

The South China Sea: Island Building and Evolving U.S. Policy

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Introduction

There should be no mistake: the United States will fly, sail and operate wherever international law allows...America, alongside its allies and partners...will not be deterred from exercising these rights...after all turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit.¹

Speaking at the high profile Shangri-La Dialogue in Singapore on May 30, 2015, U.S. Secretary of Defense Ashton Carter announced a new formulation to Washington's South China Sea policy occasioned by China's island building in the South China Sea (SCS). He made clear that its newly created SCS islands will not constrain legal U.S. maritime activity on, under, and over the high seas. While this was a new formulation, it was an expression of traditional U.S. policy associated with freedom of navigation. It was also a bit of preemptive diplomacy since China has yet to officially claim any maritime entitlements associated with its artificial islands that could potentially constrain America's exercise of its lawful high seas freedoms.

Coming from the Secretary of Defense, not the Secretary of State, the Carter statement was also the most public example of the growing involvement of the U.S. security establishment in declaratory SCS policy, a trend that has been building over 2014-15 because, frankly, China has elected to largely ignore Washington's pleas for restraint in the pursuit of what it considers its territory in the Spratly Island chain of the South China Sea.

Which country actually has sovereignty over the Spratly Islands is uncertain. China, Taiwan, Vietnam, Malaysia, and the Philippines all claim some or all of the Spratly's. Because the demonstration of effective administration is considered an act of sovereignty each country been hedging their claims by permanently occupying features in the Spratly group—and have done so for several decades. Vietnam occupies 29 features, China seven, the Philippines nine, Malaysia five and Taiwan one—the largest naturally formed feature. Importantly, creating artificial islands does not increase the maritime entitlements (territorial sea or EEZ) of those features beyond what they merited before reclamation.²

Despite a long standing claim, China was very late to what could be called the Spratly Islands "land rush" four decades ago. They were left with slim pickings, as all the "best" islands and rocks had already been occupied by Vietnam, the Philippines and Malaysia long before Beijing elected to act in 1988. Until 2014, China, like other claimants, modestly expanded its foothold on its seven very small features so that small military garrisons on these remote outposts could be more comfortably housed and communications equipment, radar, and defensive armament could be accommodated. Over the years all the claimants to the Spratlys managed to coexist in a "live and let live" environment.

That changed starting in 2014 when China quietly began dredging operations aimed at enlarging the three rocks and four low-tide elevations (a land feature submerged at high tide) it has occupied for over 20 years.³ China changed its modestly developed holdings into *de facto* (not *de jure*) islands that are a several order of magnitude improvement over what existed before; these actions altered the previous years of geo-political stability by irrevocably upsetting the balance of power in the SCS. Beijing now has seven small island bases in the midst of the Spratly chain.

The Island Building Issue

As the scale of this unannounced activity became publicly obvious thanks to commercially available satellite imagery, it triggered a spate of negative comments from the United States, ASEAN and, most vociferously, from the Philippines. China was accused of undermining trust by introducing a military power dimension to the already complicated sovereignty disputes in the Spratly Islands.⁴

These accusations are correct. The reality today is that China has changed the strategic balance in the Spratly Island chain by creating facilities on the new islands that will militarily overshadow the garrisons and defensive capabilities of the features occupied by Vietnam, the Philippines or Malaysia. Studying the satellite photos available online makes it obvious that China is creating well-designed military bases that will accommodate larger garrisons, more military equipment including defensive and offensive missile systems, with new harbors that will permit the features to be mini-bases for small warships and coast guard vessels.⁵ It seems likely all of the newly formed islands will have expanded helicopter landing facilities and most significantly, on Fiery Cross Reef, Subi Reef and Mischief Reef, runways for jet aircraft. At least one of these, on Fiery Cross, has been constructed and is long enough to accommodate fighter-jets.⁶ Despite publically downplaying the military utility of these man-made islands, Beijing has created seven island bases about 500 nautical miles (nm) away from China's mainland county of Hainan.⁷

What is China Up To?

These expansions are the latest step by Beijing in what has essentially been a long-term campaign aimed at recovering *de facto* control over all the land features in the SCS.⁸ Because Chinese sovereignty assertions are involved, it is not surprising that Beijing has not backed down despite sustained criticism. Its responses to criticism can be generally characterized as telling everyone, including Washington, to mind their own business—the Spratlys are Chinese territory and they can do what they like. Nonetheless, continued public pressure from Washington, Manila and ASEAN did cause Beijing to “offer multiple and sometimes contradictory explanations” as the reason for destroying tons of coral in the process of creating these islands. These include enhanced ability to provide disaster relief, environmental protection, search and rescue activities, meteorological and other scientific research.⁹ Beijing has implied that military use is simply a secondary consideration, indicating the improved facilities would permit China to “better safeguard national territorial sovereignty [i.e., the Spratlys] and maritime rights and interests.”¹⁰ This statement is certainly true.

The U.S. military has no doubts that the island building is designed specifically for use as PLA operating bases. According to the Commander of U.S. Pacific Command, Admiral Harry Harris, USN, these “...facilities are clearly military in nature.”¹¹

Besides Island Building, There are Other Issues

Washington also longstanding problems with Chinese behavior in the SCS related to the so-called nine-dash line (NDL) that encloses most of the SCS and appears on all of China's maps of the area. Beijing inherited this line from the Republic of China.¹² Is the line simply a cartographical annotation indicating China's claim to all the land features within it, or since it cuts through the EEZs of all of the South China Sea coastal states, is it also an attempt to claim a significant portion of the resources that, under the Law of the Sea, legitimately belong to the coastal states?

China has been crystal clear that it considers the entire Spratly group, along with the Parcels and Scarborough Shoal to be their territory, but beyond those assertions, China gives every indication that it is trying to rewrite "commonly accepted" international law in order to legitimize a Chinese claim to ocean resources inside the NDL. Despite years of asking, Beijing has refused to officially clarify what this line signifies. While officially mute on the topic, the actions its Coast Guard, maritime militia and state-owned oil company (CNOOC) have taken over the years indicate that Beijing thinks it has a claim on most of the fish and hydrocarbon resources in the SCS, including those belonging to Vietnam, the Philippines and Malaysia. The United States has already made clear that it thinks this line has no legal basis under the law of the sea.¹³

While the cartographic depiction of the NDL has existed on Chinese maps and charts for more than sixty years, it was not until December 2014 that the U.S. government finally conveyed an official position challenging the use of the NDL as way to indicate a claim beyond the land features inside the line.¹⁴ It seems that Beijing's deliberate ambiguity preserves all of China's options without forcing it to make legally dubious assertions.¹⁵ Ambiguity makes issuing protests that Chinese sovereignty is being compromised easy since the totality of the claim is unclear. Ambiguity also makes it possible for Beijing to rationalize employing a wide range of activities that harass and threaten maritime activity undertaken by other SCS littoral states in their own EEZ.

The NDL has been particularly vexing for Manila. China's harassment of contractors has effectively stymied Manila's attempts to exploit a gas and oil rich area known as Reed Bank.¹⁶ Left with no other credible options, Manila took legal action permitted to United Nations Convention on Law of the Sea (UNCLOS) signatories and legally challenged China at the Permanent Court of Arbitration (PCA) in The Hague in January 2013.¹⁷ The NDL as well as Chinese appropriation of low tide elevations on the Philippine continental shelf are at the center of its request for an arbitral finding.

China has opted not to participate in the arbitration, and indicated it would not be bound by any finding. It did however argue that the PCA should dismiss the Philippine case on the grounds that the PCA did not have jurisdiction because the Philippine arguments were really about sovereignty, and UNCLOS does not address sovereignty issues.¹⁸ This legal strategy failed. The PCA found it did have jurisdiction.¹⁹ The PCA is now focusing on the merits of the Philippine request for arbitration; the expectation is their decision should come sometime in mid-2016.²⁰ Washington, Manila, and presumably all of the other claimants, save China and perhaps Taiwan, hope that the PCA will bring clarity to what has been a legally ambiguous situation.

As a policy approach the United States strongly supports the use of arbitration as a way to resolve the overlapping claims in the SCS. This is not surprising, since U.S. policy is based on the notion that “following the rules” is the key to stability in East Asia. As Secretary of State John Kerry said during a December 2013 visit to Vietnam:

Claimants have a responsibility to clarify their claims and to align their claims with international law and to pursue those claims within international peaceful institutions. Those countries can engage in arbitration and other means of negotiating disputes peacefully.²¹

China’s Strategic Approach to Maritime Claims in the South China Sea

As mentioned, island building is the next step in a patiently executed Chinese strategy aimed at gaining complete control over all the land features in the South China Sea; features that Beijing has long claimed and firmly believes are its territory. It has a long record of coercive behavior in the pursuit of this objective. It gained full control of the Paracel Islands following a 1974 invasion that defeated and expelled South Vietnamese garrisons. (South Vietnam at that time, and now the Democratic People’s Republic of Vietnam, claimed sovereignty over the entire Paracel chain.) In 1988, China occupied six features in the Spratlys and engaged in a bloody gun-battle with the Vietnamese (DRV) over Johnson South Reef. In 1994 it occupied Philippine-claimed Mischief Reef, ostensibly to build shelters for fishermen.²² Of late, it has been more subtle in its coercion than in past decades; it effectively seized control of Scarborough Shoal from the Philippines in a non-violent *coup de main* in 2012.²³

The reality in the South China Sea today is that China has occupied the entire Paracel group for over 40 years and, short of military action by Vietnam to try to recapture the archipelago, it will never leave. While its hold over Scarborough Shoal began only recently, there is no reason to expect China to lessen its grip unless some sort of bargain is reached with Manila that acknowledges Chinese sovereignty in return for access for Philippine fishermen. In sum, China has control of all the land features in northern half of the South China Sea; only the Spratlys remain beyond its physical grasp.²⁴

Why is Sovereignty Over the Spratly Islands so Important?

The interests of each of the Spratly sovereignty claimants include nationalism, economic gain and security. As we are witnessing today, a small number of the land features have strategic value as military bases because they will have harbors that can support warships and runways large enough to accommodate tactical jet aircraft. The Spratlys have the potential to become a foothold that could enable a country to interfere with trade, or host a hostile naval force, destined for China or the rest of Northeast Asia. In fact, the location of the Spratlys has been on the minds of Western geo-strategists since the end of World War I. It was worries about an aggressive Japan that triggered France to annex the both Spratlys and Paracels in the 1930’s.²⁵

Today the proliferation of precision weapons and the ability to deliver them has reduced the wartime salience of military forces in the Spratlys as a threat to either maritime commerce or naval forces operating in the southern half of the South China Sea. But, in times short of war, controlling these islands is the best way for China to make certain no one else controls them, and to improve surveillance of its maritime approaches. Since China is hugely dependent on the maritime trade routes that pass to the west of the Spratlys, including trade associated with the much-touted 21st Century Maritime Silk Road, it is not a surprise that China blends strategic interest along with a nationalist narrative of recovering lost territory as the reason it wants to physically be in control of the Spratlys.

Another important reason why any of the other claimants care who “owns” the many largely uninhabitable above-water land features is that sovereignty carries with it certain rights to the resources of the surrounding waters—either 12 nautical mile territorial waters or, if the feature is deemed an island, a 200-nautical mile exclusive economic zone (EEZ). Maritime entitlements associated with land features above water at high tide yield ocean resources, including fish, hydrocarbons, and minerals on or beneath the ocean floor, to the sovereign state.

Finally, nationalism in and of itself is also very important for all the claimants. Public pressure to not concede “our sovereign territory” plays a very significant role in shaping government options, and makes compromise difficult.

Why Can’t a Negotiated Solution be Reached?

Many outside observers argue that a resource sharing regime is the sensible way to end the confrontation over sovereignty.²⁶ Starting with Deng Xiaoping in the 1970’s, China has indicated that it is willing to discuss shared development; with the important caveat that China retains sovereignty.²⁷ So far no other claimant has been willing to deal with China on those terms.

China’s island building suggests that a status quo involving occupation of Spratly holdings by another country is not an acceptable long-term outcome, and has begun to publicly suggest that Vietnam and the Philippines abandon their outposts.²⁸ As a general observation, a permanent resolution to the issue of sovereignty in the Spratlys is likely to come about in only one of four ways:

- All parties agree to undertake judicial arbitration.
- All parties agree to freeze in place, tabling the issue of ultimate sovereignty indefinitely in favor of a cooperative regime for resource exploitation and management. (Something that Washington and the ASEAN claimants should vigorously pursue.)
- Individual claimants reach an agreement with China, to freeze in place, or possibly to renouncing sovereignty claims, in return for economic rights—to oil and gas from a specific area such as Reed Bank, for example.
- The most powerful claimant uses military intimidation or actual use of force to evict rival claimants.

Beijing appears to prefer a more gradual incremental coercive approach that stays below the threshold of a direct use of violence—an approach characterized as “grey zone” scenarios.²⁹ But given Beijing’s implacable approach to off-shore island sovereignty, one cannot rule out this possibility.

So, Why is the United States Involved? What are American Interests?

Starting in summer 2010, the Obama administration clearly signaled that the United States considers establishing rule-based stability in the South China Sea to be an important U.S. national priority,³⁰ and to a degree a litmus test of the credibility of the so-called rebalance to Asia strategy. The United States, as Secretary Carter made clear at the 2015 Shangri-La dialogue, also has an abiding interest in “freedom of navigation” in the South China Sea, specifically in the EEZs of coastal states. Washington is convinced that UNCLOS permits any nation to exercise all of its “high seas freedoms” in the EEZ of any coastal state. These freedoms include, *inter alia*, peaceful military activities including surveillance. China disagrees. It claims that surveillance is not a “peaceful” activity.³¹

The U.S. defense treaty with the Philippines is an important interest and obligation. While the treaty does not specifically geographically cover the Philippines’ Spratly claims, it is relevant to the Spratly dispute because if China were to attack a Philippine naval or coast guard vessel, shoot down a Philippine military aircraft, or kill or wound members of the Philippine armed forces, treaty language related to attacks on “its [the Philippines’] armed forces, public vessels or aircraft in the Pacific” suggests that the treaty would apply. This is an important deterrent to violence against the Philippines, especially since it has been reinforced by public U.S. statements from the President, and more recently by the Secretary of Defense, that America’s commitment to defend the Philippines is “ironclad.”³²

Finally, a very important U.S. interest is its bilateral relationship with China. Washington has been at pains to ensure South China Sea disputes do not hijack the overall U.S.-China relationship which is central to the resolution of other critical issues that matter to Washington, such as ending the Iranian and North Korean nuclear programs; addressing climate change; maintaining peace in the Taiwan Strait and East China Sea; and promoting trade, investment, and economic growth. This mix of significant interests forms the broader context for U.S.-China relations, and based on its approach to date suggests that the Obama Administration believes that the *South China Sea should not become the central element in the overall U.S.-China relationship*.

Existing U.S. Policy toward the South China Sea

Based on public statements and Congressional testimony from serving U.S. officials, U.S. policy consists of the following key elements:

- No use of force or coercion by any of the claimants to resolve sovereignty disputes or change the status quo of disputed South China Sea features.
- The necessity of freedom of navigation, which includes unimpeded lawful navigation for commercial, private, and military vessels and aircraft. Coastal states must respect the UNCLOS language that all “high seas freedoms,” which include peaceful military operations, are permissible within coastal states’ EEZs.
- All maritime entitlements to any of the waters of the South China Sea must be based on international law and must be derived from land features in the South China Sea. China’s nine-dash line defined as a claim to historic rights over the enclosed waters does not meet these criteria.

- The United States takes no position on the relative merits of competing sovereignty claims. It does not favor one country's claim over another's. This is not the same as saying that the Spratlys do not belong to China, as the Commander of the U.S. Pacific Command has publicly opined.³³
- An effective Code of Conduct (COC) that would promote a rules-based framework for managing and regulating the behavior of relevant countries in the South China Sea is essential. ASEAN normally does not welcome outside interference in what it judges are ASEAN diplomatic equities, but since the COC process is stalled by Chinese foot-dragging, U.S. policymakers should press ASEAN to conclude an agreed upon COC that can be presented to Beijing as an agreed upon ASEAN position.
- The U.S. government wants to improve access for U.S. military in areas proximate to the South China Sea, especially in the Philippines where an Enhanced Defense Cooperation Agreement (EDCA) with the Philippine government has been concluded.³⁴
- There is a low-key but very visible hard power element to U.S. policy in Southeast Asia. Starting in August 2013, the U.S. Seventh Fleet stepped up its military capacity in the South China Sea by instituting full time U.S. Navy warship presence, along with periodic aircraft reconnaissance missions, somewhere in the South China Sea. On average there are two USN warships patrolling that body of water daily. (Unofficially, this compares with five to six PLA Navy warships plus some number of Chinese Coast Guard vessels operating in the SCS.)³⁵
- And since July 2014, calling for a halt, or freeze, in land reclamation activities in the Spratlys; particularly by China.

In policy terms Washington has also been quick to capitalize on China's apparent blind spot—being tough with its neighbors simply incentivizes them to move closer to Washington.

China's behavior has energized Washington's security relationship with the Philippines, facilitating the access of U.S. forces back to bases in the Philippines, a development that probably would have never happened had China not so blatantly pushed the Philippines around. Chinese behavior has provided the pretext for Washington to waive requirements against selling maritime security-related equipment to Vietnam; it has energized Japanese and Australian efforts aimed at improving the maritime security of SCS littoral states, while gradually involving them both more directly in the South China Sea.

It has awakened Indonesia's concerns about the China's nine-dash line in the South China Sea as well as its maritime frontier, especially around its Natuna Island gas fields.³⁶ It has allowed Malaysia to become a "comprehensive partner" with Washington.³⁷ It has resulted in a Philippine-inspired legal arbitration case, which Washington supports and that China could easily lose, making it look foolish in the eyes of the world. In short, China's approach to its maritime claims, and more lately its island building activities, have frightened its neighbors into seeking closer ties with Washington.³⁸

Beijing is aware of this and has been attempting to take the edge off its activities in the Spratlys with the promise of huge sums for improvements to regional maritime-related infrastructure. This return to economic diplomacy was first announced in Jakarta in October 2013 by President Xi and is known as "21st Century Maritime Silk Road Economic Belt," and then in 2015 with the establishment of a new international financial institution known as the Asian Infrastructure Investment Bank (AIIB).³⁹

So What Should Washington Do?

When it comes to the South China Sea, Washington should not announce policies it is not prepared to back up; in other words, no bluffing. It should also be very specific in publicly identifying where it believes China is in violation of the Law of the Sea. In addition, policy guidelines should include the following principles:

- The South China Sea is not the central strategic element in the overall U.S.-China relationship. Keep the South China Sea in perspective.
- Recognize that for all practical purposes the disputes in the northern half of the South China Sea are settled. China controls the land features and associated maritime entitlements. There is scant likelihood of ever turning the clock back regarding the Paracels or Scarborough Shoal. The focus now should be managing Spratly Islands developments by returning geostrategic balance as a way to buy time, awaiting a permanent solution.
- The U.S. government should remain sensitive to the efforts of littoral states to entangle the United States more deeply in supporting their claims—acting as their counterbalance to China.

Repeated exhortations from Washington did not stop China’s island building until reclamation activity was complete. This track record suggests it is not likely that a new spate of exhortations against militarization of the facilities will be effective. But since President Xi announced during his post-summit press conference in Washington that China is not going to “militarize” its Spratly holdings, Washington should press Beijing to explicitly explain what it thinks non-militarization means.⁴⁰ As discussed earlier, from a U.S. military perspective the facilities being built on the new islands are inherently military in nature. The only possible explanation for Xi’s pledge is that he meant China will not put weapons on these island bases. This is an important point to focus on when continuing to voice concern about the changes to the status quo that are being created by this activity.

The United States could also press ASEAN to take a serious look at how to reconcile the overlapping Spratly sovereignty claims among themselves in order to remove that stumbling block to a peaceful solution, and present a unified position to Beijing. It would be very difficult politically to accomplish this, but it is something ASEAN should at least explore. A strawman on how such an ASEAN-only deal might unfold has recently been suggested in print.⁴¹

Meanwhile, the only way to reintroduce some element of stability in the southern half of the SCS is to assist the other claimants who desire help to look after their own holdings. To this end Washington has decided to double down on its willingness to help improve the maritime security capacity of SCS littoral states. In May 2015, Secretary Carter used the Shangri-La venue in Singapore to announce a \$425M “Southeast Asia Maritime Security Initiative,” an initiative originated by Senator John McCain, chair of the Senate Armed Services Committee. Focused on Indonesia, Malaysia, the Philippines, Thailand and Vietnam, this program is designed to provide equipment, training, supplies and small scale construction. It needs to be executed as efficiently as possible.⁴²

To ensure Beijing does not resort to military force to accomplish its objectives, a policy approach that puts more emphasis on deterrence also needs to be considered. In this regard, Secretary Carter's call for Hanoi to stop improving its facilities in the Spratlys, probably to appear even-handed, seems strategically misguided. The goal should be to return some sort of strategic equilibrium to the Spratlys; Vietnam is the claimant best equipped to accomplish that. Hanoi gives every indication it will fight to hang on to its holdings; this predisposition improves deterrence if China concludes it would face a difficult campaign in trying to force Vietnam out of the Spratlys. Vietnam should be encouraged to improve its defenses. The other aspect of deterrence that will hopefully keep the peace is the U.S.-Philippine Mutual Defense Treaty because of its potential applicability if Filipino servicemen are harmed.

The United States also needs to be completely committed to a very long-term and dedicated effort to improve the maritime capabilities of the armed forces of the Philippines. This will take patience and money. This assistance should also include the development or improvement of existing bases on the Philippine home island of Palawan, directly east of the Spratlys. For a long time to come, the Philippine's best deterrent is the security alliance with the United States, but Washington should resist pressure to expand the scope of the Mutual Defense Treaty to cover the contested (and legally suspect) Philippine claims in the Spratlys.

U.S. naval and air presence in the South China Sea is already a visible daily occurrence. To improve upon this presence the United States should increase the duration of its exercises with South China Sea littoral states and expand participation in these exercises by inviting participation from other Asian maritime states, such as Japan, Australia, South Korea, and possibly India. This will increase U.S. presence in the region and demonstrate that other maritime states are concerned about stability in the South China Sea.

China's island building activities have triggered greater U.S. involvement "on the ground," as it were. A tangible demonstration of the U.S. policy of "sailing wherever international law permits," led to the direct involvement of the U.S. Navy. On October 27, 2015 Washington directed a U.S. Navy destroyer to sail within 12 nm of one of China's reclaimed islands (Subi Reef). This was intended as a demonstration that the United States would not recognize any maritime entitlements associated with Beijing's island building.⁴³ Since Beijing has yet to make any claims to entitlements, such as a territorial sea that Subi Reef is not entitled to under UNCLOS, the legal reasoning behind this demonstration is convoluted. It is in fact so convoluted that the best way to explain it is to quote at length a letter from Secretary Carter to an unhappy U.S. Senator John McCain who was seeking an explanation of why the operation was characterized as "innocent passage." A passage from the Department of Defense response explaining the reasoning behind the involvement of *USS Lassen* follows:

With respect to Subi Reef, *the claimants have not clarified whether they believe a territorial sea surrounds it*, but one thing is clear: under the law of the sea, China’s land reclamation cannot create a legal entitlement to a territorial sea, and does not change our legal ability to navigate near it in this manner. We [the Obama Administration] believe that Subi Reef, before China turned it into an artificial island, was a low-tide elevation and that it therefore cannot generate its own entitlement to a territorial sea. However, if it is located within 12 nautical miles of another geographic feature that is entitled to a territorial sea – as might be the case with Sandy Cay – then the low-water line on Subi Reef could be used as the baseline for measuring Sandy Cay’s territorial sea. In other words, in those circumstances, Subi Reef could be surrounded by a 12-nautical mile-territorial sea despite being submerged at high tide in its natural state. Given the factual uncertainty, we conducted the FONOP [Freedom of Navigation Operation] in a manner that is lawful under all possible scenarios to preserve U.S. options should the factual ambiguities be resolved, disputes settled, and clarity on maritime claims reached.⁴⁴ (Emphasis added.)

While Senator McCain was not happy, the intended message was clearly received by Beijing. They too were not happy, but in this case that result was the objective of the operation—it was the operational equivalent of diplomatic protest.⁴⁵ In response, Beijing eventually used carefully chosen language that avoided making Washington’s case that China was making an unlawful maritime claim associated with the newly created islands. In short, Beijing did not argue that the U.S. had violated Chinese sovereignty.⁴⁶ They did indicate it the U.S. had “harmed” China’s security. This is not the last we will hear about South China Sea FON operations, since the U.S. Department of Defense apparently remains committed to periodic FON operations in 2016—activity that could result in a direct military confrontation between Washington and Beijing⁴⁷.

One has to wonder whether the utility of the maritime equivalent of a diplomatic protest that runs the risk of a direct military face-off is worth the risk, since it will do nothing to neither change the reality of China’s new island bases, nor China’s interpretation of UNCLOS that requires prior permission for a ship sailing through its territorial sea on “innocent passage.” The United States already ignores that requirement, as well as China’s prohibition against military activities in its EEZ by conducting frequent reconnaissance operations in China’s EEZ. It is one thing to help nations that actually have claim in the Spratly’s to improve capabilities; it is another to wave a red flag in China’s face over maritime claims that have not made. It seems to violate the idea of keeping the South China Sea in perspective.

¹ Secretary Carter, Ashton. “A Regional Security Architecture Where Everyone Rises.” *Presentation, IISS, Shangri-La Dialogue*. Singapore. 30 May 2015. <<http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1945>>

² Beckman, Robert C. “Large Scale Reclamation Projects in the South China Sea: China and International law.” *RSIS Commentary*. 29 October 2014. <<http://www.rsis.edu.sg/wp-content/uploads/2014/10/CO14213.pdf>>

³ China has occupied the “rocks” Fiery Cross Reef, Cuarteron Reef, and Johnson Reef South along with the submerged at high tide (known as low tide elevations) features Gaven Reef, Subi Reef, Hughes Reef since 1988. China seized Mischief Reef, another low tide elevation in 1995. See: Roach, Ashley J., “China’s Shifting Sands in the Spratlys.” *American Society of International Law: Insights* Volume 19. Issue 54. <<https://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys>>

⁴ Alexander, David and Rachel Armstrong. “U.S. Says China’s Island Building Erodes Security: Beijing angered.” *Reuters*. 30 May 2015. <<http://www.reuters.com/article/us-asia-security-idUSKBN0OF01J20150531>>

⁵ The Asia Maritime Transparency Initiative (AMTI) a website sponsored by the Center for Strategic and International Studies (CSIS) in Washington DC, has carefully documented China’s reclamation activities with high resolution satellite photography. See: “Island Tracker.” *The Asia Maritime Transparency Initiative (AMTI)*. AMTI, n.d. <<http://amti.csis.org/island-tracker/>>

⁶ For an excellent assessment of the implications of the new 10,000 foot runway on Fiery Cross Reef see: Erickson, Andrew. “Lengthening Chinese Airstrips May Pave Way for South China Sea ADIZ.” *The National Interest*. 29 June 2015. <<http://nationalinterest.org/blog/the-buzz/lengthening-chinese-airstrips-may-pave-way-south-china-sea-12736>>

⁷ Beijing has announced that island building per se is complete, i.e., the destruction of coral and associated dredging, but the construction of buildings and other necessary facilities goes on. Keck, Zachery. “Exposed: China Did NOT Halt Island Building Project in the South China Sea.” *The National Interest*. 6 August 2015. <<http://nationalinterest.org/blog/the-buzz/exposed-china-did-not-halt-island-building-project-the-south-13512>>

⁸ “Since 2014, China has reclaimed 2,000 acres -- more land than all other claimants combined over the history of their claims. When combined with a range of activities, including: assertion of its expansive Nine-Dash Line claim, relocation of oil rigs in disputed maritime zones, efforts to restrict access to disputed fishing zones, and efforts to interfere with resupply of the Philippine outpost at Second Thomas Shoal, we see a pattern of behavior that raises concerns that China is trying to assert de facto control over disputed territories, and strengthen its military presence in the South China Sea.” See: “Statement of David Shear, Assistant Secretary of Defense for Asian & Pacific Security Affairs, Before the Senate Committee on Foreign Relations.” *US Senate Committee on Foreign Relations*. 13 May 2015. <http://www.foreign.senate.gov/imo/media/doc/051315_Shear_Testimony.pdf>

⁹ “Maritime Issues in East Asia: Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the Senate Foreign Relations Committee, Washington DC.” *U.S. Department of State*, 13 May 2015. <<http://www.state.gov/p/eap/rls/rm/2015/05/242262.htm>>

¹⁰ China’s Foreign Ministry spokesman cited in *Ibid*.

¹¹ Baron, Kevon. “China’s New Islands are Clearly Military, U.S. Pacific Chief Says.” *Defense One*. 24 July 2015. <<http://www.defenseone.com/threats/2015/07/chinas-new-islands-are-clearly-military/118591/>>

¹² For decades the NDL only appeared on Chinese (and Republic of China) maps and charts. Beijing has apparently opted to interpret it more broadly than the Republic of China ever intended. Anecdotal evidence from Taipei strongly suggests it was only intended to indicate a claim to all the islands and features in the South China Sea. Since the NDL was created by the Republic of China it stands to reason that Taipei has the ability to search its archives and present a clarifying statement of what was intended when its predecessor government first created this cartographical annotation. So far the Ma Ying-jeou Administration has been unwilling to provide that clarity. That said, in a speech delivered on September 1, 2014, Ma Ying-jeou suggested that what is now known as the NDL was in fact a way for the ROC to claim the islands of the SCS. See: Taiwan Office of the President. “Ma Ying-jeou Attends Exhibition of Historical Records for South China Sea.” *Taipei Office of the President in Chinese*. <<http://www.president.gov.tw>>

¹³ Assistant Secretary of State for East Asia Russel was blunt in his February 5, 2014, testimony, stating, “I want to emphasize the point that under international law, maritime claims in the South China Sea must be derived from land features. *Any use of the “nine-dash line” by China to claim maritime rights not based on land features would be inconsistent with international law.*” (Emphasis added.). “Maritime Disputes in East Asia: Testimony of Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, Washington, DC.” *U.S. Department of State*. 5 February 2014. <<http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm>>

¹⁴ The U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs. *Limits in the Seas, No. 143: China: Maritime Claims in the South China Sea*. 5 December 2014. <<http://www.state.gov/documents/organization/234936.pdf>>

¹⁵ The January 2013 edition of the *American Journal of International Law* (AJIL) features an Agora on the South China Sea Disputes. The Beckman piece remains the single best short analysis of the LOS issues surrounding the various claims in the SCS. He explores Chinese “ambiguity” in detail. See: Beckman, Robert. “The UN convention on the Law of the Sea and the Maritime Disputes in the South China Sea.” *American Journal of International Law* Volume. (2013): 150-151. <<http://www.jstor.org/discover/10.5305/amerjintlaw.107.1.fm>>

¹⁶ Chubb, Andrew. “China’s latest oil rig move: not a crisis, and maybe an opportunity?” *Southsea Conversations*. 27 June 2015. <<https://southseaconversations.wordpress.com/2015/06/27/chinas-latest-oil-rig-move-not-a-crisis-and-maybe-an-opportunity/#more-2189>>

For a thorough discussion of how China used economic leverage as well as aggressive use of fishing boats and constabulary vessels to frustrate Philippine and Vietnamese efforts to survey potential oil and gas fields, see also: Hayton, Bill. *The South China Sea: The Struggle for Power in Asia*. Yale University Press, 2014. Print. 121-150.

¹⁷ The Philippines raised three central issues. The most important is whether China can lawfully make any maritime claim based on its nine-dash line, either to sovereignty over the waters or to sovereign rights to the natural resources within the waters. The Philippines requests the arbitral panel to rule that China can only claim rights to maritime space in maritime zones measured from naturally formed land territory, and that claims based on the nine-dash line are not consistent with Law of the Sea (UNCLOS.) The main purpose of the case is to challenge the legality of China’s claim to historic rights and jurisdiction inside the nine-dash line.

The second major issue raised is a Philippine request for ruling that all of the “islands” occupied by China (the naturally formed areas of land above water at high tide) are really only “rocks” entitled only to a 12 nm territorial sea because they cannot “sustain human habitation or economic life of their own”, as set out in Article 121(3) of UNCLOS. It also requests the Tribunal to declare that China has unlawfully claimed maritime entitlements beyond 12 nm from these features.

The third major issue raised addresses the geographic features currently occupied by China that do not meet the definition of an island as set out in Article 121(1) because they are not naturally formed areas of land above water at high tide (these being Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef). The Philippines argues that such features are not subject to a claim of sovereignty and that China's occupation of them is illegal because they are part of the continental shelf of the Philippines.

Beckman, Robert. "The Philippine v. China Case and the South China Sea Disputes." *Asia Society: Lee Kwan Yew SPP Conference March 13-15 2013*, New York, NY. National University of Singapore: Center for International Law. <<http://cil.nus.edu.sg/wp/wp-content/uploads/2013/03/Beckman-Asia-Society-LKY-SPP-March-2013-draft-of-6-March.pdf>>

¹⁸ Ministry of Foreign Affairs of the Peoples Republic of China. *Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration*. 7 December 2014. Council on Foreign Relations. <<http://www.cfr.org/territorial-disputes/chinese-ministry-foreign-affairs-position-paper-matter-jurisdiction-south-china-sea-arbitration/p33978>>

¹⁹ The Permanent Court of Arbitration. "Arbitration between the Republic of the Philippines and the People's Republic of China." The Hague: 29 October 2015. <<http://www.pcacases.com/web/sendAttach/1503>>

²⁰ Kraska, James. "A Legal Analysis of the Philippine-China Arbitration Ruling." *The Diplomat*. 2 November 2015. <<http://thediplomat.com/2015/11/a-legal-analysis-of-the-philippine-china-arbitration-ruling/>>

²¹ "Joint Press Availability With Vietnamese Deputy Prime Minister and Foreign Minister Pham Binh Minh." *U.S. Department of State*. Hanoi, Vietnam: 16 December 2013.

<<http://www.state.gov/secretary/remarks/2013/12/218747.htm>>

²² For an excellent article on the Mischief Reef episode see: Dzurek, Danial J., "China Occupies Mischief Reef in Spratly Gambit." *IBRU Boundary and Security Bulletin*. April 1995.

<<https://www.dur.ac.uk/ibru/publications/download/?id=58>>

²³ Castro, Renato Cruz De. "China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Stand-off." *Center for Strategic & Interational Studies*. 6 June 2013.

<http://csis.org/files/attachments/130606_DeCastro_ConferencePaper.pdf>

Bonnet, Francois-Xavier. "Geopolitics of Scarborough Shoal." *Research Institute on Contemporary Southeast Asia (IRASEC)*. November 2012.

²⁴ Taiwan (the Republic of China) controls the Pratas Island group located at the NE area of the SCS. No other country except China claims these features. Since the Peoples Republic of China is the legal successor state to the Republic of China, I choose to consider it legally China's. The fact it has not elected to evict the ROC garrison, something it could easily do, is caught up in the larger issue of the Taiwan-Mainland dynamic.

²⁵ Samuels, Marwyn S. *Contest for the South China Sea*. New York: Methuen, 1982. 4. Print.

Hayton, Bill. *The South China Sea: The Struggle for Power in Asia*. Yale University Press, 2014. 53-56. Print.

²⁶ Beckman, Robert. "Legal Framework for Joint Development in the South China Sea." *National Institute for South China Sea Studies December 6-7, 2012, Haikou, China*. National University of Singapore: Center for International Law. 17. <<http://cil.nus.edu.sg/wp/wp-content/uploads/2012/12/Beckman-Paper-Hainan-Dec-6-7-submitted-Nov-22.pdf>>

See also: Freeman Jr., Chas W. "A New Set of Great Power Relationships." Remarks to the 8th International Conference on East Asian Studies. <<http://www.mepc.org/articles-commentary/speeches/new-set-great-power-relationships?print>>

Freeman argues, "In the end, therefore, resort to the well-established international legal principle of *uti possidetis* is the obvious solution. This Latin phrase means that, in the absence of agreement to the contrary, everyone is entitled to keep what they have regardless of how they got it. Agreement between the claimants to apply this principle and the law of the sea to the South China Sea would end their disputes over territory, quell concerns about armed conflict, and facilitate the legal apportionment of seabed resources."

²⁷ "The concept of 'setting aside dispute and pursuing joint development' has the following four elements: 1. The sovereignty of the territories concerned belongs to China. 2. When conditions are not ripe to bring about a thorough solution to territorial dispute, discussion on the issue of sovereignty may be postponed so that the dispute is set aside. To set aside dispute does not mean giving up sovereignty. It is just to leave the dispute aside for the time being. 3. The territories under dispute may be developed in a joint way. 4. The purpose of joint development is to enhance mutual understanding through cooperation and create conditions for the eventual resolution of territorial ownership."

Ministry of Foreign Affairs of the People's Republic of China. "Set Aside Dispute and Pursue Joint Development." n.d. <http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml>

²⁸ Blanchard, Ben. "China fires back at South China Sea claimants with reclamation accusations." *Reuters*. 29 April 2015. <<http://www.reuters.com/article/2015/04/29/us-china-southchinasea-idUSKBN0NKOVB20150429>>

²⁹ "Low-level coercion, such as China's ongoing efforts in the East and South China Seas, sit between peacetime and wartime. Because low-level coercion does not fit cleanly into the black and white categories of war and peace, some experts refer to these conflicts as "grey zones."

Cooper, Zack. "America's Massive Military Dilemma in Asia: Visibility vs. Vulnerability." *The National Interest*. 15 January 2015. <<http://nationalinterest.org/blog/the-buzz/americas-massive-military-dilemma-asia-visibility-vs-12040>>

³⁰ For an authoritative discussion of the rationale behind this decision see: Bader, Jeffery A., *Obama and China's Rise: An Insider's Account of America's Asia Strategy*. Washington DC: Brookings Institution Press, 2012. Print. 104-105.

³¹ This disagreement has resulted in two serious incidents: the 2001 mid-air collision between a U.S. Navy surveillance aircraft (EP-3) and an intercepting Chinese navy fighter, and the 2009 episode in which Chinese fishermen and paramilitary ships harassed USNS *Impeccable*. More recently, a dangerously close intercept of a U.S. Navy P-8 maritime patrol aircraft created another diplomatic dustup. At this stage both sides continue to vehemently disagree on this fundamental point, but have begun to put in place measures to ensure that encounters at sea or in the air are conducted safely. The goal is to reduce the risk of accidents.

³² Felsenthal, Mark and Matt Spetalnick. "Obama says U.S. commitment to defend Philippines 'ironclad'" *Reuters*, 29 April 2014. <<http://www.reuters.com/article/2014/04/29/us-philippines-usa-obama-idUSBREA3S02T20140429>> Balana, Cynthia and Nikko Dizon. "US affirms 'ironclad' support for Philippines." *Philippine Daily Inquirer*. 29 May 2015. <<http://globalnation.inquirer.net/123613/us-affirms-ironclad-promise-to-defend-philippines>>

³³ Center for Strategic & International Studies: Audio. "A presentation by Admiral Harry B. Harris, Commander, U.S. Pacific Command: Strategic Opportunities in the Indo-Asia-Pacific." 27 January 2016. <<http://csis.org/event/strategic-opportunities-indo-asia-pacific-admiral-harry-b-harris>>

³⁴ This is also true for Singapore. In April 2014, with when President Obama and President Aquino signed an agreement that will improve US military access to the Philippines.

The White House Office of the Press Secretary. "Press Briefing by Deputy National Security Advisor for Strategic Communication Ben Rhodes and NSC Senior Director for Asian Affairs Evan Medeiros." Grand Millennium Hotel, Kuala Lumpur, Malaysia. 27 April 2014. <<https://www.whitehouse.gov/the-press-office/2014/04/27/press-briefing-deputy-national-security-advisor-strategic-communication>>

³⁵ "It is my belief that the consistent presence of the Seventh Fleet and our recent force posture movements have been significant factors in deterring conflict between claimants in recent years...a strong and sustained US military presence...is welcomed by the overwhelming majority of countries in the region... [however]... diplomacy will continue to be our instrument of first resort.

"Maritime Issues in East Asia: Daniel R. Russel, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Testimony Before the Senate Foreign Relations Committee, Washington DC." *U.S. Department of State*, 13 May 2015. <<http://www.state.gov/p/eap/rls/rm/2015/05/242262.htm>>

Chatmas, Lauren. "USS Lassen Promotes Maritime Security in the South China Sea." *U.S. Navy News Service*. 9 July 2015. <http://www.navy.mil/submit/display.asp?story_id=90056>

³⁶ Murphy, Ann Marie. "Jakarta rejects China's 'nine-dash line'" *Asia Times Online*. 3 April 2014. <http://www.atimes.com/atimes/Southeast_Asia/SEA-01-030414.html>

³⁷ The Obama administration established either strategic or comprehensive "partnerships" with Indonesia in November 2010, Vietnam in July 2013, Malaysia in April 2014 and ASEAN in November 2015. The United States has been a formal treaty ally of the Philippines since 1951, and is a "Strategic Partner" with Singapore; a relationship that was formalized in 2005 when the Strategic Framework Agreement with Singapore was signed.

¹ China's behavior has also had an impact in NE Asia. It caused Japan to revise its prohibition on collective self-defense, made it bureaucratically easy for Tokyo to undertake a wrenching change in its strategic center of gravity south to its Ryukyu Island chain, and begin the process of recreating for the first time since 1945 a Japanese amphibious assault capability with direct U.S. assistance. It made it politically possible for increase in the Japanese defense budget for the first time in over a decade. Significantly, it has provided the rationale for an update of the U.S.-Japan roles and missions for the first time since the mid-1990s, with China in the bulls-eye.

³⁸ China's behavior has also had an impact in NE Asia. It caused Japan to revise its prohibition on collective self-defense, made it bureaucratically easy for Tokyo to undertake a wrenching change in its strategic center of gravity south to its Ryukyu Island chain, and begin the process of recreating for the first time since 1945 a Japanese amphibious assault capability with direct U.S. assistance. It made it politically possible for increase in the Japanese defense budget for the first time in over a decade. Significantly, it has provided the rationale for an update of the U.S.-Japan roles and missions for the first time since the mid-1990s, with China in the bulls-eye.

³⁹ Yale, William. "China's Maritime Silk Road Gamble." *The Foreign Policy Institute*. 24 March 2015. <<http://www.fpi.sais-jhu.edu/#!China's-Maritime-Silk-Road-Gamble/c1qvb/5511bfb60cf21e26baa971ab>>

⁴⁰ Page, Jeremy, et al. "China's President Pledges no Militarization in Disputed Islands." *Wall Street Journal*. 25 September 2015. <<http://www.wsj.com/articles/china-completes-runway-on-artificial-island-in-south-china-sea-1443184818?cb=logged0.8426927910956248>>

⁴¹ McDevitt, Michael. "A modest proposal to help ASEAN reconcile their overlapping claims in the Spratlys." *PACNET* #40. 9 July 2015. <<http://csis.org/publication/pacnet-40-modest-proposal-help-asean-reconcile-their-overlapping-claims-spratlys>>

⁴² The White House: Office of the Press Secretary. "FACT SHEET: U.S. Building Maritime Capacity in Southeast Asia." 17 November 2015. <<https://www.whitehouse.gov/the-press-office/2015/11/17/fact-sheet-us-building-maritime-capacity-southeast-asia>>

Mehta, Aaron. "Carter Announces \$425M in Pacific Partnership Funding." *Defense News*, 30 May 2015. <<http://www.defensenews.com/story/defense/2015/05/30/carter-announces-425m-in-pacific-partnership-funding/28206541/>>

⁴³ This was a Freedom of navigation operation, better known as a FONOP. According to the Department of Defense the FON program is, "actively implemented against *excessive maritime claims* by coastal nations in every region of the world, based upon the Department's global interest in mobility and access. The Program is principle-based, in that

it is administered with regard to the *excessive nature of maritime claims*, rather than the identity of the coastal nations asserting those claims. As a result, U.S. forces challenge excessive claims asserted not only by potential adversaries and competitors, but also by allies, partners, and other nations.” (Emphasis added.)

U.S. Department of Defense. “Freedom of Navigation Program, Fact Sheet” March 2015. <[http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20\(March%202015\).pdf](http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf)>

⁴⁴ Carter, Ash. “To Sen. John McCain (R-Ariz.) On South China Sea Freedom of Navigation Operation.” 22 December 2015. *USNI News*. 5 January 2016. <<http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>>

For reasons as to why the operation triggered many public questions see: Glaser Bonnie S. and Peter A. Dutton. “The U.S. Navy’s Freedom of Navigation Operation Around Subi Reef: Deciphering U.S. Signaling.” *The National Interest*. 6 November 2015. <<http://nationalinterest.org/feature/the-us-navy%E2%80%99s-freedom-navigation-operation-around-subi-reef-14272>>

⁴⁵The State Department’s explanation of the Freedom of Navigation (FON) Program is as follows: “U.S. policy since 1983 provides that the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Law of the Sea (LOS) Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. The FON Program since 1979 has highlighted the navigation provisions of the LOS Convention to further the recognition of the vital national need to protect maritime rights throughout the world. The FON Program operates on a triple track, involving not only diplomatic representations and operational assertions by U.S. military units, but also bilateral and multilateral consultations with other governments in an effort to promote maritime stability and consistency with international law, stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected in the LOS Convention. U.S. Department of State. “Maritime Security and Navigation.” n.d.

<<http://www.state.gov/e/oes/ocns/opa/maritimesecurity/>>

⁴⁶ Webster, Graham. “How China Maintains Strategic Ambiguity in the South China Sea.” *The Diplomat*. 29 October 2015. <<http://thediplomat.com/2015/10/how-china-maintains-strategic-ambiguity-in-the-south-china-sea>>

⁴⁷In the last sentence of the letter Carter writes: “We will continue to demonstrate as much by exercising the rights, freedoms and lawful uses of the seas all around the world, and the South China Sea will be no exception.”

Carter, Ash. “To Sen. John McCain (R-Ariz.) On South China Sea Freedom of Navigation Operation.” 22 December 2015. *USNI News*. 5 January 2016. <<http://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>>



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