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## **Arctic Lessons: What the South China Sea Claimants can Learn from Cooperation in the High North**

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### EXECUTIVE SUMMARY

- Countries with contested claims in the South China Sea have much to learn from how the Arctic states are managing their disputes and working to resolve them.
- While both the Arctic states and South China Sea claimants have pledged to resolve their disputes peacefully and in accordance with accepted principles of international law, China rejects international legal arbitration and its nine-dash line is incompatible with the 1982 United Nations Convention on the Law of the Sea (UNCLOS). If the South China Sea dispute is to be resolved, Beijing must bring its claims into line with UNCLOS. The circumpolar states recognize that the best way to develop hydrocarbon resources is to settle disputed maritime boundaries first.
- The prospect of conflict in both the Arctic and the South China Sea has been exaggerated, but cannot be ruled out, especially in the latter where an accidental clash could escalate into a serious crisis. Conflict management efforts by ASEAN and China have been highly disappointing. The relevant parties should consider signing Incidents at Sea (INCSEA) agreements of the kind negotiated by some Arctic countries during the Cold War to prevent maritime clashes.

- Absent a resolution of the dispute, the South China Sea claimants should emulate the Arctic states by pursuing deeper functional cooperation in areas such as joint fisheries management and search and rescue (SAR).
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## INTRODUCTION

As a consequence of global warming the Arctic is undergoing profound changes. Rising air and sea temperatures in the Arctic have created a negative feedback loop in which older, thicker multiyear ice is melting and being replaced with younger, thinner and weaker ice that rapidly disappears in the summer creating darker, heat-absorbing water which leads to further ice melt.<sup>1</sup> As the ice retreats, however, new commercial opportunities are opening. Arctic shipping lanes—which cut sailing times between Europe and Asia by more than one third—are staying open for longer periods of time during the summer. The melting ice is also making energy and mineral resources more accessible, and rising water temperatures may increase fish stocks.

The prospects of seasonally ice-free Arctic trade routes and rich natural resources have aroused considerable interest around the world and perhaps nowhere more so than in Asia. In May 2013 five Asian countries—China, India, Japan, Singapore and South Korea—were granted permanent observer status to the Arctic's most important institution, the Arctic Council (AC), whose membership includes the five Arctic littoral states (Canada, Denmark via Greenland, Norway, Russia and the United States, known as the Arctic-5) and three Nordic countries (Finland, Iceland and Sweden). The AC's decision was widely seen as legitimizing the roles and interests of Asian countries in the High North.

Asian states with overlapping territorial and maritime boundary claims in the South China Sea should look beyond the commercial opportunities offered by melting ice in the Arctic and examine how the circumpolar states are managing and working to resolve their disputes. Cooperation among the Arctic states is already extensive, and growing. This stands in marked contrast to the situation in the South China Sea where tensions have been rising and attempts at conflict management have proved ineffective. As they look to the Arctic, the South China Sea claimants should absorb three lessons. First, the delimitation of maritime boundaries has enabled the commercial development of maritime resources. Second, the Arctic states are genuinely committed to resolving their disputes using existing international legal frameworks. Third, functional cooperation is critical to building trust.

## THE RESOURCES FACTOR

The Arctic Ocean and the South China Sea are strikingly different in terms of their geography, climate and geostrategic importance. One area of commonality,

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<sup>1</sup> According to the US National Snow and Ice Data Center, in the summer of 2012 Arctic ice coverage fell to a record low of 3.41 million square kilometres, compared to an average of 6.22 million square kilometres during 1981-2010. Arctic Sea Ice News and Analysis, National Snow and Ice Data Center <<http://nsidc.org/arctic-seaicenews/>>.

however, is the presence of rich natural resources and the competition to exploit them.

Both seas host important fishing grounds: approximately ten per cent of the global catch is made in the South China Sea and five per cent in the Arctic.<sup>2</sup> Overfishing and Illegal, Unregulated and Underreported (IUU) fishing activities occur in many parts of the world, but according to the UN they represent a “critical threat” to biodiversity in the South China Sea.<sup>3</sup> The problem is exacerbated by contested maritime jurisdictions caused by overlapping 200 nautical miles exclusive economic zones (EEZs). Over the past few decades numerous incidents have occurred in which coastal authorities have detained or even opened fire on trawlers deemed to be fishing illegally in “their” waters.

China’s expansive claims in the South China Sea is really the crux of the problem. Official Chinese maps indicate a discontinuous nine-dash line that encloses approximately 80 per cent of the South China Sea. Although China has never officially clarified what the nine-dash line denotes, it appears that Beijing is not only claiming sovereignty over the atolls within the line but also “historical rights” to maritime resources.<sup>4</sup> The nine-dash line significantly cuts into the EEZs of the Philippines, Brunei, Malaysia, Indonesia and Vietnam, and violates their sovereign right to develop maritime resources provided for under UNCLOS. Rising tensions have prevented the claimants from engaging in meaningful talks to jointly manage fisheries, and as a result fish stocks are rapidly being depleted.

In the Arctic, the picture is more positive. Several Arctic states have delimited fishing zones, including in disputed waters. Since 1976, Norway and Russia have had a joint fisheries commission that sets quotas for the main fish stocks in the Barents Sea. As the waters of the Arctic Ocean grow warmer and the ice retreats during the summer, fishing opportunities are expected to increase.<sup>5</sup> The prospect of overfishing and IUU fishing in this new environment has prompted the Arctic-5 to begin negotiations on an agreement to jointly manage fish stocks.<sup>6</sup> No such negotiations are currently taking place among the South China Sea littoral states, although ASEAN has sponsored discussions at the track two level.

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<sup>2</sup> UNEP/GEF South China Sea Project website <<http://www.unepscs.org/>>; Charles Emmerson and Glada Lahn, “Arctic Opening: Opportunity and Risk in the High North”, Chatham House-Lloyd’s Risk Insight Report (April 2012) < <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/0412arctic.pdf>>.

<sup>3</sup> “Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand”, UNEP (22 May 2009), p. 6 < <http://www.unep.org/eou/Portals/52/Reports/South%20China%20Sea%20Report.pdf>>.

<sup>4</sup> In 2013 Zhiguo Gao –a Chinese judge on the UN’s International Tribunal on the Law of the Sea– published a co-authored academic article which argued that the nine-dash line was justified under international law and had “become synonymous with a claim of sovereignty over the island groups that always belonged to China and with an additional Chinese claim of historical rights of fishing, navigation, and other marine activities (including the exploitation of resources, mineral or otherwise) on the islands and in the adjacent waters”. Zhiguo Gao and Bing Bing Jia, “The Nine-Dash Line in the South China Sea: History, Status, and Implications”, *The American Journal of International Law*, Vol. 107, No. 95 (2013), p. 108.

<sup>5</sup> Roger Howard, *The Arctic Gold Rush* (London and New York: Continuum, 2009), p. 96.

<sup>6</sup> “Accord Would Regulate Fishing in Arctic Waters”, *New York Times*, 16 April 2013.

While fisheries are an important source of state revenue in both the Arctic and the South China Sea, the main prize is oil and gas. Growing global demand for energy resources, plateauing or declining production rates in existing fields, new technologies and—in the case of the High North—melting ice, have spurred regional and international interest in the development of new reserves.

Determining the scale of hydrocarbons in both places is difficult – in the Arctic due to complex geography and in the South China Sea because energy companies are reluctant to operate in disputed areas. As a result, all estimates are highly speculative. In the South China Sea, Chinese estimates are at the high end of the scale, usually between 100-200 billion barrels of oil (bbo). In 2012, for instance, state-owned energy company China National Offshore Oil Corporation (CNOOC) estimated that the South China Sea held 125 bbo and 500 trillion cubic feet (tcf) of gas in undiscovered resources.<sup>7</sup> In 2010, the U.S. Geographical Survey (USGS) published a much lower estimate of 5-22 bbo and 70-290 tcf of gas in undiscovered resources.<sup>8</sup> Potential reserves of hydrocarbons in the Arctic are estimated to be much higher. In 2008, the USGS estimated the Arctic could contain 90 bbo and 1,669 tcf of gas, which constitute 13 and 30 per cent of estimated total global undiscovered oil and gas, respectively.<sup>9</sup> Although these figures have been widely cited, the methodology used by the USGS has been challenged. Moreover, the commercial viability of energy reserves in the High North has been called into question given the high costs of Arctic exploration and development, and the fact that cheaper alternatives exist, including oil from the Middle East and shale gas from North America. Nevertheless, in both the Arctic and the South China Sea the *perception* that the ocean floor is rich in energy resources continues to be an important driver of disputes.

## TERRITORIAL, MARITIME BOUNDARY AND OUTER CONTINENTAL SHELF CLAIMS

Disagreements between and among countries over the sovereignty of islands, maritime boundaries and ownership rights to seabed resources exist in both the Arctic and the South China Sea. What differentiate the two areas are the scope of the claims and how the claimants have approached the disputes.

In the whole of the vast Arctic region only one piece of territory is disputed: Hans Island, a 1.3 square kilometre atoll in the Nares Straits that is claimed by both Canada and Denmark. However, sovereignty of the island has not been a major

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<sup>7</sup> “The South China Sea”, U.S. Energy Information Administration (7 February 2013) < <http://www.eia.gov/countries/regions-topics.cfm?fips=SCS>>.

<sup>8</sup> “Assessment of Undiscovered Oil and Gas Resources of Southeast Asia, 2010”, U.S. Geographical Survey Fact Sheet 2010-3015 (June 2010) < <http://pubs.usgs.gov/fs/2010/3015/pdf/FS10-3015.pdf>>.

<sup>9</sup> “Circumpolar-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas in the Arctic”, U.S. Geographical Survey, Fact Sheet 2008-3049 (2008); Donald L. Gautier et al, “Assessment of Undiscovered Oil and Gas in the Arctic”, *Science*, Vol. 324, 1175 (2009).

irritant in bilateral relations and the two countries are currently discussing dividing the island equally.<sup>10</sup> The picture in the South China Sea is completely different, where entire archipelagos are contested by multiple parties. Vietnam contests China's 1974 occupation of the Paracel Islands; this dispute is truly intractable as Beijing refuses to discuss the issue with Hanoi. Further south, China, Taiwan and Vietnam claim sovereignty over all the atolls in the Spratly Islands, while the Philippines, Malaysia and Brunei claim parts of the group. All of the claimants except Brunei have occupied islets in the Spratlys, and nearly all have attempted to strengthen their claims through acts of administration such as setting up local government units and establishing regular air, sea and telecommunications links. Resolving the territorial disputes in the South China Sea is problematic, to say the least. The International Court of Justice (ICJ) could issue a ruling on sovereignty, but the consent of all parties would be required before it could examine the case. China, however, rejects international legal arbitration as a means to resolve its territorial, border or maritime boundary disputes. In Beijing's view, the disputes can only be resolved bilaterally – that is between China and each of the claimants on a one-on-one basis.

With regards to maritime boundary disputes, the situation in the South China Sea is far more complex and contentious than in the Arctic. There are only two disputed sea boundaries in the High North: between Canada and America in the Beaufort Sea; and between Canada and Denmark in the Lincoln Sea. The disputed areas in question are relatively small and neither has generated serious friction in bilateral relations. While technically not maritime boundary disputes, the legal status of two Arctic sea lanes is a source of controversy: both Canada and Russia claim the Northwest Passage (NWP) and Northern Sea Route (NSR) respectively as internal waters and that foreign ships must apply for permission to transit. The United States and other countries contend that the NWP and NSR are international straits and that the regime of transit passage applies. Washington and Ottawa have agreed to disagree over the status of the NWP; the NSR is not yet a problem in US-Russia relations but has the potential to become one as maritime traffic increases. In the South China Sea the problem of disputed maritime boundaries is on a much larger scale. As noted earlier, China's nine-dash line covers 80 per cent of the South China Sea and overlaps with the EEZs of all the littoral states. Few non-Chinese legal experts believe that this line is compatible with UNCLOS, and in January 2013 the Philippines formally challenged China's claims at the UN.<sup>11</sup> Despite China's refusal to participate in the proceedings the case is on-going and the Arbitral Tribunal is likely to issue a verdict in 2015. However, even if the Tribunal rules that the nine-dash line is incompatible with UNCLOS, Beijing will likely ignore the ruling, leaving the problem unsolved.

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<sup>10</sup> "Hans Island: New proposal would see isle split equally between Canada and Denmark", *National Post* [Canada], 11 April 2012.

<sup>11</sup> Notification and Statement of Claim, Department of Foreign Affairs, Manila, 22 January 2013, <<http://www.dfa.gov.ph/>>.

Outer continental shelf claims have added a new dimension to the disputes in the Arctic and South China Sea. Within ten years of acceding to UNCLOS, states can claim sovereign rights to seabed resources in continental shelf areas that extend beyond the EEZ limit out to between 100-150 nautical miles. To secure such rights, states must submit detailed scientific and technical information to the United Nations Commission on the Limits of the Continental Shelf (CLCS), which is mandated to make recommendations based on the evidence submitted. As outer continental shelf areas could be rich in hydrocarbons and minerals, some Arctic and South China Sea littoral states have pursued their claims with enthusiasm.

The Arctic-5 and South China Sea claimants differ significantly in their approach to their maritime disputes. While Canada and Denmark have agreed to resolve their territorial dispute through direct talks, the Southeast Asian claimants are wary of China's preference for bilateral negotiations due to power asymmetries. On the issue of natural resources, the Arctic states recognize that energy companies are only willing to make long-term investments in areas of uncontested jurisdiction. When sea boundaries are delimited, there can be no arguments over sovereign rights. In areas of overlapping claims, joint development is possible, but this method is unrealistic in the South China Sea given the sheer size of China's claims and the involvement of multiple parties. Regarding outer continental shelf claims, the CLCS cannot examine claims that have been challenged by other states. So far, none of the Arctic states have challenged each other's submissions, engendering optimism that any overlapping claims can be resolved through peaceful negotiations as outlined in UNCLOS; in the South China Sea protests have been lodged, thereby stymying the process.

Perhaps the most crucial difference is the application of international law. In May 2008 the Arctic-5 issued the Ilulissat Declaration in which they pledged to resolve their territorial, maritime boundary and outer continental shelf claims in accordance with UNCLOS.<sup>12</sup> Since 2008 they have demonstrated a strong commitment to this pledge, and in 2010 Norway and Russia resolved their disputed sea boundary. The South China Sea disputants have also vowed to settle their disputes in accordance with UNCLOS.<sup>13</sup> However, China's commitment to existing international legal regimes is questionable: it has rejected a role for the ICJ and refused to participate in the case brought by the Philippines at the UN. Worryingly, in June 2013 Chinese Foreign Minister Wang Yi stated that a solution to the dispute must be on the basis of "fully respecting historical facts and international law".<sup>14</sup> Thus in China's new ordering of priorities, history comes before law.

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<sup>12</sup> The Ilulissat Declaration, Arctic Ocean Conference, Ilulissat, Greenland, 27-29 May 2008 < [http://www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)>. Canada, Denmark, Russia and Norway are parties to UNCLOS. America is not a party to UNCLOS but accepts its key provisions as being reflective of customary international law.

<sup>13</sup> "Declaration on the Conduct of Parties in the South China Sea", 4 November 2002, <<http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>>.

<sup>14</sup> "Exploring the Path of Major Country Diplomacy with Chinese Characteristics", Remarks by Foreign Minister Wang Yi at Tsinghua University, 27 June 2013.

## CONFLICT OR COOPERATION?

For both the Arctic and the South China Sea there have been dire predictions of conflict sparked by maritime disputes. Though these fears are widely exaggerated, conflict cannot be ruled out, especially in the South China Sea where the situation is more combustible than in the Arctic.

During the Cold War, the Arctic was a major theatre of strategic rivalry between the United States and the Soviet Union as nuclear ballistic-missile submarines from both countries lurked beneath the ice. Following the end of the Cold War, the strategic significance of the Arctic dissipated. Since the mid-2000s, however, there has been a modest increase in military activities in the Arctic, particularly by Russia and Canada which have sought to increase the presence of their armed forces to underpin their respective sovereignty claims. Yet conflict in the Arctic seems highly unlikely for three reasons. First, seven of the eight AC members are mature, Western liberal democracies that are members of North Atlantic Treaty Organization (NATO) and/or the European Union (EU). A conflict between these states is unthinkable. Russia is the outlier, as it is not a liberal democracy and does not belong to NATO or the EU. Yet despite occasional belligerent statements from Russian politicians, Moscow has firmly chosen cooperation over competition with the other Arctic states, principally because it recognizes it needs the help of Western governments and corporations if it is to realize its ambitions to be an energy superpower. Second, most of the hydrocarbon reserves are located within EEZ limits and as there is no equivalent of the nine-dash line, the question of ownership does not arise. Disputes may arise from extended continental shelf claims but, as noted, the Arctic-5 have pledged to resolve those disputes using UNCLOS. Third, some of the Arctic states already have conflict prevention and confidence-building measures in place or are negotiating new ones. Cold War-era Incidents at Sea (INCSEA) agreements between Russia and America, Canada and Norway that forbid dangerous behaviour at sea remain in force, and in 2011 the AC members signed a binding agreement on SAR (contrast this with an agreement *in principle* between ASEAN and China to establish an SAR hotline in September 2013).<sup>15</sup>

Once again, the picture in the South China Sea is less encouraging. The rapid modernization of China's navy and the expansion of its civilian maritime agencies have allowed Beijing to increase its presence in the South China Sea and bring coercive pressure to bear on the smaller claimants. The rise of Chinese military power has in turn provided a catalyst for regional military modernization programmes, notably in Vietnam and the Philippines. And although few observers predict a major war in the area, a serious diplomatic and military crisis caused by an accidental clash at sea is a distinct possibility, especially in the absence of INCSEA-type agreements. Efforts by

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<sup>15</sup> "Agreement on Aeronautical and Maritime Search and Rescue in the Arctic" < <http://www.ifrc.org/docs/idrl/N813EN.pdf>>.

ASEAN and China to establish conflict management mechanisms have been highly disappointing. The 2002 Declaration on the Conduct of Parties in the South China Sea (DoC) has yet to be even partially implemented and the prospect of a legally binding and credible Code of Conduct is very dim due to China's obvious lack of enthusiasm for such an agreement.<sup>16</sup>

## CONCLUSION

Despite major geographical and geopolitical differences between the Arctic and the South China Sea, there is much that China and Southeast Asian countries can learn from cooperation in the High North. First, the settlement of maritime boundaries removes disputes over ownership of seabed resources. Second, and related, outstanding disputes should be resolved in accordance with existing international legal regimes, especially UNCLOS. China's nine-dash line must therefore be brought into line with international law. Third, in the absence of a resolution, the disputants should accelerate efforts to establish effective conflict management and crisis prevention mechanisms, and pursue deeper functional cooperation in areas such as fisheries management. Crucially, talks should be outcome-oriented rather than process-driven as is presently the case.

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<sup>16</sup> Ian Storey, "China Runs Rings Around Asean", *Wall Street Journal*, 3 October 2013.

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