Strategic Rivalry in the South China Sea: How can Southeast Asian Claimant States Shape a Beneficial Outcome?

By David Arase*

EXECUTIVE SUMMARY

- China’s 9-dash line claim in the South China Sea (SCS) affects not only small rival claimant states, but also engages the vital interests of Indo-Pacific powers that depend on free navigation across that sea.

- Beijing’s ill-defined territorial claim and the questionable governance rights that it arrogates are based on one-sided historical and legal interpretations that ignore the substantive and procedural rights of other states under international law.

- Because the 9-dash line claim is legally problematic, China is acting quickly to impose a new status quo, and will require each rival claimant to sign a bilateral agreement recognizing China’s sovereignty claim in return for good relations.

- The navies of major powers such as the US and Japan are being drawn into the SCS to hedge against the risk that their navigational rights on the high seas will not be respected by China.

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While the situation may look dire for small SCS claimant states, they still have significant sources of leverage:

i. Their common reference to the international rule of law to secure their rights and interests points them in the same direction;

ii. They have legally defined rights in the SCS that they do not lose unless they sign them away. Steadfastness on this point preserves their rights and gives a distracted world time to notice the SCS situation. International legal norms that support small state interests are upheld and provide a basis for other major powers to defend these norms in the SCS.

iii. Paradoxically, major power rivalry gives the small claimant states leverage to make a critical difference in how the situation evolves;

iv. Finally, the small states are in a position to propose a cooperative solution to what may become an unproductive major power deadlock.
CHINA’S 9-DASH LINE CLAIM

What is the claim?

Any discussion of current South China Sea tensions begins with China’s 9-dash line claim. It is derived from an 11-dash line drawn on a map in 1947 by a Chinese Kuomintang (KMT) government official. This line represented the Republic of China’s claim to sovereign control over virtually the entire South China Sea after Japan’s claim to govern it was vacated by its defeat in WW II. The Communist Party of China (CPC) slightly amended this claim in 1953 by erasing two dashes in the Gulf of Tonkin but leaving the rest of the KMT’s claim intact.1

Today, China claims “indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof” within the 9-dash line.2 Meanwhile, neighboring SCS coastal states have their own legally and historically based EEZ and island territorial claims within the 9-dash line. The basis of China’s claimed boundary and governance rights is historical, backed by ancient Chinese maps and textual records that demonstrate Chinese presence in these waters.

How China advances exclusive control of the 9-dash line claim

China seeks to isolate small rival claimants in four ways. First, it will not give non-claimant states a role in settling disputes nor in claiming stakeholder status. Second, it will not give international judicial authorities a role in settling disputes. Third, it seeks to exclude discussion of South China Sea disputes from ASEAN-China summit and ministerial meeting agendas, and even seeks to prevent ASEAN ministers, at their own meetings, to take a robust public position on China’s assertive actions in the SCS. China only agrees to discuss a Code of Conduct (COC) with ASEAN in a working level sideline venue. Finally, China will settle disputed claims only via bilateral negotiation with individual rival claimants.3 The combined effect is to minimize the individual and collective abilities of Southeast Asian claimants to resist China’s demands.

Next, while talking about a COC with ASEAN, China acts in several ways to secure its control inside its 9-dash line claim. It sends fishing fleets further and further into contested areas and imposes annual unilateral fishing bans. To defend their advance, and to remove rival claimants, it expands the size, capacity, and patrolling range of its coast guard and maritime militia

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forces. Finally, to defend this advancing Chinese civilian vanguard, the PLA Navy is deploying its fleet and aviation capacities to deter rival claimants from resorting to military resistance.5

Finally, to consolidate control of the most distant corners of the territory within the 9-dash line, China has carried out a campaign of artificial island construction in seven locations in the Spratly Islands over the past year. These islands are serving two purposes. One is to support civilian and military deployment and operations in distant contested territory, and the other is to make it possible to claim a territorial sea around these artificial islands whenever China chooses to do so, which would impede freedom of navigation (FON) in the heart of the SCS, creating what US Admiral Harry B. Harris, US Pacific Fleet Commander, has called, “a wall of sand.”6

Why is China’s 9-dash line claim a concern to other states?

China’s historical claim is countered by the historical and legal claims of other coastal states. More to the point, the international community has agreed that land territory claims and the maritime rights that attach to them are defined by international law. In the SCS, the United Nations Convention on the Law of the Sea (UNCLOS), which all disputants have ratified, provides the mechanism for establishing maritime rights and resolving maritime disputes, and general international law provides mechanisms for resolving the territorial status of islands.

The general concern is that China seems not to accept UNCLOS as the definitive basis for establishing claims and resolving disputes. First, the 9-dash line has not been given precise geographic coordinates. It remains vague and notional. And China has not explained how the shape and reach of the line can be derived from Chinese land territory following UNCLOS principles.

Second, the precise object of China’s claim is also unclear. Is China claiming indisputable sovereignty only over the land features inside the line? The sea? Or does it claim both? The precise relationship of China’s claim to existing legal norms remains unexplained, but we can see that the 9-dash line delimitation, which cannot be derived from existing Chinese land territory using UNCLOS principles, and key Chinese assertions of sovereign right, e.g. the right to forbid foreign militaries access to its EEZ, are inconsistent with existing international legal principles.

Third, the sovereign rights that China claims inside the line are also unclear. According to UNCLOS principles, a state’s territorial waters extend only 12 nm from a coastline into the

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sea. Beyond that limit, a state has the right to an additional 200 nm EEZ in which it has the exclusive right to develop maritime and seabed resources. But the EEZ remains the global commons for other purposes including FON, i.e., free access and unhindered passage by commercial and military air and sea vessels. Territorial waters still afford foreign military vessels “innocent passage”, which means free transit that “is not prejudicial to the peace, good order or security of the coastal State.” However, a Chinese foreign ministry official explained why a US military patrol plane was ordered to leave the vicinity of an artificial island in the SCS in the following way: "Freedom of navigation does not mean to allow other countries to intrude into the airspace or the sea which is sovereign… No freedom of navigation for warships and airplanes." This suggests a Chinese interpretation of “sovereign right” that is different from the rights established by UNCLOS.

Fourth, China has constructed artificial islands in the Spratly Islands. While other claimant states have added reclaimed land to islands they occupy, the number, speed, scale, and geographic spread of China’s construction of artificial islands since late 2013 set China apart from what other claimants have done. Its island construction reportedly now gives it 95 percent of the “sand area” in the Spratly islands. China may wish to claim natural island status for its artificial islands, but UNCLOS explicitly states that artificial islands do not generate a territorial sea, EEZ, or continental shelf ownership.

Fifth, other coastal states advance conflicting historical and legal claims to islands and waters inside the 9-dash line. But China refuses to bring its disputes before international legal settlement mechanisms as provided by UNCLOS and general international law to resolve such questions, and objects when other claimants exercise their right to do so.

What are China’s aims?

If China seeks to establish “indisputable sovereignty” within the 9-dash line, it would appear that it is proceeding in three steps. First, it is establishing and normalizing exclusive Chinese occupation, use, and defence of the area. Next, it is asking others to recognize a new governance status quo. Finally, China would want each rival claimant to withdraw its

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11 See articles 60 and 121 of UNCLOS. Article 60, section 8 states: Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf. www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
12 These would include conciliation, the International Tribunal for the Law of the Sea, arbitration, and special arbitration as provided under Annexes V-VIII of UNCLOS.
conflicting claim and recognize China’s 9-dash line claim via direct bilateral agreements. In the absence of other supporting customary or treaty-based law, this collection of bilateral agreements could legitimize the scope and depth of China’s sovereignty claims.

What benefits can China expect?

China may expect substantial rewards from its efforts. First, treating the South China Sea as nationally owned territory will transfer considerable food and energy resources to China.

Second, China may want to exclude foreign militaries from the South China Sea which would secure not only China’s maritime trade through the South China Sea, but also give safe haven to China’s nuclear ballistic missile submarines based on Hainan Island. And exclusive military control of the SCS gives China a staging area for distant sea operations in the Western Pacific and Indian Ocean regions.

Third, China’s idea of sovereign governance of the SCS is only partially known, but clarifications it has given to date indicate that it will have the option to limit FON if it chooses to do so by granting or withholding transit rights. Because one third of global trade transits the SCS, the very existence of this option, irrespective of whether China is willing or successfully able to enforce it will affect the balance of power in the region. It would give China leverage over the trade-dependent littoral states of East Asia.

Finally, these substantial economic, military, and political gains will facilitate a new regional order informed by Chinese interests and norms. China will gain the freedom to set new rules by which other states in the region must play, irrespective of what international law might say.

THE SCS AS A VORTEX OF MAJOR POWER STRATEGIC TENSION

This developing situation in the SCS has implications for other major powers in the Indo-Pacific region. The Asia-Pacific and the Indian Ocean regions, once considered separate economic and political spheres, are today forming a single vast belt of Indo-Pacific growth and integration stretching from Japan through the Straits of Malacca to India. Because a freely transited SCS is indispensable to the trade and investment of major Indo-Pacific powers, and in light of China’s unilateral efforts to change the maritime status quo there in questionable ways, the SCS has become a vortex of major power strategic interests.

Over 90 percent of Japan’s imported energy arrives via the SCS. Thus, at the 2014 Shangri-La Dialogue, Prime Minister Shinzo Abe said, “Japan will offer its utmost support for the efforts of the countries of the Association of Southeast Asian Nations as they work to ensure the security of the seas and the skies, and thoroughly maintain freedom of navigation and freedom of overflight.”14 This year when asked if Japan would patrol the SCS, Japan’s top military officer said that, with respect to surveillance patrols “depending on the situation, I think we

14 “Abe says Japan will support nations in disputes with China,” Financial Times, 30 May 2014. http://www.ft.com/intl/cms/s/0/b078c8ce-e812-11e3-9cb3-00144feabdc0.html
could consider doing so.”15 And in June, the Philippine and Japanese navies conducted a joint drill near the Spratly Islands with Japan sending a P-3 patrol aircraft and 20 troops.16

Some $5.3 trillion of US trade crosses the SCS, and the US Pacific Command headquartered in Honolulu is responsible for maintaining open trade from Hawaii across the Indo-Pacific region up to the Persian Gulf. In a speech in Hawaii on the SCS situation on 27 May, Secretary of Defense Ashton Carter said, “The United States will fly, sail and operate wherever international law allows, as we do all around the world.”17 Aside from moving more military deterrence capability to Asia and designing a new operational concept to ensure continuing maritime access to the Western Pacific in the event of war, since 2010 the US has signed significant new defence cooperation agreements with the following countries: Indonesia, Singapore, the Philippines, Australia, Indonesia, Japan, India, and Vietnam.

While India would not want to join any scheme for multilateral patrols in the SCS, it has important stakes in maintaining FON in the SCS. Today over half of India’s trade transits the SCS.18

At the 2015 East Asia Summit, Indian External Affairs Minister VK Singh said, “India supports freedom of navigation in international waters, including the South China Sea, the right of passage and overflight, unimpeded commerce and access to resources in accordance with principles of international law, including the 1982 UN Convention on the Law of the Sea. Territorial disputes must be settled through peaceful means, as was done by India and Bangladesh recently using the mechanisms provided under UNCLOS.”19 20

Because they are Indo-Pacific economic and naval powers, Japan, the US, and possibly India in the future, are compelled to upgrade their strategic presence in the SCS as a hedge in the event their vital interests become threatened.

HOW CAN SMALL CLAIMANT STATES DEFEND THEIR INTERESTS?

China’s unilateral and coercive actions to establish exclusive control over the 9-dash line area confront smaller SCS coastal claimant states, which are unable to resist Chinese encroachments, with the prospect of inexorable loss of control over their claimed territory. These insecure states (Philippines, Vietnam, Malaysia, Brunei, and Indonesia) all belong to ASEAN, and so they have instinctively turned to ASEAN for support.

However, ASEAN lacks the capacity to guarantee the security of its members against big power coercion. Moreover, ASEAN members with no stake in the SCS disputes, and that have much to gain from China, lack the motivation to challenge China in the SCS. Thus, each ASEAN SCS claimant state is left to its own devices, and China confronts little effective resistance to its advancing control of its 9-dash line claim.

This might make the situation seem hopeless. However, viewed in the larger context these small states have four significant sources of leverage that can help them influence the situation.

First, they share an interest in resisting the unilateral, coercive pressures on their claims by China. They also share an interest in finding a peaceful, equitable, and lawful resolution of disputes. And they all have reason to prefer FON to Chinese national governance of their international air and sea transportation routes. All this gives them a basis for greater leverage via coordinated action.

Second, these non-Chinese claimant states have legally defined rights in the SCS which they do not lose unless they sign them away. In recognition of this reality, China aims to negotiate a bilateral agreement with each small state claimant to win formal recognition of China’s claims, remove each conflicting small state claim, and in this way create a legally plausible right to govern the SCS. Without these official concessionary agreements, China’s claim will always be open to legal challenge.

By resisting Chinese pressure to give up their claims, small states preserve their rights. China escalating its unilateral and coercive actions to force them to give up their claims would impede its 21st Century Maritime Silk Road agenda; dim the appeal of a China-led “Community of Common Destiny” in Asia; and risk third party intervention. China needs a peaceful and productive neighborhood to achieve the China Dream of a modern advanced society before it gets old. Each year of escalating dispute with neighbors delays China’s own progress and increases the appeal of peaceful compromise.21

Third, paradoxically, the emerging big power standoff in the SCS gives leverage to small claimant states by virtue of their ability to cooperate strategically—or not—with the big powers competing for advantage. On the one hand, they could choose to recognize China’s indisputable sovereignty inside the 9-dash line and agree to “end cold war thinking,” i.e.,

terminate security relationships with the US originating during the cold war. This would buy them security in a China-dominated regional order. On the other hand, they could continue to cooperate with the US, which needs this cooperation to maintain an ability to preserve FON in the SCS. And if Japan, India and Australia feel the need to increase their naval access to the SCS, they also will need the cooperation of the small claimant states.

Clearly, their power to choose the direction and extent of cooperation with big powers gives small claimant states the ability to influence the kind of order that will emerge out of this strategic competition. Even if they only manage independent uncoordinated actions, but in a parallel direction, they could still have a decisive effect.

Finally, the present era of globalization has exposed the weaknesses of state-centric governance. The growing need for cooperation to manage interdependence is moving the world toward norms of inclusive global governance. There is an opportunity for small claimant states to ride this tide and independently propose a cooperative SCS governance arrangement. Precisely because they lack coercive power, they can credibly advance a peaceful and equitable solution acceptable to stalemated big powers looking for a way out. The democratic powers will accept an arrangement governed by international legal norms. China has signed and ratified UNCLOS, and it may finally accept the need for a new approach once it sees that in today’s world, armed might does not give it superior rights.

CONCLUSION

In conclusion, the small state claimants in the SCS do not lack leverage; they merely lack the ability to use it so long as they remain isolated and unaware of their options. First, their fundamental interests bring them together. Second, a decision to preserve their legally based claims will deny China the success it needs, and will uphold international legal norms that will permit the enforcement of FON in the SCS. Third, the power of small claimant states to give or withhold cooperation with big powers can have a decisive influence on the future of regional order. And finally, as a big power stalemate emerges, small states can propose a way out through cooperative governance that preserves their rights and interests and benefits even the competing powers in the SCS.
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