

CHAPTER 8

Tempering the South China Sea Slow Boil: Expanding Options for Evolving Disputes

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The South China Sea issue is multi-dimensional in nature. There are at least four existing and parallel categories of disputes and/or competitions between parties in the South China Sea. They are: i) territorial disputes over islands/rocks, low-tide elevations and submerged features between claimants; ii) competing claims among littoral states regarding sovereignty, sovereign rights, and jurisdiction over maritime zones; iii) disputing interpretations about the rights of coastal and user states in different maritime zones (especially within territorial seas and exclusive economic zones of coastal states) regarding freedom of navigation and over-flights, including activities of military vessels and aircraft; and iv) strategic competition between the rising resident power - China and the established, however distant, power – the U.S., in which the South China Sea has become the frontier and a bellwether of the Asia-Pacific, if not global, competition. This paper explores the dynamics of the South China Sea issue in recent years from international relations and international law aspects and offers predictions of scenarios of near future development as well as suggests some options for management of the issue.

Driving forces of South China Sea dynamics

In general, the situation in the South China Sea has become tenser mainly due to the growing strategic importance of this sea in the calculation of the parties, especially of China. A number of experts argue that China is trying to turn the South China Sea into its own backyard.¹ Accordingly, the South China Sea becomes a border region and a buffer zone that prevents other countries from accessing and attacking China. Mainly, the South China Sea will be a strategic foothold in which China can defend itself against the military alliances between the United States and other regional

¹ See for example, Richard Javad Heydarian, "China Is Slowly Turning the South China Sea Into Its Own Territory," <http://nationalinterest.org/feature/china-slowly-turning-the-south-china-sea-its-own-territory-16554> or Max Fisher, "The South China Sea: Explaining the Dispute," <https://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html>

countries, such as Japan and South Korea. China's efforts to change the status quo in the South China Sea are aimed at gaining a foothold in the race for control in the South China Sea as this water becomes one of the most important components of China's anti-access / area denial strategy with the goal to push America as far offshore as possible. Furthermore, China also wants to have a protected area for its missile carrying submarines (SSBNs) as a basis for a second strike nuclear capability against the U.S.² These factors make strategic competition among major countries in the region more acute.

On another dimension, You Ji considered the competition among different interest groups within China as a driver for increasing tension in the South China Sea. The role of Chinese law enforcement forces in the South China Sea has increased in recent years. The PLA navy wants to strengthen its traditional role and take the lead in implementing China's policy on the South China Sea dispute. Therefore, this leads to competition with other agencies.³

Furthermore, some observers believe that the rise of nationalism in many countries in the region is one of the factors that make the situation in the South China Sea more complex and difficult to solve. The epitome is when China deployed drilling rig HYSY 981 in Vietnam's exclusive economic zone during May-July 2014, calling this rig "national mobile territory" and mobilising not only law enforcement vessels but also hundreds of fishing vessels to protect the rig.

Fishing nationalism is also growingly becoming one of the main drivers behind tension in the South China Sea. China has built up a large fleet of fishing vessels, the "ears and eyes" of naval forces and marine law enforcement. More than 50,000 large and small fishing vessels deployed in the South China Sea receive subsidized gasoline and are equipped with the Beidou satellite navigation system to contact Chinese enforcement forces.⁴ Most of Vietnam's fishing activities are also concentrating in the South China Sea and fishermen receive endorsement and

² Nayan Chanda, "Submarine Sanctuary: Why China Is Determined to Establish Dominance Over South China Sea," September 29, 2016, <https://yaleglobal.yale.edu/content/submarine-sanctuary-why-china-determined-establish-dominance-over-south-china-sea>

³ J. You, "Xi Jinping and PLA Centrality in Beijing's South China Sea Dispute Management," *China: An International Journal*, vol. 15 no. 2, 2017, pp. 1-21. *Project MUSE*, muse.jhu.edu/article/661217.

⁴ "Satellites and seafood: China keeps fishing fleet connected in disputed waters," <https://www.reuters.com/article/us-southchinasea-china-fishing-insight/satellites-and-seafood-china-keeps-fishing-fleet-connected-in-disputed-waters-idUSKBN0FW0QP20140728>

support from the government and people to go fish in its claimed exclusive economic zone to demonstrate de-facto exercise of sovereign rights.

On the role of energy, Dylan Mair and Rachel Calvert argue that China's estimation of oil and gas in the South China Sea is often exacerbated compared with data from the US Department of Energy (EIA) and other independent sources.⁵ According to these authors, in the disputed areas there are insufficient oil reserves, mainly gas, and they usually have a depth of 1-2 km (except for the area around the islands in the Paracels and Spratlys). Gas can be commercialized by building pipelines or liquefied for shipment. Moreover, if world oil prices are not high enough, investment will be totally unprofitable as it requires high technology with expensive costs. Yet, the potential oil and gas in the South China Sea is not so important to China's energy security. Security of the Middle East's energy transport routes through the South China Sea is more vital for China. More than 80% of China's oil and one third of imported liquefied petroleum gas come from the Middle East through the South China Sea. This makes other routes not as significant. For example, inland transport routes through Myanmar and from Russia account for a negligible share (oil and liquefied natural gas from the Middle East through Myanmar to China account for only 16% and 8% respectively). In 2013-2014, China and Russia have signed more agreements on energy, but by 2035 Russia is estimated to provide only 5% of China's demand. Similarly for Japan and South Korea, if freedom of navigation through the South China Sea is blocked, Japanese ships must cross the Indonesia archipelagic waters and off the east coast of the Philippines. That detour would increase transportation costs significantly, which would lead to a rise in gasoline prices and consumer spending and the Japanese stock market may be down by 10% or more in two or three years.⁶

On the other hand, one of the main reasons why the disputes in the South China Sea are so protracted and difficult to resolve is because of the uneven distribution of energy resources, which is unfavorable to the most ambitious player - China. China

⁵ Dylan Mair and Rachel Calvert, paper for South China Sea international conference, organized by DAV in November 2015, Da Nang city, Viet Nam

⁶ Presentation by Kazumine Akimoto, Senior Research Fellow at the Ocean Policy Research Foundation, Japan, at The 2nd Arctic/Asia-Pacific Maritime Workshop on Sea Lines of Communication Security in the Asia-Pacific and the Arctic, co-organized by the China Institute at the University of Alberta and the National Institute for South China Sea Studies, June 6, 2014, <https://cloudfront.ualberta.ca/-/media/china/media-gallery/conferences/maritim/e/2014maritimeworkshoppoogram.pdf>

does not want to delimit the sea partly because the maritime zone it deserves to entitle is the northern part of the South China Sea that does not have much energy reserve. That uneven distribution is one of the main reasons why China continues to promote the “shelving the disputes, jointly exploiting resources” principle in maritime zones of other countries where there are large oil and gas reserves.

The interplay of international law and power

States are conducting external behaviors in an environment where their actions are constrained by established international law. International law is both environmental as well as instrumental for achieving the national interest of all countries, regardless of size. In part, states try to make use of international law to justify their actions, blame competitors, and interpret ambiguous content or specific provisions of international treaties in their own ways to maximize interests. The interplay of international law and power is clearly demonstrated in the development of the South China Sea issue.

China, with the pertinent goal of gradually transforming the South China Sea into its backyard, has for decades exploited the ambiguity and limitation of international law to strengthen its foothold and control in the South China Sea.

Specifically, on the issue of sovereignty, China maintains its claim to all of land and submerged features in the South China Sea, expanding its occupation in the Parcel and Spratly areas and control in Scarborough Shoal, and reclaiming, transforming, building, and militarizing the features that it controls. These activities have so far fundamentally changed the status quo favourable to China.

On maritime disputes, China maximizes its claims by using the notion of historical rights of the nine-dotted line and applies Article 121 of the UN Convention on the Law of the Sea (UNCLOS) in a maximized interpretation, claiming the exclusive economic zone and continental shelf for the Parcel and Spratly groups.

On strategic competition and the dispute over rights and obligations between coastal and user states, China applies its own interpretation of UNCLOS section 3 on “innocent passage” and UNCLOS article 58 on obligations of “due regard” to the rights of coastal states to restrict and control the military activities of the United States and other countries within its claimed territorial waters and exclusive

economic zones.⁷ At the same time, China exploits the ambiguity of international law in general and UNCLOS in particular to threaten the possibility of establishment of air defense identification zone (ADIZ) in the South China Sea, as it did so in the East China Sea.⁸

Based on these “legal bases”, China has implemented a series of policy measures towards the South China Sea, including expanding its military, law enforcement and civilian presence in the sea, land and air in the South China Sea; preventing other claimants from exercising their sovereignty, sovereign rights, and jurisdiction on the whole area that China claims; delaying the settlement of disputes and advocating for the “shelving the dispute, jointly exploiting resources” principle; and promoting China’s narratives in the international arena regarding the South China Sea issue in general and specific incidents in particular (concerning land reclamation in the Spratly, incidents with Vietnam’s seismic exploration ship Binh Minh 02 in 2011, Viking 2 in 2012, oil rig HYSY 981 deployment in 2014, South China Sea arbitration, to name a few).

In terms of strategies, Xiangning Wu and You Ji argue that China calculates that it would be more cost-effective to deter moves from other claimant states through assertive actions in the disputed waters. However, China has formed such a strategy that while slowly transforming the status quo in the region, China will not stimulate any decisive response and intervention from ASEAN and other countries, especially from the United States. Specifically, one tactic that China has used is to self-impose red lines in order to avoid standoffs. For example, China only has serious law enforcement in the areas where its boundary base line has been announced. The difference can be clearly seen through China’s law enforcement in the Spratly and the Paracel islands. In the former, the enforcement is largely rhetorical while in the latter, expulsion is the common measure.⁹

Relevant countries have adjusted their policies and responded with different levels of determination to China’s policy and activities, thereby creating a state of affairs

⁷ UN Convention on the Law of the Sea, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁸ “Beijing says it could declare ADIZ over South China Sea,” https://www.japantimes.co.jp/news/2016/07/13/asia-pacific/china-blames-philippines-stirring-trouble-inherent-territory/#.WkS9NIU_m2w

⁹ Chapter for upcoming book on South China Sea published by Edward Elgar publisher, edited by Tran Truong Thuy, Nguyen Thuy Trang

in the South China Sea with multiple layers of political, diplomatic, military and informational dimensions. This state of affairs in the South China Sea consists of the following main characteristics:

The United States views China's actions as a challenge to the US-led order in the Asia-Pacific, thereby announcing the Rebalancing strategy during the Obama Administration. Under the Rebalancing strategy, the United States has concentrated on strengthening its position in the region by consolidating its allied system, forming new partnerships with other regional countries and increasing diplomatic relations in the bilateral and multilateral terms, as well as military and economic presence in the region in the Asia-Pacific in general and in the South China Sea in particular. In particular, the United States has increased the Freedom of Navigation Program (FONOPs)¹⁰ in the South China Sea, and promoted bilateral and multilateral naval and coast guard cooperation with and capacity building for Southeast Asian South China Sea claimants.

The United States' response to the South China Sea is perhaps strongest since the 1990s and the strongest among countries outside the region. However, it should be noted that the United States maintains a neutral position regarding the territorial and maritime dispute. Although the United States protests and does not recognize excessive claims in the South China Sea, such as the straight baselines of littoral states, China's nine-dotted line and its claim of sovereignty over low-tide elevation and submerged features, the United States does not take side in the sovereignty dispute over land features (islands/rocks) and on the interpretation of whether these features can generate full maritime zones. Regarding actions on the ground (sea), United States' activities mainly focus on the diplomatic front while it has conducted limited actions directly challenging China's activities in the South China Sea, including conducting some FONOPs irregularly. This policy is partly due to the legal ambiguity of the South China Sea issues, and partly due to the lacking of consensus within Washington on viewing whether China's activities are detrimental to US' national interest, and on the possibility and variations of accommodation with China in order to ensure stability in the Asia-Pacific region. On the other hand, the

¹⁰ See more details about the nature and purpose of FONOPs in an article by Jonathan Odom, "Why US FON Operations in the South China Sea Make Sense," <https://thediplomat.com/2015/10/why-us-fon-operations-in-the-south-china-sea-make-sense/>

United States and other countries will risk more if they contest China's moves in the disputed waters. Therefore, it lacks resolve for a more forceful policy.

Southeast Asian claimant countries are more concerned about China's territorial and maritime ambitions in the South China Sea. In order to protect their interests, to a different extent, they pursue a multi-directional policy combining: relying on international law, especially UNCLOS, to justify their maritime claim and protest perceived illegal claims and activities by others; regionalizing South China Sea issues on ASEAN-related mechanisms and mobilizing support from other ASEAN fellows; strengthening cooperation with external powers, especially the United States, Japan, Australia, and India; while maintaining cooperation with China in general and in the South China Sea in particular. However, ASEAN as a group is still struggling to remain relevant in the management of the South China Sea tension. ASEAN has failed to reach an appropriate level of consensus when critically needed because some mainland Southeast Asian non-claimants do not share the concern of claimants and, therefore, they were more supportive of China.

Non-regional countries also adjust their policy in two directions: United States' allies (Japan, Australia, New Zealand, other G7 countries, and partly the EU) basically follow the positions and actions of the United States in the South China Sea; other countries such as Russia and India maintain their relatively independent stance, although Russia is more favorable to China and India is more supportive of the United States.

As a result, the South China Sea issue during the recent decade has become an international issue, a hot spot in the geopolitical landscape of the Asia-Pacific region, as well as at international and regional diplomatic forums.

Claims over land, sea and air

On July 12, 2016, the Arbitral Tribunal of South China Sea arbitration between the Philippines and China rendered a landmark Award, which has far-reaching implications, especially for the first two dimensions of the South China Sea issue aforementioned, namely territorial disputes over islands/rocks, low-tide elevations and submerged features between claimants, and competing claims over maritime zones.

On territorial disputes, it is worth noting that Brunei, mainland China and Taiwan, Malaysia, the Philippines, and Vietnam maintain sovereignty claim over the whole or part of the Spratly group. China and Vietnam have a conflicting sovereignty claim over the Paracel group. China and the Philippines are disputing over sovereignty on Scarborough Shoal. Due to the ambiguous regime of islands in these groups as to whether the islands there can generate exclusive economic zones and continental shelves, the big question remains whether parties can claim rights over more than hundreds of features that are either low-tide elevations or submerged features. The situation becomes much clearer with the South China Sea arbitration Award between the Philippines and China.¹¹ There are at least two important aspects of the Award concerning territorial disputes in the South China Sea. First, parties can now claim sovereignty only over high-tide elevations, and, to some extent, expand the area of sovereignty claim to low-tide elevations in case the later is situated within 12 nautical miles of the former. Although these conclusions were made long before, especially in UNCLOS, particularly article 121 on regime of islands and article 13 on using the low-tide elevation situated wholly or partly within the breadth of the territorial sea from the mainland or an island for drawing the baseline, the arbitral Award has reaffirmed these points and specified these conclusions directly for the territorial issues in the South China Sea. Furthermore, after considering historical, physical, and natural conditions and other aspects of all islands of the Spratly group and Scarborough Shoal the arbitral panel reached one of the most important conclusions that no land features there can sustain human habitation or economic life of their own, and, therefore, cannot generate an exclusive economic zone or continental shelf. Consequently, no country can claim sovereignty right and jurisdiction over low-tide elevations or submerged features that are located outside 12 nautical miles of rocks in the Spratlys except over those laying on its own exclusive economic zone or continental shelf. In other words, parties now can legally claim sovereignty only over dozens of land features in the Spratlys and Scarborough Shoal, which are permanently above water.

On claiming over a maritime zone, the Arbitration Award has narrowed down significantly the disputed maritime area in the South China Sea. Legally speaking,

¹¹ Press release by the Permanent Court of Arbitration (PCA) in the South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China) concerning the Award issued by the Tribunal, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>

China from now on cannot base either on the concept of historical right of the nine-dotted line or exclusive economic zone and continental shelf of the islands for claiming about 80% of the South China Sea. On the nine-dotted line, the Arbitral Tribunal concluded, “there was no legal basis for China to claim historic rights to resources within the sea areas falling within the ‘nine-dash line’”¹². Specifically, the Tribunal concluded that, “to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished to the extent they were incompatible with the exclusive economic zones provided for in the Convention”¹³. The Tribunal also noted that, “there was no evidence that China had historically exercised exclusive control over the waters or their resources”¹⁴. On the regime of islands, as aforementioned, the Tribunal concluded that no feature in the Spratlys can generate an exclusive economic zone and continental shelf. The Arbitral Tribunal also rejected China’s claim that the Spratly Islands could be claimed as a unified archipelago; therefore it cannot draw straight of archipelagic baselines surrounding this group and use this baseline for claiming extended maritime zones (paragraphs 575 and 576). In other words, the disputed maritime area in the South China Sea is now limited just to maximally 12 nautical miles surrounding the Spratly and Scarborough rocks.

As for the situation in the Paracel group, although the features in the Paracel group were not the subjects of consideration in the Philippines-China South China Sea arbitration, these features share a lot of similarities with those of the Spratlys. One can reasonably conclude that the Paracels do not fulfill the legal considerations to have an archipelagic baseline and no features of the Paracels can be considered as islands and capable of generating an exclusive economic zone and continental shelf.

James Kraska also argues that although China has occupied the Paracel Islands and claimed historical rights for the nine-dotted, it cannot change Vietnam’s legal rights to the exclusive economic zone. The EEZ is the product of a long negotiation process on international law of the sea whose main purpose is to give coastal states the power to protect coastal resources, notably fishing resources, rather than to allow the expansion of national territory or offshore industrial development. China’s ban

¹² Ibid

¹³ Ibid

¹⁴ Ibid

on fishing for a large part of Vietnam's exclusive economic zones is illegal as only Vietnam has the right to issue such regulations.¹⁵

For claiming over air space, ADIZ is not a no-fly zone but an area in which foreign aircraft have the right to flight, but must notify the status to the competent authorities of the host country. Yet, the airspace within the EEZ area is the free-zone area and an aircraft drone does not need to notify if it does not intend to enter the airspace above the territorial waters of the other country. Therefore, one could argue that the establishment of ADIZ does not have the value of strengthening the sovereignty claim and only exacerbates the situation.

China already established ADIZ in the East China Sea and opens to the possibility of establishing ADIZ in the South China Sea. You Ji argues that China is unlikely to establish ADIZ in the near future in the South China Sea because that may create unnecessary tension with ASEAN countries and invite external powers (US, Japan, and Australia) to challenge that ADIZ.¹⁶

New status quo

Although the objectives of China's South China Sea policy (sovereignty, security, and development) and the balance of expansion on the sea while maintaining a "strategic environment conducive to development" - especially not to allow forming an alliance between the United States and the regional countries against China - remain unchanged, it is clear that recently China has adjusted its tactics with fewer incidents or collision with other parties than before, including in fisheries, oil and gas development. There are several influencing factors to that adjustment, which include: i) China has completed land reclamation in the Spratlys and it needs time to consolidate the advantages achieved; ii) The devastating award of the arbitral tribunal obliges China to take more precautionary measures, particularly those which will not be seen as a clear violation of the Judgment; iii) China prioritizes the implementation of the Belt and Road Initiative (BRI), which requires the cooperation from its neighbors; and iv) The United States has a new administration and China

¹⁵ James Kraska, "The Lost Dimension: Food Security and the South China Sea Disputes," <http://harvardnsj.org/2015/02/the-lost-dimension-food-security-and-the-south-china-sea-disputes/>

¹⁶ J. You, "Xi Jinping and PLA Centrality in Beijing's South China Sea Dispute Management," *China: An International Journal*, vol. 15 no. 2, 2017, pp. 1-21. *Project MUSE*, muse.jhu.edu/article/661217.

must carefully scrutinize the attitude of Donald Trump's Administration.

However, besides refraining from openly assertive activities that can affect China's other policy priorities, it continues to quietly expand control of its occupied islands and expand its control over the South China Sea on all three dimensions: aerial, sea and seabed.¹⁷

China's advantage in the South China Sea is the result of both strategic calculations as well as lucky opportunities that China was able to materialize. The Arbitration Award is disastrous for Chinese diplomacy (China's strategy of non-participation in proceeding proved bankrupt - China considered that the Tribunal did not have jurisdiction and all of its efforts were to indirectly intervene by releasing statements to convince the Tribunal for that objective). However, the Philippines has a new President who decided to implement the policy of putting the Arbitration Award on the side and pivoting to China, which makes the situation in the South China Sea more favorable for the Asian giant. More importantly, the main reason for the current situation lies in the root cause of the changing of the balance of power in the international relations system, especially between the rising resident power - China and the established distant hegemon - the US. The new unpredictable American President Donald Trump, who has not formed an Asian policy, only accelerates that process. If we have to summarize Trump's South China Sea policy, if any, there are some components that continue those of the Obama's, however there are also more new elements. The United States' new approach attaches the South China Sea to its overall policy to East Asia and its relations with China, with issues related to North Korea, Taiwan, and trade. Therefore, the United States is arguably more likely to have a trade-off or make a grand bargain with China in regard to the South China Sea issue than ever before. These factors only make regional countries (including Vietnam) more concerned and less willing to deal with China in general and in the South China Sea issue in particular. This new development partly explains why Vietnam, unlike during the HYSY 981 deployment in 2014, had to suspend its energy exploration operation in block 136-03 in July 2017 under whole-of government

¹⁷ See report by The Asia Maritime Transparency Initiative (AMTI) for more information about China's constructive activities on the islands after the Arbitration Award at <https://amti.csis.org/constructive-year-chinese-building/>

pressure from China.¹⁸

Regarding ASEAN, while mini-lateral maritime cooperation between ASEAN countries increases (Sulu, Malacca patrol, etc.), the overall ASEAN cooperation on the South China Sea is weakening significantly. As mentioned above, clearly within ASEAN, there is a division among member states regarding this issue. One of the driving wedges is China's ability to manipulate the ASEAN way. Another is China's economic relation with ASEAN and each of its members. China in recent years has emerged as ASEAN's leading trade partner and gained control of economic leadership in the region. Most importantly, it must be noted that China also uses its economic prowess as a reward and punishment tool. Therefore, to certain countries, it is more rewarding to please China than to maintain the ASEAN unity, especially regarding the South China Sea. Most recently, the Philippines under President Duterte has given up its traditional role as one of the strongest proponents on engaging ASEAN collectively on the South China Sea.

In this context, the only bright spot for Southeast Asian South China Sea claimants is the continued involvement of middle-power states, especially Japan, Australia and India. Japan has stepped up capacity building for Southeast Asian countries, while sustaining and elevating economic relations that serve as a counterweight to those between China and these regional states. Australian Prime Minister Malcolm Turnbull spoke at Shangri-La Dialogue 2017, making the most comprehensive and strongest remarks towards China, including on the South China Sea issue.¹⁹ India has been increasing involvement and is likely to continue its engagement in the South China Sea, especially in the context of tensions with China on the land border dispute.

Whither the South China Sea?

In the next 5-10 years, the possibility of China using force to occupy more islands of the Spratly Islands currently under occupation of other claimants or to directly

¹⁸ Bill Hayton, *The Week Donald Trump Lost the South China Sea* (Foreign Policy 31-7-17), <http://foreignpolicy.com/2017/07/31/the-week-donald-trump-lost-the-south-china-sea/>

¹⁹ Keynote Address by Prime Minister of Australia Malcolm Turnbull at IISS Shangri-La Dialogue 2017, <https://www.iiss.org/en/events/shangri-la-dialogue/archive/shangri-la-dialogue-2017-4f77/opening-remarks-and-keynote-address-fc1a/keynote-address---malcolm-turnbull-4bbe>

engage militarily with other countries in the South China Sea is less likely. The main reasons for this possibility include. i) China has now occupied all of the Parcel Islands and has strong footholds in the Spratly groups, especially after the expansion of the islands during the reclamation and fortification. These positions are sufficient to maintain its presence as new occupation does not militarily and legally bring significant added value. ii) In addition to the principles of international law, China has now signed the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the Declaration on the Conduct of Parties in the South China Sea (DOC), including provisions prohibiting the use of force to settle disputes. These developments are progressive considering China's stance in 1988. iii) More importantly, if China uses force, it will make ASEAN and other powers become fearful, unite and move closer to the United States, affecting the image of "peaceful development" that China has long been advocating for and bringing to an end the peaceful environment necessary for economic development as in over the past 35 years. (If the option of expanding occupation has to be chosen, then China's priority will be the islands / rocks/ reefs that are currently unoccupied.)

The possibility of China and other ASEAN disputants to negotiate and use other peaceful means to resolve the South China Sea dispute is also unrealistic. As for the dispute over the sovereignty over the Paracels, resolution through negotiation or through international courts is not feasible as China will not agree to it. In the dispute over sovereignty over the Spratly Islands, the possibility of solving problems in international courts or third parties is also not feasible as China does not agree and other countries are not yet prepared and some are uncertain about their legal arguments. The viability of a solution for dispute resolution through peaceful negotiation is also not high as under domestic pressure no government wants to make concessions on sovereignty.

The final delimitation of overlapping maritime areas is also unlikely to be completed in the next 20-30 years, due to: i) the resolution of sovereignty and legal issues of the Parcel and Spratly Islands must be completed first; ii) difference in the form of negotiation as China prefers to negotiate on a bilateral basis to promote its advantage as a bigger party, while smaller states prefer multilateral negotiation in order to mobilize supports and make the process less asymmetric; iii) the other problem is that the solution in conformity with international laws and international practices would not be compatible with China's ambitions and interests, as it can

only be entitled to about 20-25% of the South China Sea in the northern part with unpromising energy reserve.

The decision by the Arbitral Tribunal in the Philippines-China case could help narrow down the scope of the dispute and interpret more clearly some of the issues involved in the South China Sea (notably the issues of historic rights of the nine-dotted line, regime of islands, sovereignty claim over low-tide-elevation or submerged features), but it cannot “solve” the South China Sea definitely.

So, development in the South China Sea in the next 5-10 years could take place under the following scenarios:

Scenario 1: Continued tension on the sea but not leading to open military confrontation. China will continue its assertive activities in the South China Sea to protect its “interests” while limiting the escalation of disputes into military conflicts, and avoiding strategic confrontations with the United States, other major powers and ASEAN to maintain a peaceful environment for economic development. After the construction and consolidation of the islands, China will continue its present upward trend, intensifying its actual control activities with diversified measures on the islands and at sea along the nine-dotted line. With its rising national comprehensive power, applying this direction does not break the current situation in the region and affect China’s international stance. Meanwhile, the reaction of countries in international forums or public opinion has only a limited and immediate impact. United States’ engagement is limited to diplomacy and some demonstrative gesture on the sea such as conducting more FONOPs. This scenario also serves the internal needs of China both economically and politically, soothing the hawks and nationalists.

Scenario 2: Parties enhance the dialogue to effectively manage the dispute. In this scenario, parties will intensify dialogues for management of disputes and tension, especially on the DOC implementation, and negotiation for a Code of Conduct (COC). Thus, there will be some progress in negotiating for the delimitation of some bilateral overlapping maritime areas and joint development arrangements. The United States and China will enter into dialogue to manage their difference and avoid collision. This scenario will occur when China, after a period of expansion, adjusts its policies towards the objective of becoming a responsible rising power, embracing ASEAN and avoiding diplomatic isolation; the United States, after a

period of tension with China, has been stretched across many global fronts; and ASEAN is successful in maintaining the South China Sea issue on the agenda of regional forums and engaging other outside stakeholders to support it.

Scenario 3: The mixture of “tension and stableness”. This is the combined scenario of scenario 1 and scenario 2. China will still be assertive in the sea and on diplomacy when needed; at the same time, it shows willingness to negotiate and have dialogue with the disputing parties on maritime delimitation and maritime cooperation, and with ASEAN to implement the DOC and negotiate the COC. International forums, especially those led by ASEAN, continue to be the main platforms for parties to raise their concerns on the South China Sea issue in particular and maritime security in general. The US-China friction continues but will not lead to neither military confrontation nor grand bargain.

The possibility of scenario 3 is more likely, as the parties will continue to conduct fortifying activities on the islands they occupy, and exercise sovereign rights and jurisdictions within the maritime zone that they deserve to be entitled under UNCLOS. China will not renounce its sovereignty claim over islands and rights over water and it is more likely to continue right-asserting activities, including interfering in activities of other countries. At the same time the parties still have the incentives to maintain dialogue and achieve progress, even symbolically. Smaller countries will continue addressing the South China Sea issues at regional and international forums when needed. The United States, Japan, and other major powers will continue to have a vested interest in the issues and maintain a certain level of engagement, not allowing China control the South China Sea.

Expanding options for evolving disputes

While it is unlikely that the South China Sea issue will disappear or open conflict will happen in the next one or two decades and while the more likely scenario will be a mixture of “tension and stableness”, the main objective for the parties involved should be how to prevent the tension from arising, prevent miscalculation and escalation of tension when it arises, and find ways to promote confidence-building measures and practical maritime cooperation where and when needed.

While the tensions arising from disputes over islands and waters could not be

resolved, the South China Sea faces many non-traditional security issues that require close cooperation between countries concerned. First, over-exploitation of fisheries resources and marine pollution is a big challenge. Fishing stocks in the South China Sea are under heavy pressure and are significantly depleted by fishing activities. Total fish stocks in the South China Sea have been depleted by 70-95 percent since the 1950s and catch rates have declined by 66-75 percent over the last 20 years.²⁰ Over-fishing, destructive fishing such as using landmines or cyanide poisoning, or massive land reclamation all contribute to the destruction of marine ecosystems, negatively impacting the sustainability of living and non-living resources in the South China Sea. In addition, Illegal, Unreported and Unregulated (IUU) fishing has become one of the most serious sources of friction, which requires closer coordination and cooperation, among littoral countries. Also, climate change contributes to the damage to marine ecosystems, but this has not been fully addressed by regional governments and communities. Finally, Article 123 of UNCLOS mandates that states bordering semi-enclosed seas like the South China Sea are obligated to cooperate in areas that include the protection of the marine environment and management of fish stocks. The South China Sea Arbitration Award also adds more incentives and obligations for parties to cooperate in fishing management and environment protection. On fishing, the Tribunal ruled that fishermen from all littoral countries have traditional fishing rights within the territorial sea of Scarborough (and Spratly, Paracel rocks, by implication) and this conclusion has opened up the opportunity for cooperation on fishing management. On environment protection, the Ruling clearly defines the environmental obligations of States bordering the South China Sea and the implementation of these obligations do not depend on sovereignty claims.²¹

Second, transnational crimes such as piracy and terrorism in the region are becoming increasingly complex and serious non-traditional issues. If an offshore oil and gas facility becomes a target for terrorist attacks, the environmental disaster would be extremely severe and a massive amount of money would be spent to clean up the oil spill. Thus, in today's security environment, as transnational terrorist organizations are armed with large-scale weapons, the possibilities of an attack on a maritime

²⁰ "A blueprint for fisheries management and environmental cooperation," <https://amti.csis.org/coc-blueprint-fisheries-environment/>

²¹ Press release by the Permanent Court of Arbitration (PCA) in the South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China) concerning the Award issued by the Tribunal, <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>

resource development platform or industry become major challenges, thus requiring cooperation among countries in the region.

Third, maritime security and safety are also facing many challenges. As the second busiest shipping line in the world, the risk of collisions and incidents in the South China Sea is increasing due to the large volume of ships traveling and the presence of large numbers of naval and law enforcement vessels on the sea. Incidents in the South China Sea occur not only by accident but also, more seriously, by deliberately intentional action of right-protection of claimants, especially those involving law enforcement vessels. Data from the Center for Security and International Studies show that from 2010 to 2017 there were 53 major incidents identified in the South China Sea (Chinese maritime law enforcement vessels were involved in 75 percent of the incidents).²² The frequency and severity of recent incidents has shown that cooperation in the prevention and mitigation of maritime incidents is an urgent need.

One of the most important issues for promoting confidence building measures and practical maritime cooperation is to involve relevant parties and stakeholders. The main platform now for management of the South China Sea issue is the ASEAN-China mechanism, especially on the DOC implementation and COC negotiation. However, it is clear that while not all ASEAN members are directly involved in the South China Sea disputes, there are many other extra-regional players in the South China Sea. Principally, peace, security, freedom of the sea and respect of international law are among the concerns of all stakeholders. Practically, the incidents that have happened in the past (and those that could happen again in the future) often involve those extra-regional players as well. Transnational crimes do not always differentiate the nationalities of victims. In addition, the Arbitration Tribunal ruling has identified a big portion of the doughnut shape in the center of the South China Sea as high sea, meaning that all parties of UNCLOS have equal rights and obligations in this doughnut. Therefore, turning the South China Sea from a sea of tension to a sea of stability should be a priority of all the parties concerned. Promoting confidence building measures and practical maritime cooperation should either involve the littoral countries in the South China Sea only, ASEAN and China or, where appropriate, draw in extra-regional stakeholders as well.

²² “Are maritime law enforcement forces destabilizing Asia?” <https://chinapower.csis.org/maritime-forces-destabilizing-asia/>

