these companies had been ensnared in a bilateral dispute between China and Vietnam, or whether China’s rumored coercion had implications for the South China Sea as a whole.

1. Chinese maps show a nine-dash line – which is based on a 1947 map produced by the Republic of China – outlining its claims in the South China Sea. Known as the “cow tongue,” Beijing continues to use this map as a general reference to its claims in the South China Sea. The Paracel Islands (Xisha) are currently occupied by China but also claimed by Vietnam. The Spratly Islands (Nansha) are claimed by China. Four of ASEAN’s members - Vietnam, the Philippines, Malaysia and Brunei - have claims in the South China Sea, which overlap with each other and with claims advanced by China and Taiwan.

2. At that time, a then US National Security Council official privately told the author that the South China Sea was “no longer an issue.”

3. China’s actions against the companies involved may have been in response to Vietnamese plans. “In 2007, Vietnam drew up a long-term plan to integrate the development of its coastal territory with the marine resources in the South China Sea. China responded by applying behind the scenes pressure on Western oil companies likely...
“At the June 2008 Shangri-la dialogue, US Secretary of Defense Robert Gates spoke out against ‘coercive diplomacy… even when they co-exist beside outward displays of cooperation.’ While Gates did not explicitly identify China as the agent of this ‘coercive diplomacy,’ his comment was undoubtedly a clear reference to the controversy over British Petroleum’s commercial activities in Vietnam, and was reinforced within a few months with the revelation that ExxonMobil had come under similar pressure from China.”

In September 2008, then-Deputy Secretary of State John Negroponte traveled to Hanoi to confirm US support for the rights of US companies to conduct business in the South China Sea.

“Oblique criticism of China’s greater assertiveness in the South China Sea gave way to a more forthright exposition of US concerns in mid-2009 when two senior administration officials testified before the Senate Foreign Relations Committee on maritime disputes in East Asia. Scot Marciel, deputy assistant secretary in the Bureau of East Asian and Pacific Affairs, confirmed that China had put energy companies under pressure to suspend work on projects off the Vietnamese coast, that Washington objected to any “effort to intimidate US companies” and had raised its concerns directly with Beijing. Marciel went on to point out that the ambiguous nature of China’s jurisdictional claims in the South China Sea had become of greater concern to Washington because the areas in which Beijing had warned US energy companies not to operate seemed to lie outside China’s claimed maritime boundaries. He therefore called on the Chinese government to provide greater clarity on the substance of these claims.

In his testimony, Deputy Assistant Secretary of Defense Robert Scher remarked that while the United State supported a negotiated settlement to the dispute, rising tensions over the past few years had prompted the Pentagon to reinforce measures designed to enhance stability in the area. This strategy consists of a continued US military presence in the region, operations by the US Navy in the South China Sea to assert freedom of navigation rights and the expansion and deepening of defense diplomacy and capacity building programs with regional states such as Malaysia, Vietnam, the Philippines, and Indonesia ‘to prevent tensions in the South China Sea from developing into a threat to US interests.’ With regard to the last point, Scher pointed out that US-led security cooperation activities such as regular exercises helped regional states ‘overcome longstanding historical and cultural barriers that inhibit multilateral cooperation.’ In short, America’s military presence in Southeast Asia helps provide a stable environment for the claimants to pursue a political solution and encourages the ASEAN states to increase defense cooperation among themselves at the same time.5

In January 2010, the top US military officer in the Pacific, Admiral Robert Willard, stated that China’s ‘aggressive’ program of military modernization appeared designed to “challenge US freedom of action in the region, and, if necessary, enforce China’s influence over its neighbors.”

In February 2010, Deputy Assistant Secretary of Defense Scher reaffirmed US policy in public testimony before the US – China Economic and Security Review Commission’s hearings on “China’s Activities in the Southeast Asia and the Implications for US Interests” on Capitol Hill.

According to US and Japanese press reporting, in March 2010 Chinese officials told two visiting senior US officials that China had elevated the South China Sea to a “core interest” of sovereignty and would not tolerate any outside interference. “China conveyed the new policy to visiting US Deputy Secretary of State James Steinberg and Jeffrey Bader, senior director for Asian affairs on the National Security Council, in early March, according to sources. The two US officials met with Chinese State Councilor Dai Bingguo, Chinese Foreign Minister Yang Jiechi and Vice Foreign Minister Cui Tiankai in Beijing, and Bingguo is believed to have relayed the policy to the US side.”

In his speech at the Shangri-la dialogue in June 2010 in Singapore, Secretary of Defense Gates said “In this respect, the South China Sea is an area of growing concern. This sea is not only vital to those directly bordering it, but to all nations with economic and security interests in Asia. Our policy is clear. It is essential that stability, freedom of navigation and unhindered economic development be maintained. We do not take sides on any competing sovereignty claims, but we do oppose the use of force and actions that hinder freedom of navigation. We object to any effort to intimidate US corporations or those of any nation engaged in legitimate economic activity. All parties must work together to resolve differences through peaceful, multilateral efforts consistent with customary international law. The 2002 Declaration of Conduct was an important step in this direction, and we hope that concrete implementation of this agreement will continue.”

According to extensive press reporting, at the July 23 ASEAN Regional Forum meeting in Hanoi Secretary of State Clinton stated “The US has a national interest in freedom of navigation, open access to Asia’s maritime commons and respect for law in the South China Sea.”

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7. In addition to DAS Scher, American regional experts testified on aspects of China’s policies in the region. The author’s testimony, “Threat or Partner: Southeast Asian Perceptions of China,” dealt extensively with South China Sea issues.
8. “China Tells US that S. China Sea is ‘core interest’ in new policy,” Kyodo News Service, July 3, 2010. In the absence of a public Chinese statement confirming that China has raised the South China Sea to a “core interest” on par with Taiwan or Tibet, a few American experts have begun to question the meaning of China’s alleged definition of the South China Sea as a “core interest.” Some Chinese officials and academics may have subsequently sought to “walk back” China’s position on whether the South China Sea constitutes a “core interest.”
“In addition, Clinton said resolving disputes off China’s southern coast is ‘a leading diplomatic priority,’ signaling her intention to intercede in a region claimed in full by the Chinese government. Ending disagreements in the South China Sea ‘is pivotal to regional stability’ and to ensuring ‘unimpeded commerce."

Clinton offered support for the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC), an agreement designed to promote cooperative confidence building measures. Eight years after the DOC was inked, however, the two sides have yet to reach agreement on how to implement it, partly because China prefers to discuss the issue bilaterally with each of the claimants than with ASEAN as a group, an approach that ASEAN has rejected as ‘divide and rule’ tactics. In a surprise move, Mrs. Clinton said the US was prepared to facilitate talks on implementing the DOC.”

Eleven countries, including the four ASEAN claimants – Brunei, Malaysia, the Philippines and Vietnam – as well as Indonesia, Singapore, the European Union, Australia and Japan, “implicitly defied Beijing and followed Mrs. Clinton with statements on the South China Sea.”

According to a subsequent Washington Post article, “The decision to confront China on the South China Sea dates back several months, after officials noticed that the sea … had crept into the standard diplomatic pitter-patter about China’s ‘core interest."

In addition, Clinton also said: ‘Legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features’ … Translated, it meant that China’s claims to the whole sea were ‘invalid,’ said a senior administration official, because it doesn’t have any people living on the scores of rocks and atolls that it says belong to China.”

According to the Economist, “When 12 of the 27 countries there spoke up for the new approach solving their maritime disputes, China sniffed coordination - nay, conspiracy … That is far from how the administration presents it, however. It argues it is merely reasserting a ‘national interest’ and traditional role in East Asia, a region neglected by an America distracted by terrorism and wars in Iraq and Afghanistan. Absent without leave, America helped foster an overblown perception in the region of America’s decline and China’s ascent. It is now putting that right."

A subsequent commentator in the Singapore press wrote, “Initially buoyed by US Secretary Hillary Clinton’s willingness to stand up to Beijing over the South China Sea, some ASEAN governments now have second thoughts about having urged American intervention… Taken aback by the ferocity of Beijing’s counterattack, they are worried about growing tensions between the US and China. They fear that if the crucial US - China relationship were to deteriorate, they would be forced to take sides.

12. Wain, Barry, “ASEAN Caught in a Tight Spot,” The Straits Times, September 16, 2010. Not all Southeast Asian countries have a direct stake in the South China Sea; Cambodia, Laos, Myanmar and Thailand have resisted attempts to drag them into a conflict with China, the predominant external influence in their countries.
Aware of US plans, however, China joined the informal maneuvering, explaining to ASEAN countries its objection to the issue being ‘internationalized.’ Beijing reiterated that negotiations would be bilateral between China and each claimant.

At first the Americans were jubilant with the outcome...But it did not take long for both camps to reassess the situation, after Chinese Foreign Minister Yan Jiechi, with a carefully enacted show of anger, ticked off seven points in rebuttal. Chinese media and think-tanks joined in, warning Asia about ‘divide and rule’ tactics by outside powers and accusing Vietnam of ‘playing with fire’...The fierce Chinese response, prepared well in advance by a Beijing that anticipated that the South China Sea would become an issue under Vietnam’s chairmanship, has had ‘the desired effect on ASEAN’, according to Southeast Asian sources. No one wants to get in a fight with China.”

A day after Secretary Clinton’s public comments, “During a visit to New Delhi, US Admiral Mullen said ‘China seems to be asserting itself more and more with respect to the kind of territorial claims in islands like the Spratly’s ... they seem to be taking a much more aggressive approach’ in waters Beijing deems of economic and strategic interest.”

Prior to the 2010 US - ASEAN summit in September, “Indonesian Foreign Minister Marty Natalegawa rejected China’s stance that the US stay out of territorial disputes in the South China Sea ahead of a meeting of Southeast Asian leaders with President Barack Obama.”

At the ASEAN Defense Minister Meeting Plus (ADMM+) initial meeting in October in Hanoi, Secretary of Defense Gates “echoed recent statements by Secretary of State Clinton that the US would not take sides in competing claims, but would insist on open access to international waters and shipping lanes ... but also said that he did not directly speak with (Chinese Defense Minister) Liang about the South China Sea or other maritime squabbles but that the issue was a hot topic at the conference.” Gates accepted an invitation from his Chinese counterpart, Gen. Liang Guanglie, to visit Beijing. American press reporting suggested that the tone of the US/Chinese “dispute” over the South China Sea issues had softened.

**China’s Assertiveness**

“China has two types of arbitrary claims: an assertion that China’s territorial seas extend into much of the South China Sea and the more recent claim that they have the right to control navigation and research activities, not just fishing and seabed resources, within their Exclusive Economic Zones. If not challenged, China’s assertive incrementalism has international legal risks, since international law is built on norms.”

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17. Ten Kate, Daniel and Susan Li, “Indonesia Rejects China’s Stance that US Stay out of Local Waters Dispute,” Bloomberg, September 22, 2010

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Exclusive Economic Zones (EEZs)

The South China Sea has drawn increased US attention, particularly from the US navy, due to the growing capabilities of the Chinese navy (People’s Liberation Army – Navy or PLAN). Though China’s ability to project naval power remains limited, China has constructed a major new naval base on Hainan island fronting on the South China Sea. This base is now home to nuclear submarines and surface combatants, and may house a Chinese aircraft carrier after 2020.

The Chinese naval base at Sanya improves the PLAN’s ability to stage naval forces into the South China Sea. However, China’s desire to push the US Navy as far away as possible from China’s coast, rather than overlapping claims in the South China Sea with Southeast Asian states, provides the principal context for assessing the implications of this new base and of the harassment in March 2009 of an unarmed US surveillance vessel by Chinese ships.

In February and March 2009, the US dispatched the USNS Impeccable to conduct “military scientific research” in the South China Sea. A civilian manned ship of the US Military Sealift Command, the USNS Impeccable was involved in marine data collection for military purposes about 75 miles south of Hainan island when it was harassed by five Chinese-flagged vessels.20

Such data collection is not regulated by a coastal state under the United Nations Convention on the Law of the Sea. Nonetheless, though the US believes its legal case is uncontestable, China had apparently asked the USNS Impeccable to leave its EEZ because it views such data collection within its EEZ as illegal and insensitive.22 The desire to affirm the US interpretation of its rights is also an important factor in motivating the US to proceed with these missions. Beijing’s interpretation of its rights in its EEZ to restrict military survey operations could have significant implications in the future, should part or all of China’s claims within the “nine dash line” in the South China Sea come to be accepted by the international community.

The US has pushed for dialogue to reduce the risk of further incidents at sea. In August, “US and Chinese officials held a special session under the 1998 Military Maritime Consultative Agreement, though little progress was made. Chinese officials at the meeting

20. The standoff between the USNS Impeccable and the PLAN vessels was followed by another incident in which a PLAN submarine snagged a sonar array towed by the USS John S. McCain off the coast of the Philippines. However, this incident was probably the result of a mistake by the Chinese submarine rather than a deliberate attempt to harass the US ship.

21. The one major exception to China’s acceptance of UNCLOS and common international practice concerns the status of military ships in EEZs. Contrary to the positions of the US and other traditional maritime powers, China has consistently argued that the status of military vessels operating in another country’s EEZ has not been settled by UNCLOS. Thus freedom of navigation in an EEZ does not extend to such activities as survey operations by naval ships. Chinese legal analysts view the claims that military ships have the right to conduct hydrological and survey operations in an EEZ as a claim from an era before 1949.

reportedly reiterated their country’s legal right to restrict foreign military activities in their EEZ and called on the US to end its surveillance activities off China’s coast. Although the two sides agreed to continue discussions, given their differing interpretations of international maritime law, and the build-up of military forces in the area, incidents such as those involving the *Impeccable* are likely to become more frequent.”

US National Intelligence Director and former US Pacific Command (PACOM) commander Admiral Dennis Blair called the harassment the most serious military dispute between China and the US since 2001. China has not backed down.

**The South China Sea**

The US would prefer not to add the South China Sea to its agenda with either China or Southeast Asian states, but has become alarmed by rising tensions in an area where it has fundamental security and important foreign policy interests. The US depends on free passage through the waters and airspace of the South China Sea to deploy American armed forces between the Pacific and Indian Oceans. Through the South China Sea pass about one third of global maritime commerce and more than half of northeast Asia's imported energy supplies. The seabed also has the potential to become a major source for the energy supplies that are essential to the further economic development of East Asia, though US estimates of potential energy reserves are considerably smaller than those of China. Escalating rivalries in the South China Sea pose the most serious and intractable security problem in Sino-Southeast Asian relations.

The 2002 Declaration on the Conduct of Parties in the South China Sea was welcomed in Washington. This Declaration deterred claimants from occupying vacant “features” in the South China Sea. Though not a legally binding document between ASEAN and China, the Declaration and China’s campaign to court Southeast Asia in the late 1990s and early part of this decade appeared to pave the way for confidence building measures and eventually peaceful resolution of these disputes. A 2005 agreement on a bloc in the South China Sea in which China, Vietnam and the Philippines would conduct joint seismic research appeared to be the first in a series of confidence building measures until, in 2008, it collapsed amid a political scandal in Manila.

Since late 2007, however, the security situation has deteriorated. At the heart of the problem has been escalating tensions, accusations and actions between China and Vietnam. How the blame for this situation should be distributed is subject to debate, but in American eyes China has reverted to its assertive approach of the 1990s in the South China Sea.

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23. China claims about 3 million square kilometers of ocean as part of either its territorial waters or Exclusive Economic Zone (EEZ). More than half of these claims are disputed by its neighbors. The Gulf of Tonkin is the only maritime boundary where China has negotiated a boundary treaty.


26. Some Chinese experts have labeled this sea a “new Persian Gulf.”
China has increased naval patrols, pressured foreign energy companies to halt operations in contested waters, created new administrative mechanisms to strengthen its claims in the Paracel and Spratly islands, and unilaterally imposed fishing bans in parts of the sea. China has also disputed claims to the outer continental shelf advanced by Vietnam and Malaysia through submissions to the United Nations Commission on the Limits of the Continental Shelf, and protested a renewal of the Philippine claim to part of the South China Sea. In addition, China has insisted that disputed claims are bilateral issues that should not be settled through multilateral mechanisms. Accordingly, China launched a diplomatic campaign to keep the South China Sea off the regional agenda during Vietnam's 2010 chairmanship of ASEAN. China's confrontational approach set the scene for a continuation of the downward spiral of actions and reactions on the part of claimants in the South China Sea. It also provoked a response from the US, which has gradually escalated as China persisted with actions that appeared to add up to a campaign to coerce other interested parties.

**The South China Sea and Southeast Asia**

Chinese actions in the South China Sea over the past three years have compromised China's decade-long campaign to portray itself as a benign partner to its southern neighbors. They have also attracted the attention of a distracted power that could have complicated and constrained China's diplomatic and economic campaign to court Southeast Asia. China and the US shared an interest in divorcing the South China Sea from their policies in Southeast Asia as a whole. It may be argued that the primary beneficiary of rising tensions in the South China Sea has been Vietnam.

After the Asian Financial Crisis of 1998, Beijing launched an intensive campaign to court its southern neighbors. China became the foremost supporter of the status quo in Southeast Asia, agreed to place contentious issues such as the South China Sea on the shelf, and learned to play along with Southeast Asia's “Gulliver Strategy” of tying China into a web of multilateral organizations and commonly accepted norms. The highest level of China's political leadership was prepared to devote extraordinary time to this effort, and to the resolution of conflicts that bubbled up from lower levels. In return, China asked Southeast Asians for a bit of deference, their participation in China's booming economy through the ASEAN-China Free Trade Area, and the severance of old semi-diplomatic ties between Southeast Asian states and Taiwan. Asking so little and offering so much, China was successful in portraying itself as an attentive, accommodating and friendly “elephant.”

Moreover, sensitive to local perceptions and preferences, Beijing quickly learned that criticism of Southeast Asian security alliances and partnerships with Washington was not welcomed because it implicitly required Southeast Asian states to choose between China and the US. Thus, determined to avoid counterproductive competition with the US in the region and well aware of Southeast Asian skittishness when security issues were raised, Beijing ended open, direct criticism of American policies in Southeast Asia in 2001. Instead, it advanced its own new security concepts that fit so well with Southeast Asian preferences and left grumbling about the “militarization” of American foreign policy during the Bush administration to Southeast Asians.

For its part, the US government also resisted internal and external pressure to view
Southeast Asia as an area for competition with China. While the US focused on counter-terrorism, it repeatedly stated that it was not engaged in competition with China in Southeast Asia. In 2005, then Deputy Secretary of State Zoellick publicly and emphatically denied that China was the name of the game in Southeast Asia. Washington resisted episodic suggestions that the US alliance relationship with the Philippines applied to the South China Sea.

Insead, when it considered security issues in Southeast Asia, the US focused on:

- Cooperation on counter-terrorism,
- Deepening of the US alliances with Thailand and the Philippines and of the close security partnership with Singapore, as well as new partnerships with Indonesia and Vietnam,
- Support for littoral countries’ efforts to improve maritime security in the Strait of Malacca and the tri-border area between Indonesia, Malaysia, and the Philippines,
- Non-traditional security issues

With the South China Sea still as a mill pond, many Southeast Asians (and American experts) began to question the relevance of the old self-declared US role as a “security guarantor” against another major external power. A few US officials continued to privately mutter that “China should be the organizing principle for our policy in Asia.”27 but their arguments had no traction until China’s policy in the South China Sea began to change.

In the past few years the Chinese government’s attention to Southeast Asia has flagged, though senior Chinese leaders again visited Southeast Asian countries last year and the China-ASEAN Free Trade Agreement came into force on January 1, 2010. China had hoped to use the first East Asian Summit in December 2005 as a means to assume the leadership of Asian multilateralism, but those aspirations were dashed by the inclusion of additional states at the summit and ASEAN’s determination to retain leadership of this multilateral organization. Meanwhile, Beijing’s accommodating approach to the region as a whole has shifted as it has lost interest and simultaneously reverted to more assertive tactics in advancing its territorial claims in the South China Sea. One result has been to undermine such limited Southeast Asian cohesion as now exists, including through ASEAN. The countries that have acquiesced to increased Chinese influence - Cambodia, Laos, Myanmar and Thailand – did not join their fellow ASEAN members in speaking out about China’s policies in the South China Sea at the ASEAN Regional Forum in Hanoi this summer.

In sum, while the DOC and China’s campaign to court Southeast Asia put the South China Sea “on the shelf” for China and “at the bottom of the in box” for the US, South China Sea policy could be largely divorced from both Chinese and US policy for Southeast Asia. This allowed both external powers to de-emphasize traditional security concerns. However, continued tensions in the South China Sea have the potential to change US perceptions and stoke Sino-US competition in the ASEAN region. Such a development will inevitably limit ASEAN countries’ autonomy.

Explaining China’s Policies

One scholar advances three possible explanations for Chinese assertiveness in the South China Sea.

(i) Beijing may be attempting to pressure Hanoi into accepting a joint exploration and production agreement covering energy fields located off the Vietnamese coast.

(ii) China may be signaling to Vietnam its strong disapproval of deeper US-Vietnam security ties.

(iii) Beijing is motivated primarily by geo-strategic concerns such as rising demand for energy, the need to guarantee the security of China’s sea lanes of communication (SLOCs) and China’s great power ambitions.28

In Washington, speculation about China’s motives abounds but might be grouped into the following categories:

A) China’s behavior in the South China Sea is a result of Chinese “probing” of American resolution at a time when the US faces domestic economic difficulties.

B) China’s behavior is a natural outgrowth of its “rise” in power in comparison with its southern neighbors. Beijing is now seeking to “collect chits” or secure Southeast Asian acquiescence in its claims as a reward for China’s good behavior in the region over the past decade.

C) China’s long-term policies haven’t changed, but China is sufficiently confident of its strength to allow public airing of South China Sea issues and to decline to clarify its positions in discussions with the US.

D) China stumbled into a series of disputes with Vietnam and misjudged Hanoi’s ability to pull the US and the majority of ASEAN members into a bilateral dispute.

Only time will reveal the mix in Chinese motivations, but a few factors should be considered:

a) China is particularly sensitive to issues involving the protection of its sovereignty and territorial integrity. Defending the boundaries of China’s claimed EEZ and exercising sovereignty over claimed islands in the South and East China Seas are important elements in China’s policy.

b) Chinese leaders believe that the ability to gain access to resources within and below the sea is essential for China’s future economic development. Many of these resources, particularly energy resources, are believed to lie within China’s claimed territorial waters and EEZ.

c) Chinese security analysts have written extensively in the past few years on the importance of SLOCs. Chinese maritime trade with most of the globe passes through the South China Sea, as does about 75% of all of Chinese shipping.

d) China is designing an anti-access strategy to impose high costs on US naval ships seeking to penetrate China’s coastal areas, but it has yet to articulate how growing

The South China Sea: An American Perspective

Naval capabilities should be used to protect China’s many interests in the maritime domain. The first priority is to defend China’s territorial and EEZ claims. As yet, the Chinese navy has little ability to project power but the South China Sea is one area where the Chinese navy can exert pressure.

**Outlook**

At this point in time, the US has stood up for fundamental principles such as freedom of navigation in the South China Sea, strengthened its relationship with Vietnam, and worked closely with the majority of ASEAN states. Washington is perplexed by China’s reluctance to clarify its positions. One American scholar has suggested that, over time, China is likely to “soften” its positions, Southeast Asia is likely to “adjust,” and US interest in the South China Sea is likely to “subside.”

In the meantime, several factors will influence US policy. These include:

A) The US will not be intimidated or compromise on fundamental principles.

B) Sino-US relations, a mix of cooperation, rivalry, and competition, are already burdened with complex and important issues. The US would prefer not to add the South China Sea to this list. At the ASEAN Defense Ministers Meeting Plus (ADMM+) in October the Secretary of Defense accepted an invitation to visit China. However, security issues in the South China Sea can no longer be separated from US and Chinese policies towards Southeast Asia as a whole. China continues to cling to its “divide and rule” policy of bilateral negotiations with individual claimants in the South China Sea and may resent American reassertion of its rights, but in the American view the burden is now principally on China to reduce tensions and clarify its goals.

C) The US would like to strengthen ASEAN’s role in the South China Sea, enhance ASEAN’s status, and reassure Southeast Asian states that the US will remain involved. The US will be particularly attentive to Indonesia, Malaysia and the Philippines. It will look to ASEAN to take the lead in “giving life” to the code of conduct.

D) For historical reasons, much of Washington’s foreign policy elite is particularly pleased with the rapid improvement in US-Vietnamese relations. Inevitably, however, both Hanoi and Washington will calculate their long-term interests in further cooperation given their relationships with China.

E) Although they now appear to be a minority that is a step behind the emerging consensus, advocates of a less accommodating policy with regard to China see the South China Sea as an opportunity to test China. Others, who must plan for worst-case

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30. Americans who have unsuccessfully advocated for policies to “contain” China have found their arguments strengthened by China’s actions since 2008 in the South China Sea. One prominent commentator, Robert Kaplan, recently wrote in the Washington Post (“China’s Caribbean,” September 26, 2010) that “The geographic heart of America’s hard-power competition with China will be the South China Sea, through which passes a third of all commercial maritime traffic worldwide and half of the hydrocarbons destined for Japan, the Korean peninsula and northeast China... China seeks domination of the South China Sea to be the dominant power in the Eastern Hemisphere.”
scenarios, are focused on the growing capabilities of the Chinese navy. But the “foot is now off the accelerator on the South China Sea.”

The internal factors driving China’s policy in the South China Sea are opaque. Americans often find it difficult to determine whether Chinese policies reflect decisions on the part of central authorities in Beijing or competition within China between bureaucratic or provincial interests. However, should Beijing be prepared to clarify its goals in the South China Sea in discussions with the US and enter into negotiations with ASEAN, tensions over the South China Sea may again take a back seat as the US and China manage their bilateral relationship over the next few years.
Part 2

RECENT DEVELOPMENTS
IN THE SOUTH CHINA SEA
Part 3

LEGAL ASPECTS OF THE SOUTH CHINA SEA DISPUTES
DOTTED LINES IN THE SOUTH CHINA SEA: FISHING FOR (LEGAL) CLARITY

Erik Franckx & Marco Benatar

Introduction

Almost invariably, attempts of states to consolidate control and jurisdiction over insular features signify the onset of a barrage of cartographic materials. On the one hand, carefully crafted maps can be key in resolving international disputes, indicating the intention of the parties and providing precise geographic data. On the other hand, too eager a resort to maps is dangerous, for "like statistics, they can 'lie'". The dispute over the maritime features in the South China Sea is no exception. Claimant states in Southeast Asia have gathered a wealth of cartographic materials to back up their contentions, varying in substance and technical quality. One map that has recently resurfaced and made quite a splash is a Chinese official map of the South China Sea portraying the enigmatic “9-dotted-line” or “U-line”. The forceful reassertion of this document elicits a host of questions as to its origins, what it means and ultimately what its value is in the ongoing maritime rows.

The aim of this study is to offer an international legal analysis of the aforementioned map. The paper starts off with a brief discussion of the history of the cartographic piece and some recent developments in this regard. Thereafter, the legal merit of various (and

3. Although sometimes referred to as the “historic claim line”, this characterization should be avoided. Most Chinese terms used to describe the line do not include the Chinese symbol for “historic”. Daniel J. Dzurek, “The Spratly Islands Dispute: Who’s on First?”, Maritime Briefing, International Boundaries Research Unit (Durham University), vol. 2, n° 1, 1996, p. 11.
at times fickle) interpretations of the U-line will be assessed. We will derive arguments predominantly from the law of the sea to demonstrate that the Chinese claims connected to the 9-dotted-line are debatable as a matter of international law. The focus will then turn to case law pertaining to cartographic evidence. Factors derived from this body of jurisprudence leads us to conclude that the map would in all likelihood be accorded fairly weak probative force before a court of law. Finally, we will show that even if the map were to be legally significant it could not be used against other interested parties in the dispute as a result of the latter's effective protest.

**Chinese map**

**a) Background**

The origins of today’s U-line date back to the activities of the Republic of China’s (hereafter ROC) Land and Water Maps Inspection Committee, formed in 1933. Its works included the surveying and naming of islands in the South China Sea and the production of maps showing these islands within Chinese territory.4

The first officially endorsed dotted line originates from the aftermath of the Second World War. The cartographic piece in question was produced by the ROC’s Department of the Territories and Boundaries of the Ministry of the Interior in December 1946.5 On this map, the U-line consists of 11 intermittent dashes enclosing the greater part of the South China Sea and its mid-ocean features.6 Starting at the Sino-Vietnamese boundary, the first two segments pass through the Gulf of Tonkin. The third and fourth parts of the line separate the Vietnamese coastline from the Paracel Islands (Hoàng Sa) and Spratly Islands (Trường Sa) respectively. The fifth and sixth segments on the interrupted line go past the James Shoal (4° N), the southernmost maritime feature claimed by the PRC and the ROC. Moving in the direction of the North-East, the subsequent two dashes are located between the Spratly Islands (Trường Sa) on the one hand and Borneo (Indonesia, Malaysia, Brunei) and the Philippines (Palawan Province) on the other hand. The ninth, tenth and eleventh segments separate the Philippines from the ROC.7

Following the removal of the Nationalists from the mainland, cartography illustrating the same dashes can be found emanating from the PRC. Thus, from then onwards, occurrences of the U-line can be observed on either side of the Taiwan Strait. One

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5. Zou Keyuan mentions the existence of an even earlier line in the South China Sea drawn up by a Chinese cartographer, Hu Jinjie, in 1914 and subsequently in the 1920s and 30s. Such lines can also be found in some atlases from this period. Nonetheless, it must be stressed that: 1) these earlier apparitions are prior to the first official map depicting the “U-line” and 2) the aforementioned atlases were compiled by individuals, thus acting in personal capacity. See Zou Keyuan, “The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands”, *International Journal of Marine and Coastal Law*, vol. 14, 1999, pp. 32-33.
particular change needs to be noted: since 1953 PRC maps of the South China Sea depict 9 instead of 11 segments (the dashes in the Gulf of Tonkin were erased).  

b) PRC letter to the UN Secretary-General (7 May 2009)

The controversy surrounding the 9-dotted-line came to the fore in 2009 in connection with the Malaysian-Vietnamese joint submission and Vietnamese individual submission to the Commission on the Limits of the Continental Shelf (hereafter CLCS). The Commission issues recommendations to coastal states wishing to establish the outer limit of their continental shelves beyond 200 nautical miles. The timing of the submissions by the Vietnamese and Malaysian governments can be explained by their respective deadlines in May 2009. In response to these initiatives, the PRC issued the following reaction, hereby for the first time backing the U-line at the international level:

“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 (see attached map). The above position is consistently held by the Chinese Government, and is widely known by the international community”.

A reading of the note verbale allows one scholar to discern several Chinese assertions:

8. Li & Li, supra 4, p. 290. This view is contradicted by Zou Keyuan, who states that the two segments were removed in the 1960s. See Zou, supra note 5, pp. 34-35.
1) **Sovereignty** over the South China Sea islands and their adjacent waters (the attached map indicates the following maritime features within the interrupted line by name: Xisha Qundao\(^{13}\), Nansha Qundao\(^{14}\), Zhongsha Qundao\(^{15}\) and Dongsha Qundao\(^{16}\)).

2) **Sovereign rights and jurisdiction** over the relevant waters including their seabed and subsoil.

3) **Consistency** of the PRC's official position on maritime and territorial claims in the South China Sea.

4) **Knowledge** of third states as regards the PRC's maritime and territorial claims in the South China Sea.

5) The U-line *delineates* the Chinese claims of sovereignty, sovereign rights and jurisdiction.\(^{17}\)

**Claims**

The aforementioned letter, while novel in its maritime aspects, repeats similar assertions put forward in the past as regards insular features.\(^{18}\) Furthermore, several mainly Chinese and Taiwanese scholars have proffered their own interpretations of the 9-dotted-line. Amidst the confusion, one can only be certain of the fact that the Chinese pretensions regarding the South China Sea do not surpass this demarcation.\(^{19}\) These views and their legal merit will now be discussed.

**a) Historic claims**

**State practice**

Although assertions of this ilk do not seem to feature in PRC policy, the ROC has traditionally advocated this position on the U-line quite strongly as evidenced in a host of declarations. For instance, in 1991 at one of the South China Sea Workshops, a representative of the Taipei Economic and Trade Office in Jakarta (Indonesia) declared:

“The South China Sea is a body of water under the jurisdiction of the Republic of China. The Republic of China has rights and privileges in the South China Sea. Any

\(^{13}\) Paracel Islands/Hoàng Sa.

\(^{14}\) Spratly Islands/Trường Sa.

\(^{15}\) Macclesfield Bank.

\(^{16}\) Pratas Islands.

\(^{17}\) Hu, *supra* note 6, pp. 204-206.


activities in the South China Sea must acquire the approval of the Government of the Republic of China”.

The 1993 Policy Guidelines for the South China Sea (endorsed by the Executive Yuan) note that:

“In terms of history, geography, international law and facts, the Nansha Islands [Spratly Islands], Shisha Islands [Paracel Islands], Chungsha Islands [Macclesfield Islands], Tunghsa Islands [Pratas Islands] are part of inherent territory of the Republic of China; the sovereignty over those islands belongs to the Republic of China. The South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, where the Republic of China possesses all rights and interests” (emphasis added).

In 1994, a Minister of the Executive Yuan, Chang King-yu, stated that “the waters enclosed by the ‘U’-shaped line in the South China Sea are our historic waters and the ROC is entitled to all the rights therein” (emphasis added).

The Taiwanese policy is further deduced from protests lodged against the conduct of littoral states in the region. In response to the Malaysian occupation of two maritime features in the Spratly Islands and the Philippines’ decision to incorporate Scarborough Shoal on its map, the ROC stated:

“The South China Sea is a body of water of the Republic of China. The Republic of China has all rights and privileges in the South China Sea. Any activities (including the discussion on joint cooperation or on Code of Conduct, etc.) in the South China Sea region must acquire the approval of the Government of the Republic of China” (emphasis added).

Certain pundits have cobbled together legal arguments for this tenuous claim. For instance, Zhao Guocai observes: “China owns the historic right of islands, reefs, shoals, banks, and waters within the 9-dotted line. The South China Sea is regarded as the historic waters of China, which was universally acknowledged at that time. So far it has lasted for half a century.”

Legal analysis

An examination of scholarly writings regarding historic claims relative to maritime areas

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22. Dzurek, supra note 3, p. 13.
gives rise to a great deal of terminological confusion. Germane concepts such as historic rights/historic title, historic waters and historic bays are not easily distinguished and elucidated.\(^{26}\)

In order to avoid a lengthy and somewhat superfluous inquiry on the distinction between historic rights and historic title, suffice it to make clear that “historic rights” are the genus under which one can place the species “historic waters”. In turn, “historic bays” are a species of “historic waters”.\(^{27}\) In the context of the 9-dotted-line, ROC behaviour seems to imply recognition of historic waters as regards a substantial part of the South China Sea.

No universally accepted definition of historic waters exists, but in broad terms it denotes rights that accrue to a coastal state with respect to (a) maritime area(s) that the state would not normally enjoy. The extent of the rights concomitant to the historic waters can vary considerably. The legal conditions for acquiring historic waters were considered in a 1962 study carried out by the UN Secretariat’s Office of Legal Affairs (hereafter OLA) at the request of the International Law Commission.\(^{28}\) In the view of the OLA:

“There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States.”

The ROC, nor the PRC for that matter, meet these criteria. Conditions (1) and (2) require the claimant state to exercise authority via acts displaying sovereignty with a sufficient level of frequency and effectiveness. Only occasionally is authority exercised and when it is, such a display mainly relates to certain islands and not the sea. As a result, the freedom of fishing and navigation of other states remain unencumbered.\(^{30}\) Consequently, no historic claim can be made. The theoretical requirements needed to fulfil condition (3) are uncertain. Essentially, the discussion pivots on whether other states need to acquiesce or whether the absence of any reaction is enough.\(^{31}\) But no matter which view one subscribes to, all seem to agree that protest from foreign states can prevent the peaceful and continuous exercise of sovereignty, and this is precisely what has occurred with respect to the South China Sea (see part V.b)).

Some have retorted that claims must be considered in light of the rules of international law that existed when the U-line map was drawn up, i.e. 1946 (the so-called doctrine of intertemporal law\(^{32}\)). This is quite peculiar, as this approach only weakens an already unconvincing contention. At that time, the legally recognized breadth of the territorial sea totalled a mere 3 nm, making historic claims all the more exorbitant.\(^{33}\) Given the fact that


\(^{27}\) Zou, supra note 24, p. 152.


\(^{29}\) Id., p. 13. The study mentions a potential fourth requirement (justification “on the basis of economic necessity, national security, vital interest or a similar ground”) for which there is less agreement.

\(^{30}\) Zou, supra note 24, p. 161.

\(^{31}\) For a treatment of both positions, see UN, supra note 28, pp. 16-19.


\(^{33}\) See Hasjim Djalal, “South China Sea Island Disputes”, The Raffles Bulletin of Zoology, Supplement No. 8, 2000,
historic waters normally either relate to bays or a range of territorial waters,\textsuperscript{34} it is therefore not surprising to note that a recent treatise on historic waters does not find it necessary to make any reference to this nine-dotted line historic claim.\textsuperscript{35} Moreover, even if for the sake of argumentation one were to envisage the hypothesis that China were able to make such an unprecedented extensive historic claim (\textit{quod non}), it should be remembered that historic claims do not create an \textit{erga omnes} regime, but rather depend, as stressed by one author recently, on express or implied recognition on a state-to-state basis.\textsuperscript{36}

On a final note, the prolific usage of the nomenclature “South China Sea” does not confer historic Chinese sovereignty.\textsuperscript{37} Under international law the mere naming of an area does not establish sovereignty over it.\textsuperscript{38} The name has been vigorously protested by interested states, including Vietnam.\textsuperscript{39} Foreign cartography uses the name South China Sea simply in accordance with the maritime nomenclature published in the International Hydrographic Organization’s \textit{Limits of Oceans and Seas} (1953), which “[has] no political significance whatsoever”.\textsuperscript{40} Thus, this choice of terminology does not imply recognition of Chinese sovereignty on the part of Western states. Also, the Chinese have historically employed different names for this maritime area such as “Giao Chi Sea” (Song and Ming dynasties) and “South Sea” (Qing dynasty (1905), Republic of China (1913), People’s Republic of China (1952 and 1975)).\textsuperscript{41}

**New developments**

Recent developments might render this discussion moot. Indeed, it could very well be that the ROC is steadily abandoning its longstanding thesis. Statements in recent years hint to a change in stance, aligning the ROC’s policy on this matter with that of the PRC.

\textsuperscript{35} The only time China is mentioned relates to the historic claim of the former USS.R. to Peter the Great Bay (\textit{id.}, p. 144).
\textsuperscript{37} This argument has been made in Wu Fengbing, “Historical Evidence of China’s Ownership of the Sovereignty over the Spratly Islands”, in China Institute for Marine Development Strategy (ed.), Selected Papers of the Conference on the South China Sea Islands, Beijing, Ocean Press, 1992, p. 111 (in Chinese), referenced in Zou, supra note 24, p. 161, footnote 98.
\textsuperscript{38} Nguyen Hong Thao, \textit{Le Vietnam et ses différends maritimes dans la Mer de Bien Dong (Mer de Chine méridionale)}, Paris, Pedone, 2004, p. 258.
\textsuperscript{39} Vietnam refers to this maritime area as “Biển Đông” (East Sea). See National Border Committee under the Ministry of Foreign Affairs of Vietnam, <biengoilanhtho.gov.vn/bbg-vie/home.aspx>.
\textsuperscript{41} Nguyen, \textit{supra} note 38, p. 257.
References to historic rights/waters are absent whilst the focus seems to be on territorial sovereignty over the islands and their territorial waters. The most recent example is a May 2009 statement protesting the Vietnamese and Malaysian-Vietnamese submissions to the CLCS:

“The Government of the Republic of China reiterates that the Diaoyutai Islands, Nansha Islands (Spratly Islands), Shisha Islands (Paracel Islands), Chungsha Islands (Macclesfield Islands), and Tungsha Islands (Pratas Islands) as well as their surrounding waters are the inherent territories and waters of the Republic of China based on the indisputable sovereignty titles justified by historic, geographic and international legal grounds. Under international law, the Republic of China enjoys all the rights and interests over the foregoing islands, as well as the surrounding waters and sea-bed and subsoil thereof”.

b) Insular claims

Interpretation 1: All insular features within the U-line are PRC/ROC territory

An early proponent of this territorial interpretation, the Indonesian diplomat Hasjim Djalal, whilst acknowledging the “enigmatic” nature of the Chinese line, based his findings...
on a careful analysis of the PRC’s statements, particularly those formulated during a 1979 meeting of the International Civil Aviation Organization (ICAO).44

Smith notes that the mid-ocean features falling within these “lines of allocation” are those for which the Chinese claim sovereignty. He emphasizes that the dashes do not suggest any maritime boundary claims and would have no impact on the resolution of maritime boundary disputes.45

Dzurek too believes that the U-line does not demarcate the borders of Chinese maritime jurisdiction posited on a cartographic argument, namely the fact that the dashes separating Malaysia and the Natuna Islands deviate from the agreed Indonesian-Malaysian continental shelf delimitation line.46

As indicated above, contemporary ROC state practice seems to evidence a shift toward this position.

The delicate question to whom the islands in the South China Sea belong, which entails rigorous analysis of a complex factual matrix and the application of manifold legal concepts (such as discovery, critical date and effectivités), would take us too far from our present theme.47 Bearing that in mind, it is appropriate to stress here that the Chinese map in se cannot constitute a valid territorial title to the islands. In Burkina Faso/Mali the International Court of Justice (hereafter ICJ) provided its “definitive”48 explanation on the evidentiary value of cartographic evidence:

“[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or

46. Dzurek, supra note 3, p. 11.
47. For a book-length treatment of these issues, see e.g. Monique Chemillier-Gendreau, Sovereignty over the Paracel and Spratly Islands, The Hague, Kluwer Law International, 2000.
unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts”. The obiter dictum has been approvingly cited in a host of contentious cases, and in individual opinions of judges. Some have read this passage as a “categorical” refutation of the concept of cartographic title. In any event, the small window the Court seems to leave open (“maps annexed to an official text of which they form an integral part”) refers to instruments such as treaties and is thus not applicable in casu.

Interpretation 2: the U-line is the boundary line of the EEZ generated from South China Sea islands

A number of Chinese scholars seem to support this theory, although their reasoning is somewhat dissimilar and often linked to the historic rights/waters thesis. Zhao Lihai notes:

 “[T]he nine-dotted line indicates clearly Chinese territory and sovereignty of the four islands in the South China Sea and confirm China’s maritime boundary of the South China Sea Islands that have been included in Chinese domain at least since the 15th century. All the islands and their adjacent waters within the boundary line should be under the jurisdiction and control of China.”

Jiao Yongke alleges:

“The water areas within China’s Southern Sea boundary line constitute water areas over which China has a historic proprietary title, they constitute China’s specific exclusive economic zone, or historic exclusive economic zone, hence it ought to have the same status as the EEZ under UNCLOS provisions.”

54. Riddell & Plant, supra note 48, p. 266.
Finally, Zou Keyuan believes that the PRC has asserted a historic claim but that this claim is “equivalent to the legal status of EEZ or continental shelf”.

This second explanation of the intermittent dashes is entirely contingent upon the first. In other words, it must be premised on Chinese sovereignty over the maritime features in the South China Sea. Proponents of this thesis see the U-line as a maritime boundary connecting the limits of the EEZ that originate from the islands. A variety of questions arise. A first thorny problem relates to the delimitation of such sea areas. After all, a coastal state cannot simply impose its delimitation upon others states in a unilateral fashion. The validity of such an action will depend upon compliance with international legal norms.

Furthermore, are the maritime features even able to generate maritime zones (irrespective of who the rightful owner is)? All will depend on whether the insular features qualify as islands in the juridical sense. The United Nations Convention on the Law of the Sea (hereafter 1982 Convention) contains a provision to this end, Art. 121:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

Land surfaces in the South China Sea will therefore generate the additional EEZ (and continental shelf) only if they meet the stringent requirements set out above. It so happens that the insular quality of a range of maritime features in South China Sea have been called into question. Oude Elferink cautiously finds that “at least some of the islands in the South China Sea have an EEZ and continental shelf. Other insular formations can almost certainly be considered to fall under the sway of Article 121(3) [rocks].” If it turns out that these land surfaces are not islands, (at least part of) the EEZ interpretation of the U-line is without legal merit. This imperative, but rather fact-laden and technical inquiry exceeds the scope of our study.

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57. Zou, supra note 24, p. 160.
Factors weakening the map’s probative force

According to a well-documented rule, the international adjudicator enjoys particularly wide discretion in determining the weight of evidentiary material. Bearing in mind this principled freedom, we have examined judicial precedents concerning maps in order to infer factors that are typically used by a judge or arbitrator to assess the probative force of cartographic evidence. The following factors demonstrate the inherent evidentiary shortcomings of the Chinese 9-dotted-line.

a) Cautious approach to cartographic evidence

As a preliminary observation, it should be pointed out that the general tendency is such that international courts and tribunals refrain from rendering rulings based merely on cartographic findings. Although accurate maps reflecting the intentions of the parties can indeed constitute “a solid and constant basis for discussion” the absence of which “is an inconvenience much to be regretted”, they will often play a secondary role of corroborating other evidence that points in the same direction. Returning to the Burkina Faso/Republic of Mali decision:

“[M]aps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. (...) except when the maps are in the category of a physical expression of the will of

61. See the amply body of case law and scholarly opinion cited in Gérard Niyungeko, La preuve devant les juridictions internationales, Brussels, Bruylant, 2005, pp. 322-335.
63. Although there is no doctrine of stare decisis in international law, international courts and tribunals will often cite case law. This is particularly true for the ICJ, which is highly self-referential and will only deviate from its past jurisprudence when substantial reasons are present. See Alan Boyle & Christine Chinkin, The Making of International Law, Oxford, Oxford University Press, 2007, pp. 293-299.
64. Frontier Dispute, supra note 49, p. 582, § 55: “(...) actual weight to be attributed to maps as evidence depends on a large number of considerations”; Qatar v. Bahrain, supra note 51, Dissenting Opinion of Judge Torres Bernárdez, p. 274, § 37: “The weight of maps as evidence depends on a range of considerations”.
65. Island of Palmas case (Netherlands v. USA.), 4 April 1928, 2 R.I.A.A. 829, pp. 852-853: “(...) only with the greatest caution can account be taken of maps in deciding a question of sovereignty (...)”, reaffirmed in Nicaragua v. Honduras, supra note 50, p. 58, § 214; Eritrea/Yemen Arbitration: Phase one: Territorial Sovereignty and Scope of the Dispute, 9 October 1998, 22 R.I.A.A. 209, p. 296, § 388: “The evidence is, as in all cases of maps, to be handled with great delicacy”.
67. Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan), 19 February 1968, Proposal of Mr. Nasrollah Entezam, 17 R.I.A.A. 1, p. 505: “Maps are only secondary evidence. Only such maps are primary evidence as are prepared by the surveyor on the spot by observation. Even they are primary evidence only of what a surveyor can himself observe”; Qatar v. Bahrain, supra note 51, Dissenting Opinion of Judge Torres Bernárdez, 16 March 2001, p. 274, § 37: “In general, the value as evidence attached to them by international courts and tribunals is corroborative or confirmatory of conclusions arrived at by other means unconnected with the maps, because the maps as such are not a legal title”; Island of Palmas, supra note 63, pp. 853-854: “Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of rights”; Id., p. 853: “If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be”. 

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the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or \textit{juris tantum} presumption such as to effect a reversal of the onus of proof.\textsuperscript{68}

This wary stance has been detected and documented in authoritative scholarly opinion,\textsuperscript{69} and in certain instances has been met with considerable approval.\textsuperscript{70}

\textbf{b) Incompatible maps}

When cartographic materials contradict one another, they lose credibility. As stated by the ICJ in the \textit{Kasikili/Sedudu} case:

“(…) in the light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case.”\textsuperscript{71}

Maps showing the nine-dotted-line paint a different picture of the South China Sea than cartographic evidence and other materials of the regional littoral states. It would be hard to gain an accurate understanding of maritime and political boundaries based solely on a juxtaposition of these maps. Additionally, portrayals of the U-line are not consistent. As mentioned above, the U-line in PRC cartography prior to 1953 consists of 11 dashes,
whereas later versions of the dotted line consist only of 9 segments. No official reasons have been given for the mysterious removal of two dashes.

c) Incoherent/ambiguous cartographic symbols

Ambiguous cartography has surfaced in arbitral proceedings in the past. In the *Eritrea/Yemen Arbitration*, Eritrea submitted maps depicting dotted lines in support of their claims. The Tribunal made short shrift of the party’s evidentiary approach:

“In some instances the Tribunal cannot agree with the characterization of the maps sought by the Party introducing it. Moreover, the Tribunal is unwilling, without specific direction from the map itself, to attribute meaning to dotted lines rather than to colouration or to labeling. The conclusions on this basis urged by Eritrea in relation to a number of its maps are not accepted”.

Naturally, the analogy with the U-line, the lack of a map legend, and cryptic wording contained in the PRC’s letter to the UN Secretary-General is readily made. The perplexity is all the greater because the depiction of the 9-dotted-line deviates from international cartographic standards developed by the International Hydrographic Organization precisely for the purpose of clarity.

d) Unclear intent

As rightly pointed out by Judge Oda in his separate opinion in *Kasikili/Sedudu*:

“(…) a claim to territory can only be made with the clear indication of a government’s intention, which may be reflected in maps. A map on its own, with no other supporting evidence, cannot justify a political claim” (emphasis added). In *casu*, the criterion of discernible intent on the part of the PRC government is not adequately fulfilled. The variety of interpretations of the U-line offered by legal scholars as well as the PRC’s ambiguous note verbale *de dato* 7 May 2009 bear witness to this conclusion. Besides confusing sentences structures, terms employed in the note verbale, namely “relevant waters” and “adjacent waters”, are particularly puzzling as they do not appear anywhere in the 1982 Convention. The ostensibly deliberate vagueness is exacerbated for the PRC has yet (*anno* 2010) to pass legislation giving the U-line any effect in its domestic legal order.

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73. The dashes used to draw the Chinese U-line do not match chart specifications developed by the International Hydrographic Organization for indicating international maritime boundaries, the territorial sea, the contiguous zone, the EEZ, the continental shelf, fishery zones etc. See International Hydrographic Organization, *Regulations of the IHO for International (INT) Charts and Chart Specifications of the IHO*, Monaco, International Hydrographic Bureau, 4th ed., 2010, B-440, C-407 (International Boundaries and National Limits) available at <www. iho-ohi.net/iho_pubs/standard/S-4/S4_v4.000_Sep10.pdf>. This type of argument was advanced by Ukraine against Romania in the Black Sea case. See Counter-memorial of Ukraine, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, 19 May 2006, 5.141-5.149, pp. 123-125.

74. *Kasikili/Sedudu Island*, supra note 50, Separate Opinion of Judge Oda, pp. 1133-1134, § 40. See also: *Frontier Dispute*, supra note 49, p. 583, § 57: “The Chamber now turns to the maps produced in this case. Not a single map available to the Chamber can reliably be said to reflect the intentions of the colonial administration expressed in the relevant texts concerning the disputed frontier”.

75. Smith, supra note 45, p. 224.
Dotted Lines in the South China Sea: Fishing for (Legal) Clarity

Even if one could unearth the PRC’s intention behind the map, the legal implications thereof should not be overestimated. Turning back to Judge Oda’s aforementioned writings:

“A map produced by a relevant government body may sometimes indicate the government’s position concerning the territoriality or sovereignty of a particular area or island. However, that fact alone is not determinative of the legal status of the area or island in question. The boundary line on such maps may be interpreted as representing the maximum claim of the country concerned, but does not necessarily justify that claim.”

**e) Lack of neutrality**

When a map is drawn up by an impartial expert its probative value tends to increase. *A contrario*, cartographic materials produced at the behest of one of the parties in a dispute will be viewed with more suspicion. The arbitrators in the *Beagle Channel Arbitration* commented along these lines:

“While maps coming from sources other than those of the Parties are not on that account to be regarded as necessarily more correct or more objective, they have, *prima facie*, an independent status which can give them great value unless they are mere reproductions of—or based on originals derived from—maps produced by one of the Parties,—or else are being published in the country concerned by, or on behalf, or at the request of a Party, or are obviously politically motivated. But where their independent status is not open to doubt on one or other of these grounds, they are significant relative to a given territorial settlement where they reveal the existence of a general understanding in a certain sense, as to what that settlement is, or, where they conflict, the lack of any such general understanding.”

The lack of neutrality is patently evident with respect to the 9-dotted-line. As discussed in part II.a), the history of the U-line can be traced back to an internal commission established by the ROC government to update the Chinese map and reassert its position. Such a unilaterally-appointed and staffed governmental body can hardly be deemed impartial vis-à-vis other interested states in the South China Sea region. It should not be forgotten that conscientious map-makers can be used for deceitful purposes:

“[A] map-maker (…) may be employed to reveal what a particular State such as his own asserts to be the full measure of its territorial domain, regardless of the propriety of the assertion and without intimation that the portrayal depicts the scope of a claim rather than the position of an accepted boundary. Through subsequent copying and reproduction by unsuspecting cartographers not only are these erroneous accounts perpetuated but the very fact of repetition tends to endow them with legal sanction by producing a large number of maps unanimous in their testimony”.

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77. Beagle Channel Arbitration (Argentina v. Chile), 18 February 1977, 21 R.I.A.A. 53, p. 167, § 142. See also *Frontier Dispute, supra* note 49, p. 583, § 56: “Other considerations which determine the weight of maps as evidence relate to the neutrality of their sources towards the dispute in question and the parties to that dispute”.
78. A.O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester, Manchester University Press, 1967, p. 224. See also Hyde, *supra* note 19, p. 315: “(…) the aggressive territorial aspirations of a state may, in the course of a span of years, be reflected in a progressive series of maps that grimly depict the actual and gradual advance; and the later portrayals may thus differ sharply from the earlier ones, even though no treaty has in fact extended limits or modified a frontier”.

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f) Technical imprecision

In his treatment of the evidentiary value of maps, De Visscher included the following criteria: “(…) les garanties d’exactitude géographique intrinsèques de la carte (…)”, sa précision au regard des points contestés (…)”.79 According to Brownlie, “a map has probative value proportionate to its technical qualities”.80

Case law also points to the requirement of technical precision in maps.81 In the Island of Palmas case, sole arbitrator Max Huber wrote that:

“[t]he first condition required of maps that are to serve as evidence on points of law is their geographical accuracy.”82

The ICJ opined that:

“The actual weight to be attributed to maps as evidence depends on a range of considerations. Some of these relate to the technical reliability of the maps. This has considerably increased, owing particularly to the progress achieved by aerial and satellite photography since the 1950s. But the only result is a more faithful rendering of nature by the map, and an increasingly accurate match between the two. Information derived from human intervention, such as the names of places and of geographical features (the toponymy) and the depiction of frontiers and other political boundaries, does not thereby become more reliable. Of course, the reliability of the toponymic information has also increased, although to a lesser degree, owing to verification on the ground; but in the opinion of cartographers, errors are still common in the representation of frontiers, especially when these are shown in border areas to which access is difficult”83

In light of these views, the advent of modern technology could increase judges’ recourse to map evidence. An excellent case in point is the ICJ’s 2004 advisory opinion on the Israeli Wall in which it relied (in part) on an electronic map posted on the Israeli Ministry of Defence website to pinpoint the current and future route of the wall in Palestinian territories.84 Conversely, it does not seem that the Chinese map can meet stringent technical standards. Although the Chinese interrupted lines generally follow the 200 meter isobath, they have so far never been precisely demarcated, thus lacking accurate geographic coordinates.85 In addition, there seems to be some slight inconsistency among PRC maritime cartographic materials: the endpoints of the 9

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81. Cukwurah, supra note 78, pp. 217-220.
82. Island of Palmas, supra note 63, p. 853. Cited in Dubai/Sharjah Border Arbitration, supra note 71, p. 630, § 168. See also Delimitation between Eritrea and Ethiopia, supra note 71, p. 1075, § 3.19: “The Commission is also aware that maps, however informative they may appear to be, are not necessarily accurate or objective representations of the realities on the ground”.
83. Frontier Dispute, supra note 49, pp. 582-583, § 55. See also Beagle Channel, supra note 77, p. 174, § 154: “The Court is obliged to conclude therefore that the Pelliza map is of too uncertain a character to have the requisite probative value (…)”.
85. Dzurek, supra note 3, p. 12; Zou, supra note 5, p. 51.
different segments that make up the line vary (variations have been found ranging from 1 to 5 nm).  

An additional element contributing to the inaccuracy of the Chinese map is its excessively small scale. The ICJ has lamented maps drawn to an insufficient scale. A prime illustration can be found in *Land, Island and Maritime Frontier Dispute*:

“Honduras has produced a second map, of 1804, showing the location of the ecclesiastical parishes of the province of San Miguel in the Archdiocese of Guatemala. The scale of this map is however insufficient to make it possible to determine whether the course of the last section of the river Goascoran is that asserted by El Salvador, or that asserted by Honduras”.

Similar problems have occurred before arbitral tribunals. For instance, the *Eritrea-Ethiopia Boundary Commission* held:

“Moreover, much of the map evidence is on so small a scale, or so devoid of detail, that it can only be treated as ambiguous in this respect”.

**Non-opposability of the map vis-à-vis other regional states**

**a) Applicable standard**

Even if one accepts that the 9-dotted-line is an erroneous portrayal of reality, that does not mean that it can be cast aside forthwith. This point was elucidated in the *Beagle Channel*:

“(…) the importance of a map might not lie in the map itself, which theoretically might even be inaccurate, but in the attitude towards it manifested—or action in respect of it taken—by the Party concerned or its official representatives”.

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86. Dzurek, *supra* note 3, p. 11.
87. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, 11 September 1992, p. 550, § 315. See also: *Kasikili/Sedudu Island, supra* note 50, Dissenting Opinion of Vice-President Weeramantry, p. 1176, § 73: “Maps can of course carry varying degrees of weight depending on their authorship and the circumstances in which they were made. Moreover, the scale of the maps is often so small as not to show clearly the particular area which is the subject of the dispute, while other maps which are sufficiently large can indicate the area of dispute in sufficient detail”.
88. *Delimitation between Eritrea and Ethiopia, supra* note 71, p. 1089, § 4.67. Earlier on in that case (p. 1076, § 3.21), the Commission also states: “A map (…) on so small a scale that its import becomes a matter for speculation rather than precise observation, is unlikely to have great legal or evidentiary value”. See also: *Case concerning the Location of Boundary Markers in Taba (Egypt/Israel)*, 29 September 1988, 20 R.I.A.A. 1, p. 48, § 184: “The Tribunal does not consider these map-based indications to be conclusive since the scale of the map (1:100,000) is too small to demonstrate a location on the ground as exactly as required in these instances where the distances between disputed pillar locations are sometimes only of a few metres”; *Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy (Argentina/Chile) (“Laguna del Desierto”), 113 I.L.R. 1*, 13 October 1995, p. 224: “In the first place, some observations are called for as regard the maps of scale 1: 10.000 submitted by Chile. These maps drawn to a scale considerably greater than that of the Map of the Mixed Boundary Commission or of those attached to the Chilean Submission of 31 January 1995, claim to provide a more accurate representation of the true topography of the ground”.
89. *Beagle Channel, supra* note 77, p. 164, § 137.
The judges in *Temple of Preah Vihear* had a more pronounced take, sending a clear warning signal as to the potential effects of inadvertence in the face of cartographic assertiveness:

“(…) it is clear that circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*”.90

Another instance of the linkage between maps and acquiescence was restated more recently by the *Eritrea-Ethiopia Boundary Commission*:

“A map *per se* may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behaviour, be of great legal significance”.91

Of course, the fact patterns underlying the above-mentioned cases are wholly different from that with which we are faced, making it debatable whether the precedents could even apply here. *In casu* we are dealing with a purported maritime boundary, the establishment of which is, in the words of the ICJ, “a matter of grave importance and agreement is not easily to be presumed”.92 Furthermore, as rightly observed by Strupp:

“(T)his strange U-shape claim was so abnormal and so exorbitantly outside reality during the decades 30 to 60 that it is not conceivable that by way of “acquiescence with regard to map claims” a (tacit) recognition by the foreign states community of those “extremely irregular” pretensions, by application of rule *qui tacet consentire videtur si loqui debuisset ac potuisset* or else, could seriously come under examination”.93

“In the utterly eccentric ‘moon claim’-like circumstances of the South China Sea [South China Sea] ‘U-shaped line’ evidently exists no rational basis at all for such enormously high degree of ‘hyper-sensitivity’ on behalf of states confronted with adverse map claims in terms of ‘acquiescence’”.94

It would however be prudent to adopt an intermediate approach. Having examined a large body of state practice, Blum, in his influential work on historic titles, comes to the following conclusion:

“[R]ecent instances of protests lodged against ‘map claims’ seem to indicate that States do, in fact, ‘keep a vigilant watch over the maps published by the civilized nations’ (…). On the whole, it seems to emerge that States will be imputed with knowledge of each other’s domestic legislative activities and other acts done under their authority, and that the plea

91. *Delimitation between Eritrea and Ethiopia, supra* note 71, pp. 1075-1076, § 3.22. The Commission similarly observes (p. 1076, § 3.21): “But a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere, and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences”.
94. *Id.*, p. 17, footnote 98.
of ignorance will be accepted only in the most exceptional circumstances. States desirous of reserving their rights will therefore be well advised to follow with a substantial amount of self-interested awareness the official acts of other States and to raise an objection to them – through the legitimate means recognized by international law – should they feel that their rights have been affected, or are likely to be affected, by such acts\(^5\).

\[b)\] **Protest/lack of acquiescence**

Assuming that the danger of implied acquiescence looms large, it must be demonstrated that coastal states have expressed their disapproval of the Chinese U-line policy and its underlying contentions. Some Chinese scholars have alleged that the international community has not voiced its dissent so as to prevent the solidification of Chinese pretensions in the South China Sea:

“Upon the declaration of the nine-dotted line, the international community at no time expressed dissent. None of the adjacent states presented a diplomatic protest. This silence in the face of a public declaration may be said to amount to acquiescence, and it can be asserted that the dotted line has been recognized for half a century. In recent years, however, several Southeast Asian countries, which have been involved in sovereignty disputes of the South China Sea, have questioned the juridical status of the nine-dotted line”\(^6\).

Zhao Guocai maintains: “Since the declaration of the 9-discontinued-and-dotted line, the international society at that time had not put forward any dissent. Neither had the adjacent States raised any diplomatic protests on the 9-dotted line. These amounted to acquiescence”\(^7\).

Taking Vietnam as a case study, we can observe that these statements are unconvincing. An illustration of this point is Vietnam's objection to China’s pretensions by stating that it would “not recognize any so-called ‘historical interests’ which are not consistent with international law and violate the sovereignty and sovereign rights of Vietnam and Vietnam's legitimate interests in its maritime zones and continental shelf in the East Sea”\(^8\). More recently the Vietnamese government issued the following declaration in response to the PRC’s 2009 note verbale:

“The Hoang Sa (Paracels) and Truong Sa (Spratlys) archipelagoes are part of Viet Nam’s territory. Viet Nam has indisputable sovereignty over these archipelagoes. China’s claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes Verbales CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void”\(^9\).

Such conduct must comply with the international legal criteria necessary to imbue acts of protest with legal effect such that the U-line cannot be used against the protesting

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\(^6\) Li & Li, *supra* note 4, p. 290.

\(^7\) Zhao, *supra* note 25, p. 22, translated in Li & Li, *supra* note 4, p. 292.


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state. The temporal criterion\(^\text{100}\) has been met in that the aforementioned examples quickly followed the Chinese acts it disapproved of. The requirement of clear intent has also been fulfilled in that the Vietnamese declarations are unequivocally aimed at preventing the coming into being of new Chinese legal entitlements. Another criterion also exists, namely that protest must be consistent and uninterrupted.\(^\text{101}\) Nevertheless, as concerns the PRC, it seems unfeasible to apply this test in light of its ambiguous position vis-à-vis the map and what it truly signifies. After all, it is only possible to act by way of protest once the opposing state has made an official and intelligible claim. We have dealt in detail with the enigmatic character of the 9-dotted-line and the repercussions of ambiguous intent on the Chinese side. Thus, it is only possible to object to visible and comprehensible Chinese U-line assertions in the rare instances that they occur (e.g. the 2009 PRC letter to the UN Secretary-General).

### Conclusion

In this short contribution we have attempted to uncover some of the legal uncertainties shrouding the dashes on the Chinese map of the South China Sea. Our analysis has brought us to the conclusion that as a matter of international law, the U-line lacks a solid basis, and thus poses problems if maintained as part and parcel of PRC as well as ROC official policy. Adherence to the nine-dotted-line is also out of step with the current management regime, which includes workshops, confidence-building measures and cooperation through joint development.\(^\text{102}\) Fortunately, the PRC, the ROC and other regional actors have made use of these multilateral mechanisms and continue to do so in a fruitful manner. Our hope is that claimant states abandon unilateral cartographic assertions and focus their energies on mutually beneficial outcomes as regards the South China Sea.

\(^{100}\) Land, Island and Maritime Frontier Dispute, supra note 87, p. 577, § 364.


FUNCTIONAL COOPERATION IN THE SOUTH CHINA SEA: EXPERIENCES AND LESSONS
Abstract

The clashing interests of the claimants to jurisdiction over the land features in and the waters of the South China Sea make it highly unlikely for their conflicting claims to be resolved either through negotiations or through adjudication by an international body. However, tensions, instability, volatility and the likelihood of conflict could be reduced if each claimant were to bring its position closer to compliance with the United Nations Convention on the Law of the Sea and if all of them were to arrive at further agreement on each of the elements of the Declaration on the Conduct of Parties in the South China Sea that the foreign ministers of the Association of Southeast Asian Nations (ASEAN) and China’s special envoy issued in November 2002. It would also help if an understanding could be reached between major naval powers and coastal states on what could and could not be done by foreign states and their vessels in the exclusive economic zones of coastal states. So would the general maintenance and improvement of the overall relations between China and ASEAN and its members and between China and the US.

Introduction

The subject of this paper is “Cooperation for Security and Development in the South China Sea”. We all want security. We all want development. Particularly in the South China Sea, where conflicting claims to land features and water areas abound, which much of world trade traverses, and which is considered as strategic by several capitals, nations, especially the claimant and littoral states, need to cooperate with one another in order to achieve both security and development. In that area, the disputes over claims to land features and seas, the uncertain and ambiguous definitions of conflicting claims to vast expanses of sea, and the potential of the ocean and the seabed to yield immense amounts
of food and minerals needed by the region’s enormous population bear in them potential sources of instability, mutual suspicion and even hostile confrontation.

The conflicting claims to sovereign jurisdiction over land features are unlikely to be definitively resolved anytime soon. The multiple, as opposed to bilateral, nature of the claims to land features and their seas make such a resolution infinitely more complex – and unlikely – than the territorial disputes normally submitted, with the consent of both parties, to bodies regarded as neutral, like the International Court of Justice, for adjudication. Indeed, China takes the position that it has “indisputable sovereignty” over the South China Sea, although the extent of its claims over the waters remains unclear. It is thus extremely unlikely for China to agree to submit any dispute over claims to sovereignty to any international judicial body.

**Clashing Interests**

Perhaps more fundamentally, the claimants – and not only the claimants but others as well – have strategic interests in the South China Sea. Many of those interests are in conflict, even as most of them are deemed “vital” or “strategic” or “core”. In this light, and as is to be expected, not all claimants or major powers have demonstrated any willingness to compromise on those interests.

There are the claimants, which consider their respective claims to have a strategic character and thus cannot be compromised. There are the littoral states, most of them members of the Association of Southeast Asian Nations (ASEAN). Some of the littoral states are claimants, others not, but all, including ASEAN as a group, have a vital interest in the peace and stability of the region. There are those nations that depend vitally on freedom of navigation on and overflight over the South China Sea for the conduct of their international trade. Among them are East Asian countries – Japan, Korea, Taiwan, Australia, New Zealand, Hong Kong and the Chinese mainland, as well as most Southeast Asian countries. Also included are those that trade heavily with this part of the world, among them the oil-exporting countries of the Middle East and elsewhere, India, several European countries, and the US.

All have a stake in keeping the sea lines of communication and flight paths open and free. All have an interest in the peace and stability of the region as a whole. Nevertheless, the strategic and security interests of the claimants and others are in apparently irreconcilable conflict. China has an interest in preventing pressure from being exerted from its southeast, that is, from the South China Sea, and in warding off the potential for the “south sea” being used to encircle or contain it. At the same time, it has a growing interest in freedom of navigation and overflight as a principle for the sake of its immense and rapidly expanding foreign trade and need for access to raw and other materials from abroad. Taipei cannot be seen as being softer than Beijing in defending China’s territorial integrity. At the same time, Taiwan, too, has a clear interest in freedom of navigation and overflight. The U.S. feels the need to know what is going on in China, particularly in terms of the latter’s military development, while having the freedom to ship or fly its traded goods across the South China Sea and to maintain a military presence in the area. Japan has vital commercial and security interests in peace and stability and in freedom of navigation and overflight in the South China Sea.
For Kuala Lumpur, the South China Sea not only divides West and East Malaysia from each other; it also links the two wings of the country together. It invokes national security and geographic proximity as part of the rationale for its claims. Brunei Darussalam projects its continental shelf, exclusive economic zone and a so-called fisheries zone to the maximum breadth allowed by the United Nations Convention on the Law of the Sea (UNCLOS), making sure that it has access to the resources said to abound in that part of the ocean and its seabed. The Philippines feels itself to be most vulnerable to attack from its western flank and thus seeks to push its western boundary as far into the South China Sea as possible. Chronically suffering from food and energy shortages, Manila, too, seems to be attracted to the potential riches of the South China Sea and its seabed. If it did not maintain a foothold on the South China Sea, Vietnam would find itself almost completely surrounded by China, a circumstance that Hanoi could not tolerate.

Because of the strategic nature of the various claims to some or all of the land features and waters of the South China Sea, and therefore the apparently irreconcilable character of the claimants’ positions, it is extremely unlikely that the conflicts between and among claims can be resolved anytime soon, if at all. It is also most unlikely, although not absolutely impossible, for the parties to these disputes to agree to their adjudication by international bodies, such an agreement being a pre-condition for any international body even to consider a dispute. It is highly improbable that the parties will be willing to make the necessary compromises in order to negotiate a settlement acceptable to all sides. At the same time, the UNCLOS leaves enough room for uncertainty and ambiguity for a settlement of the conflicting maritime claims to be similarly unlikely and improbable.

In this light, are China, the other claimants, ASEAN and its members, and others doomed to live indefinitely with a South China Sea that is a flashpoint for conflict or, at least, a source of instability and mutual suspicion? If not, what can be done? What can be done to mitigate the potential for conflict, overcome mutual suspicions to some extent, reduce volatility and instability, encourage cooperation, ensure untrammeled trade, and thus promote security and development in the South China Sea area? This paper suggests that these relatively modest aims be pursued pending the resolution of the disputes over sovereignty and jurisdiction. Indeed, the pursuit of these goals would make somewhat easier the difficult – and currently unlikely – task of resolving those disputes, as well as less dangerous to all concerned.

**Complying with UNCLOS**

The UNCLOS does not provide for the settlement of conflicting jurisdictional claims. These have to be resolved through negotiations between or among the claimants or through international adjudication. As noted above, neither conclusive negotiation nor a resort to international adjudication is likely anytime soon, if ever.

However, the claimants to maritime jurisdiction in the South China Sea can bring those claims closer to the provisions of the UNCLOS. By basing those claims on UNCLOS provisions, the claimants, all of which are parties to the convention, would bring a greater measure of clarity to their respective claims. They would be maintaining their claims on the basis of the rule of international law. They would be approaching the complicated situation in the South China Sea on the strength of common assumptions.
and within the same sets of parameters and thus render the situation somewhat less complex. Since early 2009, Brunei Darussalam, Malaysia, the Philippines and Vietnam have been taking measures to make their respective claims more consistent with UNCLOS requirements.

In December 1979, the Malaysian government published a map showing its claims to waters and continental shelf in the South China Sea. It included parts of the areas claimed by China, Vietnam and the Philippines. Its projected continental shelf and exclusive economic zone came to overlap with the continental shelf and exclusive fishing zone that Brunei Darussalam claimed after it acquired its independence in 1984.

Brunei Darussalam and Malaysia conducted negotiations, at least since 2003, on their overlapping claims. The dispute seems to have been resolved during the visit of Malaysia’s then Prime Minister, Abdullah Ahmad Badawi, to Brunei Darussalam in March 2009. At the end of that visit, the Malaysian leader and Brunei’s ruler, Sultan Hassanal Bolkiah, issued a joint press statement that said:

Both leaders noted the agreement of their respective governments on the key elements contained in the Exchange of Letters, which included the final delimitation of maritime boundaries between Brunei Darussalam and Malaysia, the establishment of Commercial Arrangement Area (CAA) in oil and gas, the modalities for the final demarcation of the land boundary between Brunei Darussalam and Malaysia and unsuspendable rights of maritime access for nationals and residents of Malaysia across Brunei’s maritime zones en route to and from their destination in Sarawak, Malaysia provided that Brunei’s laws and regulations are observed.

The letters said to have been exchanged had not been made public. However, after he had stepped down from the country’s leadership, Abdullah Badawi stated on the Malaysian foreign ministry’s website:

Regarding the maritime area, Malaysia and Brunei also agreed to establish a final and permanent sea boundary. This agreement serves to settle certain overlapping claims which existed in the past which included the area of the concession blocks known before as Block L and Block M. Sovereign rights to the resources in this area now belongs to Brunei. However for this area, the agreement includes a commercial arrangement under which Malaysia will be allowed to participate on a commercial basis to jointly develop the oil and gas resources in this area for a period of 40 years. The financial and operational modalities for giving effect to this arrangement will be further discussed by the two sides. This means that in so far as the oil and gas resources are concerned, the agreement is not a loss for Malaysia.¹

Malaysia’s foreign ministry issued on 3 May 2010 a statement on the March 2009 agreement, which read in part:

The key elements are the final delimitation of maritime boundaries between Malaysia and Brunei Darussalam, the establishment of a Commercial Arrangement Area (CAA) for oil and gas, the modalities for the final demarcation of the land boundary between Malaysia and Brunei Darussalam, and unsuspendable rights of maritime access for nationals and residents of Malaysia across Brunei Darussalam’s maritime zones.

With regard to the maritime areas, the Exchange of Letters established the final

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¹ Statement by Tun Abdullah Ahmad Badawi on the Exchange of Letters Between Malaysia and Brunei Darussalam, Dated 16 March 2009 (http://www.kln.gov.my/web/guest/).
Cooperation for Regional Security and Development in the South China Sea

delimitation of territorial sea, continental shelf and Exclusive Economic Zone of both States. Malaysia's oil concession Blocks L and M which coincided with Brunei Darussalam's Blocks J and K are recognised under the Exchange of Letters as being situated within Brunei Darussalam's maritime areas, over which Brunei Darussalam is entitled to exercise sovereign rights under the relevant provisions of the 1982 UNCLOS. The establishment of the CAA incorporating these Blocks provides for a sharing of revenues from the exploitation of oil and gas in the CAA between the two States.\(^2\)

In March 2009, President Gloria Macapagal-Arroyo signed into law a bill passed by the Philippine Congress revising the baselines of the Philippine archipelago. Significantly, the new law, which emanated from the Department of Foreign Affairs through the Philippine Senate, also declared a “regime of islands” for the land features in the Spratlys area that the Philippines claims and for Scarborough Shoal and the land features related to it, which are also in the South China Sea but outside the Spratlys group. Predictably, Beijing and Hanoi protested the legislation, which continued to lay claim to land features that both of them also claimed. However, the new law substantially reduced the maritime expanse claimed by the Philippines. Previously, Manila had laid claim to an expanse of water amounting to more than 70,000 square nautical miles. The enactment of the new law was an evident attempt to make the country’s maritime claims in the disputed area more consistent with the provisions of the UNCLOS. The new law specifically cites Article 121 of the UNCLOS as the basis for its declaration of a “regime of islands” for the land features in the South China Sea that it claimed.\(^3\)

According to Article 121 of the UNCLOS (Regime of Islands), an “island is a naturally formed area of land, surrounded by water, which is above water at high tide”. An island thus defined can generate a continental shelf and an exclusive economic zone of as wide as 200 nautical miles from the country’s baselines, as well as a territorial sea of up to a breadth of 12 miles and a contiguous zone as broad as 24 miles from the baselines. On the other hand, according to the same article, rocks “which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”.\(^4\)

At the same time, the Philippines has preserved for itself a degree of ambiguity by not indicating which of the land features that it claims are islands as defined in Article 121, which can generate continental shelves and exclusive economic zones, and which are rocks, which cannot.

On 6 May 2009, Malaysia and Vietnam sent a “joint submission” to the UN Commission on the Limits of the Continental Shelf as required by the UNCLOS. In a commentary for the S. Rajaratnam School of International Studies at the Nanyang Technological University in Singapore, Robert Beckman, Director of the Centre for International Law and associate professor of law at the National University of Singapore, points out:

The joint submission of Malaysia and Vietnam suggests that they have taken the position that sovereign rights to the resources of the South China Sea should be determined by principles governing the continental shelf as measured from the mainland coast. By not

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3. Document in the author’s possession.
measuring their continental shelves or EEZs from any of the islands which they claim in the South China Sea, they have in effect taken the position that no islands in the South China Sea should be entitled to more than a 12nm territorial sea – the maximum permitted by UNCLOS.5

The next day, on 7 May 2009, China protested the Malaysia-Vietnam submission, asserting its “indisputable sovereignty over the islands in the South China Sea and the adjacent waters”. A map showing China’s nine interrupted lines around the South China Sea was attached to the protest note.6 The Chinese map bearing those lines was first issued by the Nationalist regime in China in 1947. With no coordinates to pinpoint their exact locations, the interrupted lines encompass the entire South China Sea without, even after the UNCLOS came into force with respect to China, indicating the nature of the waters being claimed. Hanoi immediately rejected China’s assertion and reiterated its own claim to the Paracels and the Spratlys.7 In a separate note, Malaysia then stressed that its submission with Vietnam had been done “without prejudice” to the positions of other states that had overlapping claims in the South China Sea.8

(On 8 July 2010, Indonesia, which does not claim any of the land features or waters in dispute in the South China Sea, addressed a third-person note to the UN Secretary-General, pointing out that the Chinese map bearing the nine bars that had been submitted to the UN Commission “clearly lacks international legal basis”, a charge that Indonesia had been making for years.)

Thus, the Southeast Asian claimants have moved somewhat closer to making their respective claims consistent with the pertinent UNCLOS provisions. China, on the other hand, has maintained the official character of the nine bars without defining the nature of the waters that they encompass. China has not gone beyond indicating that those waters are “adjacent” or “relevant” to the land features of the South China Sea, over which it has “indisputable sovereignty”. Like the other claimants, Beijing has also refrained from specifying which of those land features are islands in the UNCLOS sense and which are rocks. In any case, UNCLOS provisions cannot possibly be consistent with claims to maritime areas as expansive as the one encompassed by the nine bars.

In a 16 September 2010 “commentary” for the Nanyang Technological University’s S. Rajaratnam School of International Studies, published in the Straits Times of Singapore on 25 September, Beckman suggests ten ways in which China could “clarify” its claims and, by implication, bring those claims closer to conformity with the UNCLOS. These ways include claiming sovereignty over all the islands within the U-shaped nine bars on Chinese maps and an exclusive economic zone of 200 nautical miles only from such of those islands as can sustain human habitation or economic life, as Article 121 of the UNCLOS defines them. In the context of these claims, China could assure all states of

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their right in the Chinese EEZ, in accordance with the UNCLOS, to freedom of navigation and overflight and to lay submarine cables and pipelines. China could explicitly point out that overlapping sovereignty claims to the islands or rights to the EEZ cannot be referred to any international tribunal without the consent of China or of other claimants. Much less can the UN Commission on the Limits of the Continental Shelf act on submissions involving such overlaps. Because of these, and because of what Beckman calls “the highly sensitive nature of the sovereignty claims”, a resolution of the overlapping claims to sovereignty over the South China Sea islands or to EEZs in “the foreseeable future” is highly unlikely.10

In my view, in addition to China moving its maritime claim in the South China Sea towards compliance with the provisions of the UNCLOS, the next step in the process would be for each claimant to indicate which of the land features that it claims are islands and which are mere rocks.

While the Philippines, in invoking Article 121 in its new baselines law, seems to have come closest to making, albeit by implication, the distinction between islands and rocks, a distinction that is crucial to claims to maritime jurisdiction, neither the Philippines nor any of the other claimants has done so in a clear, unambiguous and concrete way with specific reference to its claims. None of them has designated which of the land features that it claims are islands in the UNCLOS sense and which are rocks as defined by Article 121. A measure of ambiguity may be good as a negotiating tactic, but a bit more clarity, simultaneously arrived at, might help diminish uncertainty in the South China Sea and, therefore, the volatility of the situation there.

At the same time, irony and even cynicism can arise from the U. S.’ repeated invocation of international law and, specifically, the UNCLOS, when Washington has not ratified the 1982 convention and thus is still not a party to it. American officials have affirmed that the administration intends to submit the treaty to the U. S. Senate for its “advice and consent”, a necessary condition for the U. S. to become party to that international agreement. However, it has not done so to this day. Washington would have a better right to invoke the UNCLOS if the U. S. were a party to it.

Complying with the ASEAN-China Declaration on Conduct

Another important step would be for ASEAN and China to flesh out their common commitments in the Declaration on the Conduct of Parties in the South China Sea that the ten ASEAN foreign ministers and China’s special envoy, Wang Yi, signed in Phnom Penh in November 200211. They did so after much arduous negotiation not only between China and ASEAN but among the Southeast Asian claimants as well.

The Declaration states, “The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law,

including the 1982 UN Convention on the Law of the Sea.” The mention of “sovereign states directly concerned”, evidently insisted upon by China, could be construed as keeping out the direct involvement of the US, Japan or any other non-claimant, including ASEAN as a group, in any negotiations on the South China Sea. The stress on “sovereign states” is manifestly a reference to Beijing’s insistence on the non-participation of Taiwan in those negotiations.

The Declaration commits the signatories to “the freedom of navigation in and overflight above the South China Sea” and to the exercise of “self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including… refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features”. Evidently with the Mischief Reef events in mind, the element of “no new occupations” was a fundamental part of the Philippines’ position.

In several places, the Declaration calls for respect for “the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea“. It also provides for confidence-building measures and cooperative activities in several specified areas.

Thus, the Declaration pledges the claimants to the peaceful settlement of their territorial and jurisdictional disputes through consultations and negotiations without the participation of Taiwan or of non-claimants; self-restraint; no new occupations; the freedom of navigation and overflight; respect for international law, including the 1982 UNCLOS; and confidence-building measures and cooperative activities.

In 1992, in Manila, the then-six ASEAN foreign ministers had adopted the ASEAN Declaration on the South China Sea, which contained the principles of the peaceful settlement of disputes “pertaining to the South China Sea”, self-restraint, and cooperation on certain specified transnational problems. The then Chinese foreign minister, Qian Qichen, who was in Manila, together with his Russian counterpart, as “guest” of the ASEAN chairman, was invited to sign the Declaration. Presumably after consulting Beijing, Qian declined to commit China formally to the Declaration on the ground that Beijing had not been involved in its drafting. However, Qian affirmed that China adhered to the Declaration’s principles.²

Since the issuance of the 2002 Declaration on the Conduct of Parties, no serious violence has taken place in the assertion of sovereignty or jurisdictional claims to land features or waters in the South China Sea; neither have consultations or negotiations on those claims. There apparently have been no new occupations in the Spratlys area, probably because there are no longer any uninhabited islands left to occupy. The Declaration commits the parties to the freedom of navigation and overflight; yet, by affirming its “indisputable sovereignty” over undefined expanses of water in the South China Sea, China seems to reserve to itself the right to curtail that freedom in case of an alleged violation of its sovereignty. The Southeast Asian claimants seem to be moving towards the alignment of their maritime claims with UNCLOS requirements, although not totally and unambiguously so, and China leaves undefined the nature of the waters encompassed by the nine bars on its maps and the meaning and the coordinates of those lines. The conduct of confidence-building measures and cooperative activities in the South China Sea has been sporadic.

Each of the claimants ought to indicate at some point which of the land features in the South China Sea it regards as islands in the UNCLOS sense and which are rocks. Apart from this, ASEAN and China need to resolve certain issues to which the Declaration on the Conduct of Parties gives rise. One of them is the question of whether the call in the Declaration for “self-restraint” and its prohibition of new occupations, of “inhabiting on the presently uninhabited” (sic) land features in the South China Sea, would include significant new construction or the fortification of or improvement on facilities already installed in occupied territory. As it is, all claimants that maintain a presence in the disputed land features – except the Philippines, apparently not for want of intention but for lack of resources – have beefed up their facilities on the land features that they occupy.

Another question: would acts of intimidation and shows of military force violate the Declaration’s call for self-restraint? Still another: how can assurances of freedom of navigation on and overflight above the South China Sea be made iron-clad to the satisfaction of those that trade extensively across that body of water? How can China’s claim to “indisputable sovereignty” over an undetermined expanse of the South China Sea be reconciled with such iron-clad guarantees? Yet another question: why do not the claimants undertake more regularly confidence-building measures and other cooperative activities, as they have pledged to do in the Declaration? Finally: when will the “Parties concerned . . . resolve their territorial and jurisdictional disputes . . . through friendly consultations and negotiations . . . in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”, as the Declaration requires?

In the light of these unanswered questions, there seems to be a need for ASEAN and China to sit down together again – and again – in order to give further flesh to the Declaration on the Conduct of Parties and clarify the issues raised and the questions begged by the terms of the Declaration.

**Improving US-PRC, ASEAN-PRC Relations**

At the same time, it would help if China and the US could consult and come to an agreement on what is and is not allowed in the exclusive economic zone of a coastal state. This would help in avoiding situations that raised tensions in the area, like the incident involving the US vessel, the USNS *Impeccable*, in March 2009. Delivered to the U. S. Navy in March 2001, the *Impeccable*, one of five so-called Ocean Surveillance Ships in the Navy’s Military Sealift Command, was built to tow a Surveillance Towed Array Sensor System, which is meant to detect and track “undersea threats”, including mines and torpedoes – and submarines. On 8 March 2009, five Chinese vessels, some military, others civilian, “harassed” – the term used by a spokesman of the U. S. Department of Defense – the *Impeccable* and drove it away.

As acknowledged by U. S. officials, this incident took place 75 miles (120 kilometers) south of Hainan, the main island of the province of the same name in southern China (a province that includes the Paracels, the Spratlys and Macclesfield Bank), well outside China’s territorial sea as measured from Hainan’s coast but well within its 200-mile exclusive economic zone. Hainan is said to be the location of a major submarine base. The EEZ is considered as part of the high seas, and the U. S. insisted that the activities conducted by the *Impeccable* were well within its rights. China, in turn, charged that “the
US claims are gravely in contravention of the facts and confuse black and white and they are totally unacceptable to China. The spokesman of China’s foreign ministry stressed that the *Impeccable* had broken both international and Chinese law.\textsuperscript{13}

Article 56 of the UNCLOS bestows on the coastal state sovereign rights in the EEZ “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”. It also assigns to the coastal state jurisdiction over, among other things, marine scientific research, which the Chinese accused the *Impeccable* of conducting.\textsuperscript{14}

On the other hand, Article 58 of the UNCLOS states:

> In the exclusive economic zone, all States . . . enjoy, subject to the relevant provisions of this Convention, the freedoms . . . of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, 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.\textsuperscript{15}

According to this article, both China and the U. S. could be right. Clearly, however, there are not only conflicting interpretations here but also, relatedly and more importantly, a clash of interests between China and the U. S. The chances of similar incidents, which tend to raise tensions and not contribute to confidence-building, would be diminished if China and the U. S. were to reach an understanding on what activities are permissible and what are not that each might conduct in the other’s exclusive economic zone.

More broadly, steady improvements in the overall relations between China and the US would help. So would closer understanding and relations in general between China on the one hand and, on the other hand, ASEAN as a group and the Southeast Asian claimants to land and water in the South China Sea. Such helpful improvements would promote peace and stability in the region of the South China Sea, which would be in the interest of all.

\textsuperscript{13} http://news.xinhuanet.com/english/2009-03/10/content_10983647.htm.


\textsuperscript{15} Ibid.
Part 5

PROSPECTS FOR REGIONAL SECURITY AND DEVELOPMENT IN THE SOUTH CHINA SEA
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He earned his Bachelor's Degree in Political Science (minor in Economics) at the University of the Philippines in 1985 and his law degree from the San Beda College of Law, Manila, in 1990. He pursued Graduate studies on Foreign Service at Oxford University in 1995-1996 with a Distinction on Public International Law and Merit on International Trade. He has a Diploma on the Law of the Sea at the Rhodes Academy of Oceans Law and Policy, Rhodes, Greece; Certificate on National Security Law from the National Security Law Institute, Center for National Security at the University of Virginia.
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Percival has written a book on China’s growing influence in Southeast Asia. The Dragon Looks South: China and Southeast Asia in the New Century was published in 2007. He has also spoken in the US and abroad on China’s goals and activities in Southeast Asia and the Indian Ocean. In February 2010 he testified before Congress at hearings on China and Southeast Asia.

In the past few years, Percival’s classified publications have included studies for the US government on maritime security in the Indian Ocean and on a strategy for US-Indian maritime cooperation. He has also presented conference papers, in New Delhi and Singapore, on the regional security environment and growing Chinese and Indian naval ambitions and power.

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Alberto Encomienda

Mr. Alberto A. Encomienda, a career Foreign Service Officer of the Republic of the Philippines recently retired with the rank of Chief of Mission, Class I. He served as the country's Ambassador to Greece, Malaysia and Singapore. His career specialization is Oceans Law and Policy with an LLM degree from the University of London in 1972, and Columbia University in 1978.

His government work in Oceans Policy and Law of the Sea, concentrated in the decade leading to his retirement, saw Mr. Encomienda as head of the then Maritime and Ocean Affairs Unit (MOAU) under the Office of the Secretary of Foreign Affairs, which was at the same time the Secretariat of the high-level Cabinet Committee on Maritime and Ocean Affairs (CABCOM-MOA). The CABCOM-MOA was later abolished and at the same time the MOAU was upgraded to the Maritime and Ocean Affairs Center (MOAC) to which devolved the agenda of the CABCOM-MOA and its policy formulation and oversight functions. MOAC functions were later transferred to the Office of the President to give a higher profile and prominence to the Ocean concerns of the country facing modern paradigms as an archipelagic State, through the creation of the Commission on Maritime and Ocean Affairs (CMOA) chaired by the Executive Secretary. Mr. Encomienda headed the CMOA Secretariat for a year after its establishment.

In his Track I role, Mr. Encomienda had an early exposure into practical ocean governance activity in an UNCLOS Part IX setting when he presided over the conduct of Exercise Luzon Sea (ELS 1) and the Philippines-Vietnam Joint Oceanographic and Marine Scientific Research Expedition in the South China Sea (JOMSRE-South China Sea) III and IV activities reflected in the Proceedings of the Conference on the Results of the RP-Vietnam Joint Oceanographic and
Marine Scientific Research Expedition in the South China Sea (JOMSRE I to IV) and Exercise Luzon Sea (ELS) organized and held under MOAC auspices, during his tenure as its Secretary-General. Mr. Encomienda retired from diplomatic service in February 2009.

**Erik Franckx**

Erik Franckx is a research professor, President of the Department of International and European Law and Director of the Centre for International Law at the *Vrije Universiteit Brussel* (V.U.B.; Pleinlaan 2, B-1050, Brussels, Belgium; Erik.Franckx@vub.ac.be). He holds moreover teaching assignments (in chronological order) at the Vesalius College (V.U.B.), *Université Libre de Bruxelles*, the Brussels School of International Studies (University of Kent at Canterbury), the Program on International Legal Cooperation (Institute of European Studies, V.U.B.), and the *Université Paris-Sorbonne Abu Dhabi*. He has been appointed by Belgium as member of the Permanent Court of Arbitration, The Hague, The Netherlands; as expert in marine scientific research for use in special arbitration under the 1982 United Nations Convention on the Law of the Sea; as legal expert in the Advisory Body of Experts of the Law of the Sea of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization; and as expert in maritime boundary delimitation to the International Hydrographic Organization.

**Till Geoffrey**

Geoffrey Till is the Professor of Maritime Studies at the Joint Services Command and Staff College and a member of the Defence Studies Department of King’s College London. He is the Director of the Corbett Centre for Maritime Policy Studies.

In addition to many articles and chapters on various aspects of maritime strategy and policy defence, he is the author of a number of books. His most recent are The Development of British Naval Thinking published by Routledge in 2006 and Seapower: A Guide for the 21st Century the second edition of which was published by Routledge in 2009. He is currently working on a study of naval development in the Asia-Pacific region.

In 2007 he was a Senior Research Fellow at the Rajaratnam School of International Studies, Singapore and in 2008 the inaugural Sir Howard Kippenberger Visiting Chair in Strategic Studies at the Victoria University of Wellington. In November 2009 he returned to the Rajaratnam School as Visiting Professor.

**Wang Hangling**

Dr. Wang Hanling is Professor of international law and marine affairs; Director, Centre for Ocean Affairs and the Law of the Sea, Institute for International Law, Chinese Academy of Social Sciences and currently a visiting research fellow at the East Asian Institute, National University of Singapore.

He is adjunct professor of China Ocean University, Shanghai Ocean University, and Xiamen University; research fellow of the Center for Ocean Development of China; and senior research fellow of International Center for Emergency Studies, Cape Breton University, Canada.

He earned the degree of Doctor of Law from Chinese Academy of Social Sciences, studied at World Maritime University in Sweden, and worked as a researcher at University of Lapland.
in Finland, postdoctoral fellow at Dalhousie University of Canada, and visiting research fellow at the Centre for International Law of National University of Singapore. He was the last student of the late Prof. Elisabeth Mann Borgese who was a renowned expert in oceans law and policy and recognized internationally as the "Mother of the Oceans".

Dr. Wang has published widely in Chinese and English, and submitted numerous consultancy reports to the Chinese central government. He was nominated by China as an expert for Special Arbitration under Article 2, Annex VIII of the United Nations Convention on the Law of the Sea, and served as a consultant to the Division for Ocean Affairs and the Law of the Sea (DOALOS) of the Office for Legal Affairs of the United Nations. He was one of the international experts appointed by DOALOS to develop teaching materials for the UN training course on Ecosystem-based Management of the Oceans. He won the highest research award of the Chinese Academy of Social Sciences for his outstanding policy advice to the Chinese central government in 2007 and 2008.

Su Hao

Dr. Su Hao, is a professor in the Department of Diplomacy at the China Foreign Affairs University, and director of Center for Strategic and Conflict Management within this university. He was chairman of Diplomacy Department, director of China's Foreign Relations Section, general secretary of East Asian Studies Center, and director of Center for Asia-Pacific Studies in this university. He is also affiliated with some institutions in China, such as, vice president of Beijing Association of Geo-strategy and Development, member of Chinese Committee for Council of Security Cooperation in the Asia-Pacific (CSCAP); board members of China Association of Arms Control and Disarmament, China Association of Asia-Pacific Studies, China Association of Asian-African Development Exchange, and China Association of China-ASEAN. He got his B.A. in history and M. A. in international relations from Beijing Normal University and Ph. D. in international relations from China Foreign Affairs University. He took his advanced study in the School of Oriental and African Studies (SOAS), University of London in 1993-1995; and was a Fulbright scholar in Institute of War and Peace Studies of Columbia University, and in Institute of East Asia of University of California at Berkeley in 2001-2002; and a guest professor in Department of Peace and Conflict Studies of Uppsala University in Sweden in 2004. He has been teaching and doing research works on China’s foreign policy, strategic studies, international security and international relations in the Asia-Pacific region. He published some books and many articles in the fields of China's foreign policy, security issues, international relations in the Asia-Pacific region, and East Asian integration.

Li Jianwei

Li Jianwei is Deputy Director and Research Fellow at the Research Center for Maritime Economy, China’s National Institute for the South China Sea Studies, Haikou, Hainan, China. Her research interests are dispute resolution in the South China Sea region, Illegal, Unreported and Unregulated (IUU) fishing activities and their impacts, and comparative study of the trade unions in China and the UK. After joining the National Institute for the South China Sea Studies in 2005, she has been involved in the research programmes on the peaceful resolution of the South China Sea Issues and on promoting economic cooperation in the South China Sea region. Her research

**Nazery Khalid**

Nazery Khalid is a Senior Fellow at Maritime Institute of Malaysia, a leading maritime policy think-tank in the South East Asian region. The thrust of his research is in the field of maritime economics, with a focus on ports, shipping, multimodal transport, freight logistics, offshore oil and gas, maritime supply chain and maritime trade issues.

To date, Nazery has presented talks and papers at over 80 seminars and conferences worldwide on a wide range of maritime issues. He has published over 180 articles, research papers and commentaries which have appeared in various publications in print and online, including chapters in books and refereed journals. He has published books on ship financing in Malaysia and multimodal transport development in Malaysia and has also edited two conference proceedings. His research findings and views on various maritime issues and developments are often quoted in the media.

Nazery holds a Bachelor of Arts degree in Business Administration from Ottawa University, Kansas, USA and an MBA from International Islamic University, Malaysia. He taught Maritime Economics to post-graduate students at a Malaysian university and was a Visiting Scholar at the Logistics and Operations Management Section, Cardiff Business School, Cardiff University in Wales.

**Fu-Kuo Liu**

Dr. Fu-Kuo Liu is currently Research Fellow and Chair of Research Division of American and European Studies at the Institute of International Relations (IIR), National Chengchi University. He is Adjunct Professor in regional security at the International Doctor Program in Asia Pacific Studies (IDAS), College of Social Science, National Chengchi University. Additionally, he serves as the Executive Director of the National Committee of the Council for Security Cooperation in the Asia Pacific (CSCAP) in Taiwan. He is also the Executive Director of the newly established Center for Security Studies at the Institute of International Relations. Except for the work on regional security dialogues, he leads the publication of a policy-oriented monthly and currently serves as a chief editor of *Strategic & Security Analyses Monthly* (published in Chinese) at IIR.

Dr. Liu was Chairman of the Research and Planning Committee at the Ministry of Foreign Affairs, ROC (2002-2004) and consultative adviser of the Mainland Affairs Council, ROC (2004-2006). He devotes his research on Asia Pacific security, terrorism in Southeast Asia, Asian regionalism, national security and the South China Sea, peace process across the Taiwan Strait, US strategy in Asia, and Taiwan foreign and security policy. In 2009, he received a three-year research
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Rodolfo C. Severino is the head of the ASEAN Studies Centre at the Institute of Southeast Asian Studies in Singapore and a frequent speaker at international conferences in Asia and Europe. Having been Secretary-General of the Association of Southeast Asian Nations from 1998 to 2002, he has completed a book, entitled *Southeast Asia in Search of an ASEAN Community* and published by ISEAS, on issues facing ASEAN, including the economic, security and other challenges confronting the region. He has produced a book on ASEAN in ISEAS’ Southeast Asia Background Series and one on the ASEAN Regional Forum. His views on ASEAN and Southeast Asia have also been published in *ASEAN Today and Tomorrow*, a compilation of his speeches and other statements. Severino is currently working on a book on the Philippine national territory. He has co-edited two books: *Whither the Philippines in the 21st Century?* and *Southeast Asia in a New Era*, which is intended for pre-university students. He writes articles for journals and for the press. Before assuming the position of ASEAN Secretary-General, Severino was Undersecretary of Foreign Affairs of the Philippines, the culmination of 32 years in the Philippine Foreign Service. He twice served as ASEAN Senior Official for the Philippines and is one of the Philippines’ Experts and Eminent Persons for the ASEAN Regional Forum. Severino has a Bachelor of Arts degree in the humanities from the Ateneo de Manila and a Master of Arts degree in international relations from the Johns Hopkins University School of Advanced International Studies. He is on the Advisory Board of The Fletcher Forum of World Affairs, the journal of the Fletcher School of Tufts University, and on the International Advisory Board of Asia Society.

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American Review, Jane's Intelligence Review and Terrorism Monitor, and is a regular contributor to the Jamestown Foundation's China Brief and Singapore's largest-circulation English language daily The Straits Times. He has written numerous book chapters and in 2002 co-edited The China Threat: Perceptions, Myths and Reality. His latest book is Southeast Asia and Rise of China: The Search for Security (forthcoming 2011). He can be contacted at ijstorey@iseas.edu.sg

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Dr Thao is also member of many affiliations: Member of the Executive Council, Asian Association of International Law Asian ILS (from 2007 up to now); Member of the Development of International Law in Asia Association DILA; Member of the Regional Network on the Legal Aspects of Marine Pollution, GEF/UNDP/IMO Regional Programme for the Prevention and Management of Marine Pollution in the East Asian Seas (1996 up to now); Member of the Vietnam Association for conservation of nature and environment (1989 up to now); Member of the Vietnam Association for marine protection (1989-1991); Member of the Vietnam Association of jurists (1996).

He has awarded the Prix of INDEMER-2000 by the Institute of Economic Laws of the Sea, Monaco, for the best thesis: Vietnam faces to the problem of seaward extension in the South China Sea, University of Paris I, Pantheon-Sorbonne, 1996.

Selected publications:


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Dr. Mark J. Valencia is an internationally known maritime policy analyst, political commentator and consultant focused on Asia. Currently he is a Research Associate with the National Asia Research Program. Recently he was a Visiting Senior Fellow at the Maritime Institute of Malaysia and a Visiting Senior Scholar at Japan's Ocean Policy Research Foundation. From 1979 to 2004, Dr. Valencia was a Senior Fellow with the East-West Center where he originated, developed and managed international, interdisciplinary projects on maritime policy and international relations in Asia. Before joining the East-West Center, he was a Lecturer at the Universiti Sains Malaysia and a Technical Expert with the UNDP Regional Project on Offshore Prospecting based in Bangkok. He has a Ph.D in Oceanography from the University of Hawaii and a M.A. in Marine Affairs from the University of Rhode Island.


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