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Geopolitics, International Law and the South China Sea

Robert Beckman

Director, Centre for International Law, National University of Singapore

Introduction

1. I have been asked to deliver a paper on Geopolitics and the South China Sea. However, I believe that the South China Sea disputes should not be analyzed solely from the viewpoint of geopolitics. Geopolitics is important, but it is also necessary to understand the issues of international law that are raised by the disputes. International law not only structures the debate, but it legitimizes (or delegitimizes) the positions of each of the claimant States in the eyes of the international community. International law must also be considered when exploring alternatives for resolving the disputes or managing the potential conflicts that can arise as a result of the disputes. My opinion, of course, reflects the fact that I am an international lawyer, not a political scientist or strategic studies expert. In any case, I hope that I am able to shed some light on what everyone agrees is a highly complex and important problem.

The importance of the South China Sea

2. The South China Sea is a semi-enclosed sea of around 3.5 million square kilometers which extends from the eastern end of the Singapore Strait to the Taiwan Strait. It is bordered by Indonesia, Malaysia, Brunei, the Philippines, Vietnam, China and Taiwan. The South China Sea is important to international shipping because one-third of the world's shipping transits the sea on the route between Europe and the Middle East to East Asia. It is also important because it is rich in fisheries resources and because it is believed that there are huge oil and gas reserves beneath its seabed. However, the extent of the oil and gas resources in the South China Sea is not known.

The nature of the dispute on territorial sovereignty over the islands

3. The dispute is primarily about which State has territorial sovereignty over two groups of islands. The first group of islands in dispute is the Paracel Islands, which are located in the northwest corner of the South China Sea, off the coast of Vietnam and the Chinese island of Hainan. They have been occupied by China since 1974, but they are also claimed by Vietnam and by Taiwan.
4. The second group of islands in dispute is the Spratly Islands, which are located off the coasts of the Philippines, Vietnam, Malaysia and Brunei. They are claimed in whole or in part by China, Vietnam, the Philippines, Malaysia, Brunei and Taiwan. There are approximately 150 tiny islands, islets, reefs and shoals that comprise the Spratlys. However, it is estimated that less than 40 features in the Spratlys meet the definition of an island in the *1982 United Nations Convention on the Law of the Sea* (LOS Convention), which is a naturally formed area of land above water at high tide. This is

important because, under international law, the only offshore features which can be subject to a claim of sovereignty are those which meet the definition of an island.

5. As we have seen in the press in the past few days, there is also a dispute over Scarborough Shoal, a geographic feature that is not within the Paracels or Spratlys, but which is claimed by the Philippines, China and Taiwan.

How the sovereignty disputes can be resolved

6. The issue of which State has the better claim to sovereignty is governed by the rules and principles of customary international law on the acquisition and loss of territory. These principles are set out in the decisions of international courts and tribunals. If the sovereignty disputes were taken to a court or tribunal to decide which State has the better claim to the territory, the court or tribunal would examine the evidence presented by each claimant State as to the acts of sovereignty it has carried out in relation to the islands, and how other States reacted to such acts. The fact that a State currently occupies an island does not necessarily give it a superior title under international law if other States have objected to the occupation.
7. The States claiming sovereignty over the islands in the South China Sea are not required and cannot be compelled to resolve the sovereignty disputes by referring the matter to any form of third party dispute settlement. The issue of sovereignty can only be decided by a court or tribunal if the claimants States all agree to refer the dispute to them.
8. Given the sensitivity of the issue and the complexity of the dispute, it is highly unlikely that the claimant States will ever agree to refer the sovereignty dispute to a court or tribunal. Most observers agree that the only viable solution is to follow the advice of the late Deng Xiao Ping of China and to “set aside the disputes and jointly develop the resources”.

Legal basis for the right to explore and exploit the natural resources in the South China Sea

9. Many people are under the impression that whichever State has sovereignty over the islands will be entitled to all of the natural resources in and under the waters surrounding the islands. However, this is not the case.
10. The LOS Convention sets out what maritime zones States can claim from land territory, including islands. It also sets out the rights, obligations and jurisdiction of States in the maritime zones. Since

all the claimant States have become parties to the LOS Convention, it establishes the basic legal framework regarding access to resources.

11. Under the LOS Convention, coastal States are entitled to claim an exclusive economic zone (EEZ) measured from the coast of their mainland territory (or archipelago in the case of the Indonesia and the Philippines) out to a distance of 200 nautical miles (nm). States have the sovereign right to explore and exploit the natural resources in and under the water in their EEZ. The four ASEAN States involved in the South China Sea disputes all claim a 200 nm EEZ from their mainland coasts. They have the sovereign right to explore and exploit the natural resources in their EEZs, except where it overlaps with maritime zones measured from islands which are in dispute.
12. Coastal States are entitled to claim a 12 nm territorial sea from features which meet the definition of an "island" in the LOS Convention, namely, that they are naturally formed areas of land above water at high tide. If an island is able to sustain human habitation or economic life of its own, it is also entitled to an EEZ and continental shelf. The four ASEAN claimants have not claimed any EEZ from the offshore islands they occupy or claim sovereignty over. They have only claimed an EEZ from their mainland coasts. Consequently, the status of the geographic features in the South China Sea has become critically important as it will determine not only whether a feature is an island capable of being subject to a claim of sovereignty and entitled to a 12 nm territorial sea, but also whether it is an island which is entitled to an EEZ and continental shelf of its own.
13. As mentioned above, it is estimated that less than 40 of the 150 or so geographic features in the Spratly Islands meet the definition of an island in the LOS Convention. Consequently, there is a potentially serious dispute over which features meet the definition of an island, and which of those which meet the definition are capable of sustaining human habitation or economic life of their own. These legal issues are the source of the ongoing dispute over oil and gas concession blocks between China and the Philippines in the Reed Bank area (which is part of the disputed Spratly Islands) and between China and Vietnam off the coast of Vietnam. The concession blocks in question are within the EEZ of the Philippines and Vietnam, as measured from their mainland coasts. The Philippines and Vietnam maintain that these concession blocks are not in dispute because they are too far from any disputed island that is entitled to an EEZ of its own. China maintains that the concession blocks are in areas where it has sovereign rights and jurisdiction, and that the Philippines and Vietnam have no right to undertake unilateral exploration.

China's claim and the infamous 9-dashed line map

14. The disputes between China and Vietnam and between China and the Philippines have raised wider issues about the nature of China's claim in the South China Sea. Is China claiming rights and jurisdiction over the natural resources in maritime zones measured from the disputed islands, or is it claiming rights and jurisdiction over the natural resources in all the waters inside its infamous "nine-dashed lines"?
15. China's infamous nine-dashed line map was first officially published by the Republic of China in 1948. The PRC Government in Beijing first brought it into the international arena in May 2009 by attaching it to a diplomatic note sent to the UN Secretary-General. Since then, China appears to some observers to be asserting rights and jurisdiction in all the waters inside the nine-dashed lines. Chinese vessels interfered with exploration activities of Vietnam in blocks in its EEZ near its coast and in the Reed Bank area in the EEZ of the Philippines. Both Vietnam and the Philippines have maintained that China's actions were inconsistent with international law and the LOS Convention.
16. The ASEAN claimants argue that China has no legal basis under the LOS Convention or international law to claim rights or jurisdiction in the waters inside the nine-dashed lines unless such rights are in a maritime zone measured from an island within the nine-dashed lines. China has not stated that it claims sovereignty to the waters within the nine-dashed lines, or that the nine-dashed lines represent a territorial boundary claim. In its diplomatic notes to the United Nations, China has stated that it has "indisputable sovereignty" over the Spratly Islands and their "adjacent waters" and that it has "sovereign rights and jurisdiction" over the "surrounding waters". China has not clarified whether the "surrounding waters" refers to the EEZ measured from the islands or to all of the waters within the nine-dashed lines.
17. China continues to assert "rights and jurisdiction" in areas of the South China Sea which are very far from any disputed island, especially in areas off the coast of Vietnam. The only basis for such claims would appear to be that it has "sovereign rights" or "historic rights" in all the waters inside the nine-dashed lines, even in areas which are hundreds of miles from any island over which it claims sovereignty. As would be expected, Vietnam and the Philippines assert that such a claim has no legal basis under the LOS Convention or international law.
18. Therefore, the fundamental issue is whether China will limit its claim to the resources in the South China Sea to maritime zones measured from islands or whether it will continue to maintain that it

has rights to resources in the waters inside the nine-dashed lines. At this stage China does not appear ready to limit its claim to maritime zones measured from the islands. Perhaps it is constrained by domestic policy considerations, given that it is in a period of transition to new leadership. Perhaps it is still studying whether it has any plausible claim under international law to assert historic rights to the resources in the areas inside the nine-dashed lines. Perhaps it feels that it will be in a weaker bargaining position with the ASEAN claimants if it clarifies that it is only claiming sovereign rights and jurisdiction in maritime zones measured from islands.

19. Because China continues its policy of deliberate ambiguity with respect to the nature of its claim to the resources in the South China Sea, serious questions are raised in ASEAN States on whether China intends to respect international law in general and the LOS Convention in particular when dealing with its smaller neighbours. This is cause for considerable concern among ASEAN States. One of the fundamental principles that ASEAN States have followed when dealing with the major powers on maritime security issues is that any cooperation must be consistent with international law, especially the LOS Convention.

The interests of the United States in the dispute

20. The disputes between China and the Philippines and between China and Vietnam have raised concerns in the United States and many other countries that the disputes in the South China Sea could undermine peace and security in the region. One of the concerns which has been raised is whether the disputes will threaten freedom of navigation and overflight, especially the security of passage of vessels through sea lanes of communication. However, the disputes over sovereignty over the islands and rights to the resources in the surrounding waters do not appear to pose any credible threat to the freedoms of navigation and overflight in the South China Sea.
21. Nevertheless, some observers have opined that the disputes have enabled the United States to strengthen its relations with ASEAN States who feel threatened by a rising China which appears unwilling to assert its claims in accordance with the generally accepted interpretations of the LOS Convention and international law.
22. The long-standing position of the United States has been that it does not take sides on the territorial disputes over land features in the South China Sea, but that it opposes the use of force or threat of force to advance the claims of any party. The United States has also repeatedly stated that it has a national interest in freedom of navigation, in open access to Asia's maritime commons and in

respect for international law in the South China Sea. In 2010 the United States seemed to have tilted in favour of the Philippines and Vietnam on the nine-dashed line map issue and the nature of China's claim. On 23 July 2010 Secretary of State Hillary Clinton told reporters at the 17th meeting of the ASEAN Regional Forum in Hanoi that "Consistent with customary international law, legitimate claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features." The United States has also stated that it supports the 2002 ASEAN–China Declaration on the Conduct of Parties in the South China Sea and in the efforts to reach agreement on a binding code of conduct.

US concern with military activities in the EEZ

23. The concerns of the United States with China's maritime policy are only indirectly related to the South China Sea. The real concern the United States has with China's maritime policy is that it believes that China is challenging the generally accepted rules governing freedoms of the seas and unimpeded access to the seas. The most important issue between the US and China on maritime security is that the US believes China is challenging generally accepted rules of international law relating to foreign military activities in the EEZ. The US concern arises from incidents concerning US reconnaissance activities conducted off the coasts of China in the airspace above the EEZ and in the waters in the EEZ. The two incidents which are the most debated are the EP-3 incident off the coast of Hainan on 1 April 2001 and the *Impeccable* incident in the waters off the coast of Hainan on 5 March 2009.
24. The dispute between the United States and China is a dispute on the interpretation of the LOS Convention provisions on the EEZ. The US position is that the EEZ is special zone in which the coastal State has sovereign rights to explore and exploit the natural resources, and in which other States have the right to exercise traditional freedoms of the seas, including the conduct of military activities. The US argues that it has rights to conduct military activities in China's EEZ, including reconnaissance activities, so long as it gives due regard to China's rights and obligations with respect to natural resources as provided for in the LOS Convention. In short, the US argues that the EEZ is a resource zone, not a security zone. China takes a different view, and argues that foreign military activities may not jeopardize its security interests.

China's policy on maritime security

25. It can be argued that China's position on foreign military activities in its EEZ is incompatible with its evolving position as a rising naval and maritime power. China's maritime security policy seems to have been created from the perspective of the defence of its land territory. It places an emphasis on regulating or prohibiting activities in the waters off its coasts which might threaten its economic or security interests and its ability to defend its territory.

26. China's policy on maritime security is very similar to the maritime security policy of the Soviet Union prior to 1965. What is interesting is how the maritime security policy of the Soviet Union changed in the 1960s as it became a maritime and naval power. After building a strong navy, a strong merchant marine and a long-distance fishing industry, the Soviet Union recognized that its maritime policy should change to place an emphasis on supporting freedoms of the seas so that it could protect and advance its interests in the oceans. As a result, despite the Cold War, it stood together with the United States at the Third UN Conference on the Law of the Sea in the 1970s in opposing "creeping jurisdiction" by coastal states and in supporting freedoms of the seas. It emphasized that the sovereign rights of coastal States to explore and exploit the natural resources of the EEZ must not prejudice the right of other States to exercise freedoms of the seas in the EEZ, including the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, and the freedom to conduct scientific research not connected with the exploration and exploitation of the natural resources of the EEZ.

27. Given the modernization of its navy, its dependence on the international trade, and its dependence on the importation of hydrocarbons and minerals, China's interests in the oceans are similarly changing. It is likely that China's maritime security policy will also change from one emphasizing threats to its territory from foreign warships near its coasts, to one emphasizing the need to maintain freedoms of the seas so that it can protect and advance its economic and security interests in waters thousands of miles from its coasts. The day will come when China is likely to determine that it is important to its national interests to monitor naval activities in the EEZ of other States. In other words, when it becomes a naval power, China will have the same interests in freedoms of the seas as other naval powers, and as its national interests change, its maritime security policy is also likely to change.

ASEAN-China Discussions: DOC and COC

28. Four of the claimant States in the South China Sea are members of ASEAN. ASEAN has played an important role for many years in attempting to manage potential conflicts in the South China Sea. The capstone of its efforts is the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC). In 2003 China acceded to the 1976 ASEAN Treaty of Amity and Cooperation, and China and ASEAN established a strategic partnership. This diffused the disputes to a considerable extent.
29. In recent years efforts to reach a consensus on how to implement the DOC stalled. However, in July 2011, ASEAN and China reached agreement on Guidelines for the Implementation of the DOC. Like the DOC itself, the guidelines call for peaceful settlement of the dialogues and consultations and confidence-building measures. The Guidelines stated that the implementation of activities and projects under the DOC should be clearly identified and that participation in projects and activities should be on a voluntary basis. The Guidelines also provide that the decision to implement concrete measures or activities under the DOC should be based on consensus among the parties concerned, and lead to the eventual realization of a Code of Conduct.
30. At a meeting in Bali, Indonesia on 19 July 2011, the ASEAN Foreign Ministers tasked the ASEAN Senior Officials Meeting with initiating discussions on a legally binding Code of Conduct for the South China Sea.
31. Therefore, ASEAN is moving along two tracks. First, it is negotiating with China to fully and effectively implement the DOC in accordance with the agreed Guidelines for Implementation. Second, it is working within ASEAN to reach agreement on a binding Code of Conduct to further contribute to peace, security, stability and cooperation in the South China Sea.
32. The decision seems to be to reach a consensus within ASEAN on the contents of the Code of Conduct prior to involving China in the discussions. China has indicated that it is ready to participate in discussions from the outset on the Code of Conduct. The ASEAN States are likely to realize that China will be much more willing to accept the Code of Conduct if it is involved in its drafting. However, the ASEAN States may want to first reach a consensus among themselves on the basic principles to be included in the Code of Conduct before entering into discussions with China. One way that ASEAN can engage China in the discussions on the Code of Conduct would be through Track 2 discussions.

33. Discussions on the Code of Conduct have begun with some sense of urgency because of pressure from both China and the United States. The ASEAN Senior Officials hope to have a draft for the 10th anniversary of the 2002 DOC in November 2012. However, given that there are likely to be differences among the ASEAN member States on the content of the COC, and given the length of time it took to reach agreement on the Guidelines for the Implementation of the DOC, it seems unlikely that they will be able to meet this deadline.
34. Since it is in the mutual interests of China and the ASEAN claimants to reach agreement on a COC, they may be able to do so, provided that the discussions do not get embroiled in the big power struggle between China and the United States. If the discussions remain at the regional level between China and ASEAN, it is far more likely that a consensus can be reached. If a draft COC is taken to any forum outside of the region, its chances of success will be minimal. China objects to the disputes being “internationalized”. Since the Workshops on Managing Potential Conflicts in the South China Sea in the 1990s, China has insisted that the South China Sea issue is a regional problem and that outside powers should not be involved.

Potential flashpoints and the risk of armed conflict

35. There seems to be little risk of any of the claimant States attempting to use force to resolve either the territorial sovereignty disputes or their differences over the “areas in dispute”. All the claimant States agreed in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea to resolve the disputes by peaceful means and it is likely that they will comply with this obligation. Everyone has too much to lose if force is used.
36. However, there is a risk that an incident at sea could escalate into a minor conflict. The fundamental problem is that the Philippines and Vietnam are of the view that they have the right under international law to undertake unilateral actions to explore for hydrocarbons in concession blocks in their EEZ in areas which they believe are not in dispute because they are too far from any disputed island. At the same time, China believes that these concession blocks are in areas where it has rights and jurisdiction. It does not appear that the Philippines and Vietnam are going to exercise restraint and cease their exploration activities in the concession blocks that they believe to be outside the areas in dispute. Therefore, the question is how China will react. Will it simply file protests? Will it physically interfere with the exploratory activities of Vietnam and the Philippines? Will it undertake

unilateral activities of its own in the same areas? If it chooses either of the last two options, the chances of an incident at sea escalating into a minor conflict increases significantly.

37. Also, China seems to believe that it is important that it demonstrate its claim by undertaking surveys, patrols and fishing activities in areas that are within the EEZ of other States. As the recent incident between China and the Philippines over fishing activities in Scarborough Shoal illustrates, there is also a risk of an incident occurring when two countries claim sovereignty over the same islands or exclusive rights in the same waters, and one of them attempts to enforce its laws against the vessels of the other. Common sense dictates that the two sides should work out an amicable arrangement to police their own fisherman and ensure that they abide by certain common rules. Such an arrangement requires both sides to concede that the islands and their adjacent waters are “areas in dispute”. To protect the legal interests and claim to sovereignty of both parties, any cooperative arrangement should expressly provide that it is “without prejudice” to their sovereignty claims, and that participating in the cooperative arrangement does not imply recognition of the legitimacy of the claims of the other claimant States.

Conclusions

38. The South China Sea disputes are extremely complex when viewed from the perspective of international law and the law of the sea. They involve sensitive issues of sovereignty over offshore features. They also involve difficult issues on how the LOS Convention applies to the features in the South China Sea, including whether the features are islands capable of being subject to a claim of sovereignty and a territorial sea of their own, whether the islands are entitled to an EEZ and continental shelf of their own, and how to delimit the maritime boundary when there is an overlap between the EEZ from the mainland and an EEZ from an offshore island. These disputes would be very complicated even if only two States were involved. They are even more complex when several States are involved.
39. The ASEAN claimants seem to view the issues through the lens of the LOS Convention and international law, and they favour solutions based on international law. On the other hand, China seems to regard international law as malleable rather than certain, and it seems to favour resolving the disputes through negotiation, especially bilateral negotiations, where other relevant factors such as history can be taken into account.

40. The Philippines seems to have concluded that the LOS Convention and international law are on its side. Therefore, it is more likely to want to resolve the disputes in accordance with international law. It knows that in bilateral negotiations with a rising superpower, it is at a huge disadvantage. The Aquino Government, bolstered by enhanced relations with the United States, seems more willing to assert its claims and challenge the legitimacy of China's claims based on the nine-dashed line map. It strongly believes that China has no legitimate claim based on the nine-dashed line map, and that a significant portion of the EEZ of the Philippines is outside the areas in dispute. It seems intent on continuing its exploratory activities in these areas and, if challenged by China, there is a possibility that it may invoke the dispute settlement system in the LOS Convention to challenge the legality of China's actions before an international arbitral tribunal. Its goal would be to obtain a ruling from an arbitral tribunal stating that China has no rights to the resources within the nine-dashed lines unless it is from a maritime zone measured from a disputed island.
41. The fact that the United States has taken a greater interest in the South China Sea impacts the dispute in several ways. After China published its nine-dashed line map in May 2009 and then asserted its claim in the manner it did during the incidents with Vietnam and the Philippines, those countries intentionally internationalized the dispute and moved closer to the United States with respect to maritime security. Because the US has moved to bolster its security relationship with the Philippines and has supported the position of the Philippines and Vietnam that claims to maritime space must be made from land features in a manner consistent with the LOS Convention and international law, those States may have become bolder in their willingness to confront China and to challenge the legitimacy of its nine-dashed line claim.
42. However, the sovereignty disputes between the claimants to the islands in the South China Sea have very little relevance to the major source of contention between the US and China – that is, foreign military activities in the EEZ. Furthermore, although the US maintains that a major issue is freedom of navigation in the sea lanes of communication passing through the South China Sea, the disputes and incidents pose no threat to the freedom of navigation and overflight so long as there is no armed conflict between the claimants.
43. The dispute could become more complicated if China perceives that the ASEAN countries are cooperating with the United States in a concerted policy to surround or contain it. Therefore, it is in the interests of ASEAN not to be seen to be taking sides in the big power rivalry between the US and China.

44. The better solution in my opinion would be for all the parties to enter into negotiations in good faith to define the “areas in dispute” in the South China Sea, and to agree to cooperative arrangements within such areas, including the joint development of the natural resources. In other words, the only viable solution is that proposed by Deng Xiao Ping – set aside the disputes and jointly develop the resources. This cannot be done, however, until there is agreement on the areas in dispute that will be subject to joint development and cooperation.
45. In the meantime, the only interim solution is to attempt to put mechanisms in place to manage or prevent potential conflicts. This will require the claimant States, especially China, the Philippines and Vietnam, to exercise restraint and not escalate the disputes. They should refrain from arresting each others’ fishing boats in disputed areas, from undertaking unilateral exploratory activities which involve drilling, from physically interfering with the unilateral exploratory activities of other States, and from undertaking other provocative unilateral activities.
46. Finally, the larger issue raised by the dispute concerns China’s attitude toward international law in general and the LOS Convention in particular. China should understand that its rise as an economic and military power naturally creates anxiety in its smaller neighbours. It should also understand that when its actions and policies send the message that it is not prepared to further its national interests in accordance with the rules of international law accepted by the vast majority of the members of the international community, this is a cause for great concern in its smaller neighbours. Hopefully, China will realize that in the long run it is in its interests to follow the generally accepted interpretations of the LOS Convention and international law in its relations with its smaller neighbours.