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Sense and sensibility

Addressing the South China Sea disputes

EDITED BY
Eva Pejsova

WITH CONTRIBUTIONS FROM
Matthieu Burnay, Werner Ekau, Mathieu Duchâtel, Ronán Long, Liselotte Odgaard, Christian Schultheiss, Stein Tønnesson

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EU Institute for Security Studies

100, avenue de Suffren

75015 Paris

http://www.iss.europa.eu

Director: Antonio Missiroli

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FOREWORD

Following up and building on its first product – the 2015 Report *Pride and prejudice*: *maritime disputes in Northeast Asia* – the EU committee of the Council for Security Cooperation in the Asia Pacific (CSCAP EU) has completed its analytical survey of sources of tension in East Asia's maritime spaces by addressing another major hotspot, the South China Sea (SCS). Its second annual meeting, held in Brussels on 20 November 2015, focused on the competing and overlapping territorial disputes that currently put peace and stability in the region at risk. It explored the legal, political and strategic factors that are affecting this critical conduit of international trade which lies at a crossroads of geopolitical interests and has already become a flashpoint for disputes between China and other neighbouring countries (and their allies). And it assessed the possible implications and consequences of the ruling that is expected shortly from the Permanent Court of Arbitration (PCA) in The Hague.

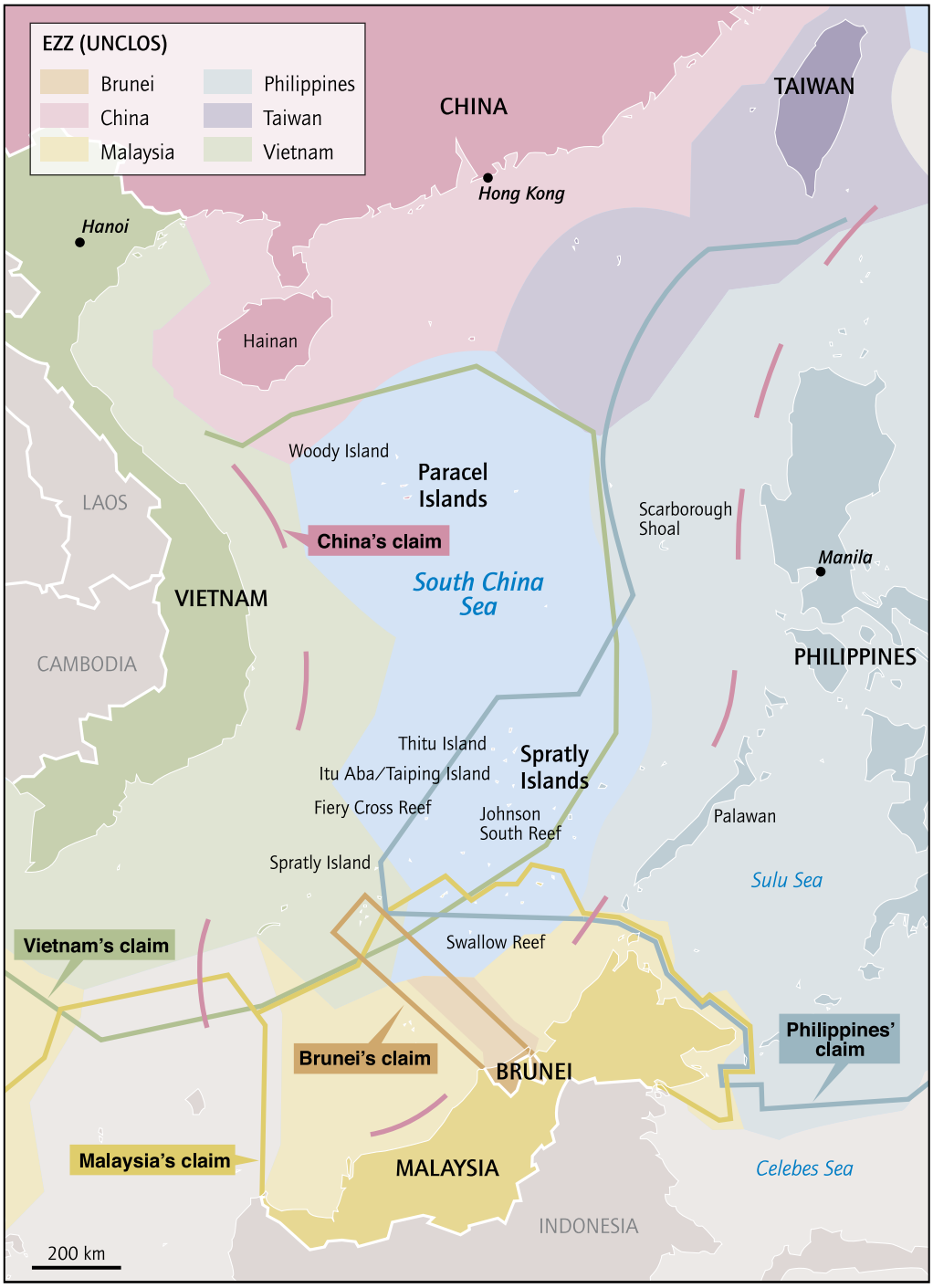
A rules-based international order has traditionally been a core interest of the EU – and a fully shared aspiration among its member states. The EU itself embodies a distinctive form of rules-based regional order, and it is only natural for it to project that logic and experience onto the global system. At times, this posture has been portrayed as a defence of an international *status quo* that has long benefited Europe – and 'the West' at large – or, conversely, as an effort to impose EU norms worldwide. Yet it is increasingly evident that a globalised world requires collectively acceptable (and accepted) rules to work effectively and fairly. Such rules can be amended to accommodate incremental change, of course, but even accommodation requires basic consensus.

The SCS-related disputes and their possible resolution through legal (and at any rate peaceful) means are therefore a critical test for the credibility of a rules-based international order capable of accommodating change – and for the consistency of the EU's own overall approach. Technicalities aside (although they do matter, as this Report proves), the outcome of this controversy is likely to shape the behaviour and expectations of key players at both regional and global level. And the allusion, in the title of this Report, to the code of conduct that eventually prevailed among the English gentry portrayed by Jane Austen in the late eighteenth century is far from an implicit concession to Europe's normative ambitions – it is rather an invitation to appreciate the value(s) of negotiation, rule of law and balance of interests which still have relevance even in the early twenty-first century.

Antonio Missiroli

Paris, May 2016

Map 1: Maritime territorial claims in the SCS



INTRODUCTION: LIGHT AT THE END OF THE TUNNEL?

Eva Pejsova

The South China Sea (SCS) is today the most volatile and potentially dangerous security hotspot in the Asia Pacific. While disputes over overlapping sovereignty claims date back to the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) in the mid-1990s, tensions began to grow more visible after China's formal submission of a map featuring its 'nine-dash line' claim to the UN in 2009. The current escalation of tensions comes after evidence of China's extensive dredging and land-reclamation activities in the contested waters came to light in 2014. Increasingly frequent clashes between military and civilian agencies of the various claimant parties and other stakeholders continue to pose a challenge to the safety and freedom of navigation, as well as to the rules-based international order in general, with repercussions reaching far beyond Asia.

The struggle over sovereignty and territorial delimitation has exacerbated existing geopolitical tensions, escalating the competition between China and the US for influence in the region, damaging relations between China and Southeast Asian claimants, dividing ASEAN, and overall weakening the region's security architecture. All the while, seabed dredging and unsustainable fishing practices have jeopardised the SCS unique, rich, and fragile marine natural environment, foreshadowing an ecological disaster that could have long-term repercussions for the coastal populations. As a security puzzle, the SCS therefore combines elements of traditional power rivalry, complexities and ambiguities of international law, as well as various non-traditional challenges related to the everyday management of one of the busiest waterways in the region and the world.

Two decades of negotiations and attempts to put in place various preventive and cooperative measures have yielded relatively little in the way of tangible results. Among them, the ASEAN-China 2002 Declaration on the Conduct of Parties in the SCS (DoC) represents so far the main formal attempt to manage the tensions. While the text remains a reference in terms of substance, its provisions are not binding and keep being violated on a regular basis. The Code for Unplanned Encounters at Sea (CUES), agreed at the Western Pacific Naval Symposium (WPNS) in 2014, was another encouraging development, but remains non-binding and does not include civilian maritime law enforcement agencies (coast guards). Various ASEAN-centred regional initiatives (ARF, EAMF, ADMM-Plus) have made progress in promoting practical maritime security cooperation – including in Search and Rescue (SAR) and Humanitarian Assistance and Disaster Relief (HADR), shipping safety and transborder criminal activities. However, due to the region's emblematic insistence on non-interference in domestic affairs, issues involving sovereignty or border delimitation are carefully avoided. And despite an evolving debate on the need to 'move

towards preventive diplomacy', regional security fora still lack formal dispute settlement mechanisms of their own.

International arbitration – whether by the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) or other special arbitral tribunals – is part of UNCLOS's 'compulsory procedures entailing binding decisions' (Article XV), applicable to all disputes over the interpretation or application of the Convention. Several countries in Southeast Asia have resorted to international tribunals to settle their maritime disputes, including Singapore and Malaysia in their dispute over Pedra Branca/Pulau Batu Puteh in 2008, or Indonesia and Malaysia over the Sipadan and Ligitan islands in 2002. The SCS case is more complicated, mostly due to the involvement of China, which already rejected earlier requests for arbitration by Vietnam and Malaysia in 2009. Politically, any delegation of authority to a third party in cases where core national interests are at stake is unacceptable for Beijing. The ruling party must give the appearance of recovering territory that a weak China once lost to rapacious colonial powers, and giving up authority means effectively losing control over its claims. Finally, due to its negative historical experience, China is also wary of the international system and doubts that it will receive fair treatment by the international courts. For all the above reasons, Beijing refuses to consider the SCS as a purely legal matter, but regards it as a historical one, to be discussed solely and bilaterally with the parties involved.

The question of the relevance and applicability of the rule of law has become central to the debate. When in January 2013 the Philippines instituted arbitral proceedings against the PRC at the Permanent Court of Arbitration (PCA), it avoided the question of sovereignty. The arbitral request questioned the legal validity of China's 'nine-dash line' based on claims of 'historical rights'; the legal status of the submerged features in the SCS; and on China's interference in the exercise of the Philippines' rights within its exclusive economic zone (EEZ). The Court's ruling on the admissibility of the case in October 2015 refuted the objections that China had set out in its position paper, noting that Beijing was still bound by its decision despite its non-appearance. For the first time in the history of the SCS disputes, the upcoming PCA ruling will clarify the position of international law *vis-à-vis* China's claims and man-made constructions, which will shed a new light on the ongoing security conundrum. While it may not solve the region's problems overnight, it will certainly serve as an invaluable legal reference for the many regional and international actors involved, when formulating their diplomatic positions.

The European Union, a global trading power, has significant economic, political, and principled stakes in the SCS. Dependent on maritime traffic and trade with its partners in East Asia, the EU has a vital interest in maintaining a stable, open and safe regional maritime security environment. As a party to the Treaty of Amity and Cooperation (TAC) and a founding member of the ASEAN Regional Forum (ARF), the Union also has solid legal and political foundations for its argument to play a greater role in security developments in East Asia. Finally, Brussels is strongly posi-

tioned as a defender of a rules-based international order, which is also anchored in its new Global Strategy. The latter is essential in light of the ongoing arbitration case. While not taking a position on sovereignty, the EU has always promoted peaceful solutions to the territorial disputes in the SCS, urging parties to cooperate, exercise self-restraint, and abide by international law (and UNCLOS especially) when resolving their disputes. When preparing its statement for the upcoming award, the Union needs to remain consistent with its own principles and adopt a firm, united position.

Overview of the Report

As its title suggests, this Report focuses on the 'sensible' solutions to the sensitive SCS problem. It aims to provide a constructive discussion on the implications of the forthcoming PCA ruling, as well as on the various provisional measures that have been – or still could be – put in place. If Europe is to contribute to the ongoing debate and to regional stability, it is by making the best use of its extensive experience in peaceful settlement of disputes, joint development regimes, as well as its expertise in international law. At the same time, such exercise should allow it to foster a consistent and comprehensive position on the SCS. Thematically, it covers three main areas: the legal aspects and political implications of the PCA ruling, the practical provisional measures for the management of the SCS resources, and the European position on the issue.

The first set of contributions look at the implications and possible outcomes of the arbitration case, including the positions of the actors involved and impact on the regional security environment. Ronán Long's opening chapter examines the issue of compulsory dispute settlement under UNCLOS and the differing positions of China and the Philippines – revealing much about their attitudes to international law in general. Indeed, one of the key questions related to the current arbitration case is the importance of the rule of law for the actors involved in shaping the regional security order. This is impossible to evaluate without considering the role of the United States. Liselotte Odgaard focuses on the escalating tensions between Beijing and Washington in the SCS, arguing that much of the friction between them stems precisely from controversial interpretations of principles of international law – which she call the legal 'grey zones' – notably related to military activities within the EEZ. To lower the risk of accidental clashes and further escalation, both sides need to invest in mutual reassurance about their peaceful intentions.

Although at the time of writing the verdict is still pending, it seems likely that the Court's admission of its jurisdiction over the case already has several important implications, which are explored by Stein Tønnesson in his chapter. By refuting China's objections, the Court implies that the case concerns maritime boundary delimitation (not sovereignty) and will be treated as such. According to Tønnesson, this means that the Court may not consider China's 'historical line' as legally valid

and take the view that the Spratly islands are not to be regarded as an archipelago, therefore not entitled to generate straight baselines. Regardless of the outcome, another key question will be China's position – which is the focus of Matthieu Burney, who analyses it from the perspective of Beijing's foreign policy, based on support for rule of law and integration within the global governance institutions. Even though in all probability Beijing will not recognise the ruling, it is legally bound by it and will have to display a minimum of respect towards the global normative system if it wants to be perceived as a responsible international player.

While the legal battle in The Hague continues, the SCS remains largely ungoverned, and much of its rich marine biodiversity suffers as a result. Pending the settlement of sovereignty disputes on land, UNCLOS urges parties to put in place 'provisional arrangements of a practical nature' and cooperate on the management of resources. The unique marine ecosystem of the SCS sustains the livelihood of the coastal populations, as well as offering vast opportunities for scientific research. Joint development of resources is often advocated for its theoretical potential to appease tensions and build confidence. Why this has not been easy in the case of the SCS is examined by Christian Schultheiss, who offers a comprehensive study of China's (as well as other parties') attitude to joint development, highlighting the obstacles to the implementation of such initiatives. Setting borders aside, Werner Ekau, an expert on tropical marine biology, looks at the SCS from the fisheries perspective. The SCS is part of a single Large Marine Ecosystem (LME) – a UN regime designed for ecologically sensitive marine areas that need to be managed in an integrated manner, through effective cooperation among the coastal states.

The position of international actors, and in this case of the European Union, is the last missing piece in the broader SCS security puzzle. Mindful of its interests (and those of its member states), Brussels maintains a common position of 'principled neutrality', all the while cultivating good diplomatic relations with its trading partners. How can this position have a positive impact on regional security? Mathieu Duchatel argues that the EU needs to support its position with a consistent policy *vis-à-vis* China and other involved parties in order to demonstrate its credibility as a security actor in the region. The PCA ruling will surely be a major test for European diplomacy and its strategic interests in Asia. The concluding chapter ponders on Brussels' likely official position and policy on the SCS, based on its international legal obligations and strategic priorities.

This Report is based on presentations and discussions that took place during the 3rd Annual Meeting of the EU committee of the Council for Security Cooperation in the Asia Pacific (CSCAP EU), held in Brussels on 20 November 2015. CSCAP EU is composed of a select mix of experts from academia, EU institutions and think tanks, and as such provides a unique platform for discussing alternative solutions and demonstrating the EU's added value for regional security. The closed-door workshop was attended by key European experts on Asia, international law and maritime security. Given its focus, the meeting was included as part of the expert

outreach and consultation process for the preparation of the EU Global Strategy on foreign and security policy, coordinated by the EUISS and the Strategic Planning Division of the European External Action Service (EEAS).

I. ARBITRATION: A GAME OF TWO HALVES FOR THE EU

Ronán Long

Introduction

The dispute between China and neighbouring states in the South China Sea (SCS) raises important concerns for the European Union on a whole range of matters including geopolitical stability in East Asia, the free flow of trade and international communications, general questions about stable ocean governance and peaceful uses of the ocean, as well as the effectiveness of the dispute resolution mechanisms under the 1982 United Nations Convention on the Law of the Sea (UNCLOS). At the heart of the dispute are competing claims to territorial sovereignty over offshore features and the assertion of coastal state jurisdiction over maritime space. The SCS dispute also involves two permanent members of the Security Council, China and the United States, in a tense standoff over their respective international law rights and obligations. The strained situation is further exacerbated by the reclamation and other activities undertaken by China in the disputed areas, which straddle one of the world's great maritime trading routes that are of fundamental importance to the EU as a global trading entity.

In October 2015, the long-standing dispute entered a new phase with the rendering of an award on jurisdiction and admissibility by an Arbitral Tribunal at the Permanent Court of Arbitration pursuant to Annex VII of UNCLOS. This chapter summarises the diverging approaches taken by the Philippines and China to dispute settlement, highlights how the Tribunal dealt with the contentious issues of admissibility and jurisdiction, and concludes by briefly mentioning some of the considerations that ought to shape EU policy, once the merits phase of the proceedings is determined.

Diverging approaches

The Philippines and China have taken fundamentally different approaches to compulsory dispute settlement under UNCLOS. On the one hand, by initiating international arbitration, the Philippines has utilised the UNCLOS provisions in full and sought a declaration from the Tribunal on three contentious matters, specifically: first, that the rights and obligations of the parties are governed by UNCLOS and that the 'historic rights' within its so-called 'nine-dash line' claimed by China are inconsistent and invalid; second, that the Tribunal clarifies the legal status of certain maritime features in the SCS; and third, that the Tribunal finds that China has interfered with the exercise of rights of the Philippines through construction and fishing activity in the disputed

areas. Significantly, the Philippines did not request the Tribunal to decide any issues of sovereignty over maritime features in the SCS, or to delimit disputed maritime boundaries within the region.

In marked contrast, China neither accepted nor participated in the arbitration proceedings. Nonetheless, it reaffirmed its objection to the proceedings in the 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines' of 7 December 2014. In a significant and somewhat controversial development, the Tribunal treated the position paper as a plea on jurisdiction and entered it on the record for the purpose of determining the application made by the Philippines. Moreover, the Chinese Ambassador to the Netherlands sent two letters to members of the Tribunal outlining the reasons why China was not participating in the proceedings, namely: that the essence of the dispute concerned territorial sovereignty over maritime features and concerned an integral part of maritime delimitation between the two countries, which were outside the scope of UNCLOS. Moreover, the Chinese indicated that their preferred means of settlement is by negotiation in accordance with bilateral instruments and in conformity with the Declaration on the Conduct of Parties in the SCS.

Admissibility and jurisdiction

The Tribunal found that it was properly constituted under UNCLOS and that China's non-appearance did not deprive it of jurisdiction. Accordingly, it found that the initiation of the arbitration was not an abuse of process and there was no indispensable third party whose absence deprives the Tribunal of jurisdiction. On a similar note, recourse to compulsory procedures was not precluded by the 2002 China-ASEAN Declaration on Conduct of the Parties in the SCS, the joint statements of the Parties, the Treaty of Amity and Cooperation in Southeast Asia, and the Convention on Biological Diversity. The Tribunal held that it had jurisdiction to consider the Philippines' submissions in relation to seven offshore features. In relation to seven others, it found that the submissions were not of a preliminary character and thus reserved consideration of its jurisdiction on these matters until the merits phase. The tribunal sought further information on how China was to desist from further unlawful claims. Other matters reserved to the merits phase included: the nature and validity of any claim by China to 'historic rights' in the SCS and whether such rights are covered by the exclusion from jurisdiction of 'historic bays or titles'; the status of certain maritime geographical features under UNCLOS and overlapping entitlements to maritime zones; the maritime zone in which alleged Chinese law enforcement activities take place; as well as whether certain Chinese activities were military in nature and thereby exempted from the scope of the UNCLOS dispute settlement provisions.

Possible outcomes

The Tribunal can clarify several legal issues relating to the status of certain geographical features in the SCS, as well as their respective maritime zones. From an international law perspective, however, it is important to emphasise that the Tribunal is not competent to decide matters pertaining to sovereignty over disputed features. Indeed, the physical composition of individual features may ultimately determine their precise legal status and the projection of maritime zones and limits, with some having no entitlements and others having a 12 nautical miles (nm) territorial sea. Indeed, if the Tribunal decides that some of the features are islands and entitled to an exclusive economic zone (EEZ) and continental shelf, then these will have significant overlapping EEZ claims. Significantly, the Tribunal will not be able to determine the maritime boundaries in the areas of overlapping claims because of China's declaration under Part XV of UNCLOS, which excludes such matters from the compulsory dispute resolution procedures. For this reason and in view of the absence of competence to rule on the issue of sovereignty, the disputes in the SCS will persist after the Tribunal rules on the merits phase and will ultimately have to be resolved by negotiation and diplomatic means by the states in dispute. The latter approach of course accords fully with both the letter and spirit of UNCLOS. Furthermore, it begs the question: ought there be a role for the EU in helping to resolve the SCS conundrum in the post-arbitration period?

A game of two halves

The EU did not participate as an observer in the jurisdiction phase of the arbitration proceedings under UNCLOS. EU policy is nonetheless very clear in that it seeks to ensure that the SCS region remains an area of peace and stability characterised by solid governance structures that are underpinned by the rule of law. Ultimately, governance of the SCS is a matter for the sovereign states within the region, whose actions must be consistent with the rules set out in international agreements and treaties, in particular UNCLOS. That said, as the proceedings move towards the conclusion of the merits phase, in effect the second half of the proceedings, the EU remains in good standing with all parties and is thus well placed to act as an honest broker in facilitating an orderly resolution of competing interests and the establishment of appropriate regional structures to address matters of common concern for SCS states. In undertaking this task, the EU's future course of action ought to be guided by the principles which have inspired its own creation and premised upon achieving two objectives: first, to promote the rule of law in its foreign policy with a particular focus on respect for the principles of the United Nations Charter and international law; and secondly, to help the littoral states in the SCS to move away from the intractable issues of sovereignty over offshore features and jurisdiction over maritime space, towards a more collaborative approach to address matters of common concern such as protection of the environment, the exploitation of natural resources, the safety of navigation and mitigating the effects of climate change.

International law and UNCLOS in particular compels states to settle their disputes by peaceful means, indeed this is a *sina qua non* of EU integration. UNCLOS remains the key reference point and every effort must be made by the international community to ensure that the states bordering the SCS do not undermine its core principles, as well as the functioning of its institutions and dispute settlement bodies in particular. Indeed, the EU has set a good example in its active participation in compulsory dispute settlement proceedings under UNCLOS, as well as in the first International Tribunal for the Law of the Sea (ITLOS) general advisory opinion on illegal, unregulated and unreported fishing. This may be contrasted with the approach of China in refusing to participate in the arbitration case taken by the Phillipines and this in turn has the potential to lead to increased regional tension and further misunderstanding.

Ocean governance leadership

Jean-Claude Juncker has mandated Commissioner Vella to 'engage in shaping international ocean governance in the UN, in other multilateral fora and bilaterally with key global partners' as part of the European Commission's work programme 2015-2020. Clearly, the EU has much to gain by adopting a strong normative approach to the implementation of international law and by pursuing the role of a decisive international actor in the functioning of multilateral and regional bodies. Perhaps one way for the EU to build confidence among the states within the SCS region is to work closely with the G77 and China during the course of deliberations at international bodies including the negotiations at the United Nations on the adoption of a new implementation agreement on conservation and sustainable use of biodiversity in areas beyond national jurisdiction.

Most of all, there is a pressing need to move the territorial disputes in the SCS beyond the issue of sovereignty over offshore features and for all parties to accept that the problems of ocean space are closely interrelated and need to be considered in their entirety. In order to further advance this objective at a practical level, the EU and its member states can share its extensive experience in achieving regional solutions to regional problems in European seas. A notable feature of the EU approach in this regard is the adoption of sea-basin strategies, which acknowledge the unique political, geographical and economic context of each maritime region. In light of this experience, perhaps the focus of the SCS littoral states ought to be on building collaborative approaches to fisheries management and the protection of the marine environment, as well as on organising joint initiatives in relation to the conduction of marine scientific research programmes.

The EU acknowledges that regulatory schemes governing the exploration and exploitation of natural resources within the region are primarily a matter for the coastal states. As part of a panoply of confidence-building measures, however, there is much to be gained if the EU shares its experience in adopting transboundary mechanisms to deal with sustainable resource use and the application of new normative tools such as the

ecosystem-based management approach to marine resource use and conservation. In this regard, it ought to be kept firmly in mind that marine ecosystems and the distribution of fish stocks transcend national boundaries. Furthermore, collaborative approaches are required to address climate change, which is expected to have a broad range of ecological, social and economic consequences for coastal and island communities bordering the SCS. In particular, the EU can continue to provide technical and financial assistance for adaptation to climate change impacts for developing coastal and island states, through initiatives like the Global Climate Change Alliance. Similarly, in light of the central importance of shipping for the orderly functioning of the European economic model, the EU can support regional measures that facilitate international trade and shipping including measures that are aimed at promoting International Maritime Organisation (IMO) navigation rules, maritime safety, routes systems and environmental standards.

In sum, at the conclusion of the second half of the arbitration proceedings, the EU and the member states should push to use their considerable economic and diplomatic powers to eschew the use of force and the ongoing militarisation of the SCS region by promoting an integrated approach to ocean governance and the rule of law in the interest of the common good.

II. HOW TO DEFUSE SINO-US TENSIONS IN THE SCS?

Liselotte Odgaard

In May 2015, a CNN exclusive showed a US military surveillance aircraft flying at low altitude over artificial islands built by China in the South China Sea (SCS). The Chinese navy warned the aircraft to leave the area eight times in response to the plane's claim that it was overflying international airspace. The incident caused uproar in the West, which portrayed China as trying to claim international waters as its own territorial waters. In China, the incident spurred warnings that if the US bottom line is that China must halt its land reclamation drive, then a China-US war is inevitable.

The good news is that despite the harsh rhetoric, a China-US war is not on the cards. The bad news is that it is difficult to envisage a lowering of tensions in the near future. To borrow the vocabulary of Princeton professor Thomas Christensen, both China and the US are 'conditional revisionists' in the SCS: this is true of China in the sense that it is attempting to expand the scope, depth and legitimacy of its presence, and of the US in the sense that it is aiming at expanding the scope, depth and legitimacy of the US alliance system in the area. As such, they are targets for each other's deterrence postures while at the same time engaged in a strategy of mutual provocation. To lower tensions, they both need to complement deterrent threats with strategies of reassurance**.** This entails persuading the counterpart that they have no interest in damaging the core values of the other so that neither of them fear being deprived of key assets if they agree to comply with each other's demands. Reassurance is complicated by the fact that China and the US have different understandings of deterrence, increasing the likelihood of misunderstanding each other's signals.

Claims and counterclaims

Blurred legal boundaries and strategic red lines have put Washington and Beijing at loggerheads. Over the past five decades, China has gradually established a foothold in the SCS. China's presence was initiated following naval battles with Vietnam in 1974 and 1988. China won both battles and has since increased its presence on reefs and islands in the Paracels and in the Spratlys. China's emergence as a power in the SCS came on the heels of the Law of the Sea negotiations from 1958 to 1982. These resulted in new rules on maritime zones for littoral states and states controlling islands. China's adoption of a Declaration on the Baselines of the Territorial Sea of the People's Republic of China (PRC) in 1996 made possible China's delineation of baselines around the Paracel

Islands in the northern part of the SCS. The declaration states that China will announce the remaining baselines of its territorial sea at a later date. The move demonstrated that China considers that it has territorial sovereignty in the SCS which entitles it to maritime zones irrespective of the distance from the coastline of the Chinese mainland. Since the SCS is a semi-enclosed sea, China's sovereignty claims overlap with the claims to territory and maritime zones of the littoral states in the SCS. The most contested area is the Spratlys. Here, Taiwan (whose claims overlap with those of the PRC), Vietnam, the Philippines, Malaysia and Brunei also have claims.

In recent years, China's presence has become controversial due to the country's emergence as a regional power with capabilities to pursue interests that are sometimes at odds with those of neighbouring powers. Regardless of the aggressive means China has used to establish a foothold, it has already occupied territory for so long that it is in all likelihood legally entitled to a presence in the region. The grey zone in international law is not China's status as a power in the SCS, but the extent of China's territorial sovereignty and maritime zones because these overlap with claims of other states. It is not clear how these overlapping claims might be resolved.

The precise extent of China's claim to sovereign territory and maritime zones has not been clarified. It is also not clear if China bases its claim on arguments of effective control or history. China argues that it has sustained human habitation and economic life in the territory and maritime space of the SCS for centuries. China seeks to justify its claim to have sustained sovereignty over the centuries on the basis of archaeological findings and by pointing out that, in Asia, other rules applied in respect of maintaining sovereignty before Western international law became applicable. Sovereignty was not manifested by the default practice of maintaining a continuous presence, unless another power contested space that China defined as within its jurisdiction, thereby challenging China's entitlement to a particular area. This understanding of sovereignty means that effective control is only exerted as a reaction to imminent foreign threats against Chinese territorial and maritime boundaries and not as a day-to-day practice in all areas over which China has jurisdiction. In Beijing's view, China has retained sovereignty over these areas irrespective of unlawful foreign occupations. For this reason, in principle China does not see itself as under any obligation to clarify its claim or subject itself to multilateral agreements with other claimant states or to international legal arbitration with regard to the sovereignty disputes.

Although not officially declared by China, China's claim is often thought to be based on the so-called 'nine-dash line' map indicating maritime boundaries encompassing around 80% of the SCS. China has neither denied nor confirmed that the map constitutes its official claim. The map is often put on display by official institutions that represent the Chinese government's views on the SCS, thereby adding to the expectation that China ultimately sees most of the area as sovereign Chinese space. If so, China is choosing to ignore the fundamental legal distinction between territorial and maritime delimitation.

The lack of clarification regarding China's claim implies that the extent to which Chinese jurisdiction interferes with Washington's core interest of maintaining freedom of navigation is also not clear. From Washington's perspective, freedom of navigation is vital to the continued effectiveness of free trade institutions and the alliance system which constitute basic pillars of US global influence.

Tangled legal issues

Even if China's entitlement to territory and maritime zones were clarified, another legal grey zone concerns military activities within maritime zones. One issue that is not clear is how to assess the status of maritime features, such as for example rocks versus islands. This complicates assessment of the type of maritime zones that can be claimed with reference to specific maritime features, and therefore also the military activities allowed near these features. In line with the Philippines and Vietnam, China is engaged in land reclamation efforts, thereby expanding its presence by enlarging features it occupies, strengthening Beijing's ability to enforce what it sees as its rights. The US has criticised China's land reclamation efforts in the SCS. Acknowledging that several claimant states have engaged in land reclamation, at the fourteenth Shangri-La Dialogue in June 2015 US Defense Secretary Ashton Carter called for China to stop its land reclamation projects. Carter has authorised his staff to consider options for flying US navy surveillance aircraft over islands and on 27 October 2015, the US navy sent a guided-missile destroyer, USS *Lassen*, within 12 nm of the Chinese land-reclaimed feature Subi Reef. China responded by sending two destroyers to the area.

A controversy exists regarding 200 nm exclusive economic zones (EEZs) allowing states rights over the exploration and use of marine resources. China argues that within EEZs, vessels and aircraft of other states need permission to enter. By contrast, the US insists that outside of a 12 nm territorial sea zone from the coastline of a state, the freedom of the high seas and air applies. This allows for the unrestricted movement of vessels and aircraft. The EEZ has a *sui generis* legal status constituting a compromise between the sovereignty of the coastal state and freedom of the high seas and air.

China enforces its interpretation of rights and obligations within the EEZ by means of national legislation and regular patrolling. In November 2013, China's National People's Congress passed regulations requiring foreign vessels to ask for permission to enter waters for purposes of fishing under the authority of Hainan province. These regulations encompass Chinese-claimed areas in the SCS. The regulation that took effect on 1 January 2014 came a year after Hainan's announcement of rules that give police the right to board and seize foreign ships that in China's view have illegally entered its waters, damaged coastal defence facilities or engaged in activities deemed to threaten national security.

The controversies between China and the US regarding military activities in the EEZ reflect a wider controversy in international law. Legally, this is a grey area. It is a matter of interpretation if military activities are included in the freedoms of navigation, of overflight and other internationally lawful uses of the sea under the Law of the Sea. Some coastal states claim that other states cannot carry out military activities in or over their EEZs without their consent and have sought to apply restrictions on navigation and overflight in these zones. China and countries such as India have common interests in maintaining the legitimacy of this position.

The opposing view, held by major maritime powers such as the US and Japan, is that the regime of the EEZ does not permit coastal states to limit traditional non-resource related, high seas activities in that area. Such activities may in their view include 'task force manoeuvring, flight operations, military activities, telecommunications and space activities, intelligence and surveillance activities, marine data collection and weapons testing and firing'.[1] On balance, freedom of navigation within EEZs does not exist to the same extent as on the high seas in the judgement of legal experts such as Helmut Tuerk.[2]

At present, there is no clear definition of the rights and obligations of states regarding military activities within the maritime zones of other states. Under these circumstances, international law will evolve from the customs established through state practice. This invites Washington and Beijing to continue to manifest what they see as legitimate interpretations of the legal provisions. In so doing they try to make sure that their interpretation becomes law. This behaviour sustains an unfortunate 'action-reaction' pattern that maintains high tension levels and engenders risks of accidental use of force, as demonstrated by the May 2015 incident.

The Hague-based Permanent Court of Arbitration may shed light on some of these issues. On 29 October 2015, the Court ruled that it has jurisdiction to hear some territorial claims the Philippines has filed against China over disputed areas in the SCS, including the status of some features such as Subi Reef. However, China's announcement in 2013 that it rejects the arbitration, considering the Philippine submission to the court a breach of their mutual agreement to resolve the issue by peaceful negotiations and dialogue as listed in the 2002 Declaration of Conduct, implies that China is not going to change its views on legitimate conduct in the SCS.

Maritime muscle-flexing

Mainstream moderate voices in China are careful to point out that China advocates peace and promotes security cooperation. However, if its core national interests are challenged, they also emphasise that China will respond swiftly and will refuse to

1. Walter F. Doran, 'An Operational Commander's Perspective on the 1982 LOS Convention', *The International Journal of Marine and Coastal Law*, vol. 10, no.3, 1995.

2. Helmut Tuerk, 'The Legal Regime of Maritime Areas and the Waning Freedom of the Seas', paper presented at High-Level Workshop: 'Maritime Issues and UNCLOS: Sharing European/EU and Asian Approaches to Territorial Disputes', Ha Long, 4-5 June 2015.

give up an inch of its land or sea territory. The message from Beijing is that the PRC prioritises stability, but challenges to alleged Chinese rights to territorial sovereignty and maritime zones will meet with a firm response that allows China to continue to exercise jurisdiction over its maritime entitlements. The red line for China's willingness to use force is blurred, and it is becoming hard to distinguish moderates from the hawkish minority which recommends more aggressive use of force. Similarly, US Defense Secretary Ashton Carter's authorisation of his staff in October 2015 to send the guided-missile destroyer USS *Lassen* within 12 nm of features that have been subject to Chinese land reclamation efforts blurs Washington's commitment to uphold long-standing universal legal principles and thus undermines its claim to occupy the moral high ground. For example, the USS *Lassen* operation took place in a legal grey zone and can indeed be interpreted as US acceptance that Subi Reef is an island with a territorial sea surrounding it. The statements issued by the US Administration after the incident implied that the US defended both the principles of the freedom of navigation and innocent passage. These are contradictory justifications since the first principle implies non-recognition that Subi Reef is an island located in Chinese territorial seas whereas the second principle suggests recognition of Chinese sovereignty. The US's confused signalling demonstrates that Washington's core interest in protecting the principles that allow commercial and military traffic to move freely in international waters and airspace is complicated by the tangled legal situation. Ultimately Washington's decision to defend its alleged right to conduct military activities in zones where these activities are contested calls into question the US claim to act according to universally recognised international legal principles.

The risk of accidental use of force is not merely a tactical issue that concerns the potential for misunderstandings between commanders at sea arising due to a lack of common rules of engagement. The US and Chinese SCS policies display different understandings of deterrence which engender sustained misreading of intentions as provocations.

Chinese deterrence encompasses the option of using compellence against states that are seen to pursue offensive strategies to coerce the other into backing off, even if such strategies have not resulted in the use of deadly force. This definition of deterrence emerges in China's tradition of using force, even in the face of military weaknesses, in order to slow, halt or reverse trends that Chinese leaders perceive as working against China's long-term security interests. By contrast, Western-style deterrence does not include the possibility of using force as a response to political, economic or diplomatic challenges. China sees its deterrence posture – involving a military build-up on insular features in the SCS and the use of law enforcement capabilities to defend alleged sovereign rights – as one of self-defence, aimed at dissuasion rather than coercion. However, the US reads this behaviour as provocation that might jeopardise its fundamental interests and values.

US deterrence entails sustaining a forward military presence in the Asia Pacific to protect core interests and values, cooperating with its network of allies and strategic partners on deterring other states from challenging fundamental principles such as the freedom

of navigation. Patrols and surveillance operations by US naval vessels within 12 nm of artificial islands are not in Washington's view actions that violate Chinese sovereignty. Instead, they are considered to demonstrate that international waters cannot be turned into national waters by means of land reclamation. Such measures are meant to deter China from behaving as if these features are sovereign Chinese territory with territorial sea zones. However, China reads this behaviour as provocation from a power that, in its view, has no right to exercise offshore deterrence in waters and airspace that are considered to be within Chinese jurisdiction.

Seeking a *modus vivendi*

When Chinese and US leaders meet, the South China Sea often features on the agenda as a thorny issue hampering their efforts to stabilise the bilateral relationship. Both sides are determined to avoid armed conflict. Nevertheless, delivering reassurance is difficult when differences regarding interpretations of legitimacy, perceptions of proper state conduct and definitions of core interests and values are as pronounced as in this case.

Credible reassurance requires that China strengthens its commitment to the freedom of navigation in the SCS. Paying lip service in support of the concept is not enough. Indeed, Beijing has already done so on several occasions. China must clarify the implications of its efforts to become a global maritime power. No one expects China to reveal state secrets, but Beijing can afford to admit that as it sends its navy on reconnaissance missions to places outside of its home region like Guam and the Arctic, China will also need to maintain the principle of the freedom of navigation. It would also be worth clarifying if China is considering building an alliance system based on its strategic partnerships that involves permanent overseas military deployments. If so, in the interest of stability and good neighbourly relations it might be wiser for China to refrain from threats of using force in areas such as the SCS where sovereignty and maritime zones remain disputed. Similarly, changing the state of play concerning the freedom of navigation through land reclamation is also a challenge to US core interests that should be avoided. China must recognise that even if its activities are reactions to initiatives by other claimant states in the SCS, China is not only involved in disputes over sovereignty and maritime zones. It is also engaged in a strategic competition with the US where the SCS has become a major arena for adjusting the principles of international order. In this context, activities such as land reclamation endeavours that challenge fundamental principles of the US alliance system alter the character of the game, thereby increasing tension levels.

Credible US reassurance that Washington has no intention of interfering with sovereignty and maritime zone issues in the SCS is also needed. This requires more than official statements confirming that the US is not taking sides in sovereignty disputes. For example, the US could demonstrate that, as China is becoming a maritime power that operates in maritime zones controlled by the US and core allies, Washington continues

to support the Cold War principles of sovereignty and maritime zone rights without compromising its commitment to act in accordance with universally recognised principles of international law. This can be manifested by for example refraining from allowing its military to navigate close to Chinese-controlled artificially built-up land features in the SCS in ways that imply that the US takes sides in maritime disputes that are currently in a legal limbo. It would serve both powers well to demonstrate that they are able to back down a little on issues that generate fear of armed conflict and overshadow areas with more potential for cooperation, such as anti-terror initiatives, UN peacekeeping and climate change.

III. UN COMPULSORY ARBITRATION: A TOUGH TEST FOR CHINA

Stein Tønnesson

On 29 October 2015, disregarding China's objections, a UN Arbitral Tribunal set up at the request of the Philippines, and consisting of four European judges and one African judge, decided that a number of issues related to the territorial disputes in the South China Sea (SCS) are indeed within its jurisdiction and may be resolved through compulsory arbitration. Although China has refused to take part in its proceedings, the Tribunal's present and future awards (rulings) will bind China as a party to the UN Convention on the Law of the Sea (UNCLOS). The Tribunal's decision strengthens the feeling in China that international law is not on its side. Probably the most worrying aspect from China's perspective is that the Court has already implicitly decided on two critically important matters: (i) China's nine-dash (U-shaped) line has no validity as a maritime zone claim; and (ii) the Spratlys (*Nansha Qundao*) is not an archipelago generating entitlements to an exclusive economic zone (EEZ) and continental shelf. These decisions, it will be argued below, serve as implicit premises for the Tribunal's ruling that it has jurisdiction over many of the issues raised by the Philippines, and this is likely to be confirmed when the Tribunal delivers its next and more conclusive award. It is likely to be issued in June 2016.

The nine-dash line is null and void

Although the Arbitral Tribunal declined the Philippines' request that it consider the legal validity of the nine-dash line as such, its decision to decide upon seven of the fifteen requests made by the Philippines means that it has already deprived the nine-dash line of any validity as the basis for a maritime zone claim.

In a Position Paper published on 7 December 2014, China put forward arguments for considering all the issues raised by the Philippines to fall outside the jurisdiction of the Tribunal. The Philippines had made fifteen submissions, one of which concerned the legal validity of the nine-dash line, while others concerned whether or not certain reefs inside the line are entitled to a 12 nm territorial water zone. The Philippines also asked if Scarborough Shoal is an island entitled to a 200 nm EEZ and continental shelf, or a 'rock' with a right to only 12 nm territorial waters.

Drawing its inspiration from discussions among scholars based in mainland China and Taiwan, the Chinese Position Paper gave three main reasons for considering the Philippines' submissions to fall outside the Tribunal's jurisdiction. First, at the core of the dispute is the question of who has sovereignty over the islands and reefs in the area. This is beyond the scope of UNCLOS, since it has nothing to say about sovereignty to land, including islands. Second, the issues the Tribunal had been asked to resolve constitute integral parts of maritime boundary delimitation, and since China in an official declaration of 25 August 2006 took exception to compulsory arbitration of all matters listed in UNCLOS Article 298, including maritime delimitation, the issues raised by the Philippines cannot fall under the Tribunal's jurisdiction. Third, the Philippines has pledged, both bilaterally and in the context of the 2002 ASEAN-China Declaration on the Conduct of the Parties (DoC), to resolve its disputes with China through friendly consultations, but has failed to engage in bilateral discussions about the issues it unilaterally decided to send to arbitration.

The Tribunal refuted the first argument on good grounds: it is fully possible to resolve the issue of an island's or rock's legal entitlements without first deciding who has sovereignty over it. The Tribunal further disproved the third argument by agreeing with the Philippines that the DoC is not a legally binding agreement, and that the parties have indeed exchanged views on the disputes: 'The Tribunal notes as a matter of fact that, despite years of discussions aimed at resolving the Parties' disputes, no settlement has been reached. If anything, the disputes have intensified.' (Paragraph 220.)

More controversially, the Court also rejected China's second objection that the issues raised by the Philippines are integral to maritime delimitation (Paragraphs 155-157, 366, 393.) This cannot but mean that the Tribunal has already indirectly decided upon two critically important issues, namely the status of China's nine-dash line and the 'plurality' of the Spratly island group.

If, by virtue of Chinese 'historic rights', the nine-dash line had some validity as a maritime zone claim – an issue raised by the Philippines but which the Tribunal decided not to consider explicitly – then the other issues, which concern the entitlement to maritime zones of reefs and islands within the line, would overlap or compete with rights derived from the line itself. Hence they would be integral to the issue of maritime boundary delimitation. By deciding, without much argument, that this is not the case, the Tribunal has effectively deprived the nine-dash line of any capacity to affect maritime delimitation. The Tribunal has reserved for the future its decision on whether it has jurisdiction over the specific question of 'historic rights'. It has also reserved judgement on its jurisdiction over entitlements affected by competing entitlements of islands other than the ones included in the Philippines' request. Most importantly, however, the Court has decided that it has jurisdiction over issues that would be affected by the nine-dash line if the latter were to have an impact on maritime boundary delimitation. Hence it cannot in the view of the Court have any such impact.

This is immensely important since China has been deliberately and consistently ambiguous as to the legal meaning of the line. On 7 May 2009 China for the first time attached a version of its map with the nine-dash line to an official letter to the UN. It said: 'China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.' This could be understood to mean that China claims just the islands and the 'adjacent' maritime zones to which they are entitled under UNCLOS. On the other hand, it might also be understood to indicate a claim to a larger area of 'relevant waters', where China has 'historic rights' dating back to before UNCLOS. The nine-dash line appeared on official Chinese maps as early as 1947-48, while UNCLOS was negotiated during 1973-82, and ratified by China as late as in 1996. Only if the nine-dash line does not represent any historic rights does the Tribunal have reason to determine that the issues raised by the Philippines are not integral to maritime delimitation. Implicitly, therefore, the Tribunal has decided that the nine-dash line has no validity as the basis for a maritime zone claim. It just illustrates China's claim to all islands within it and their maritime zones.

Interestingly, the Tribunal has also made another implicit and momentous decision, limiting the scope of China's legally permissible options: the Spratlys do not constitute an archipelago that can have a system of straight baselines around it. Hence it will neither be possible to claim the whole water area inside the island group nor claim maritime zones extending outward from its outermost points. Any maritime zone claim in the area, regardless of who makes it, must be based on the entitlements of individual islands. If the Spratlys were to be considered as an archipelago, then many of the issues raised by the Philippines would be integral to maritime boundary delimitation. In that case the Tribunal could not have had jurisdiction in the matter, since China has taken exception under UNCLOS, Article 298, to compulsory arbitration in matters concerning maritime delimitation. The Court has thus also already decided – this time without any discussion – that the Spratlys are not an archipelago.

The Spratlys isn't – they are

Chinese maps and public statements do not habitually refer to the Spratlys as a scattering of individual reefs or islands but call them *Nansha Qundao* and refer to them in English using the collective pronoun 'it', not 'they.' In its 2014 Position Paper, China speaks of 'the Nansha Islands as a whole.' Hence, in its official correspondence with the UN, China has avoided the use of plural verbs after the noun 'Nansha Islands': 'China's Nansha Islands is fully entitled to Territorial Sea, exclusive economic zone (EEZ) and continental shelf'.[1] However, in its 29 October 2015 award, the Arbitral Tribunal twice quotes China's official letters incorrectly by substituting '[are]' for 'is'. Since the Tribunal's motivation for copy-editing China's official letters can hardly have been to teach the Chinese Ministry of Foreign Affairs how to write proper English it must have wanted to make a point.

1. People's Republic of China, Note to the Secretary-General of the United Nations, Doc. CML/8/2011, 14 April 2011.

The 1982 UNCLOS established the 'archipelagic state' as a special category to accommodate the interests of a small number of states: the Philippines, Indonesia, Fiji, and the Bahamas. By virtue of being 'archipelagic' they are, under certain geographic conditions, allowed to draw straight baselines connecting the outermost points of their home islands, and all waters inside are given a special status as 'archipelagic.' Archipelagic states have furthermore the right to claim a 200 nm EEZ and continental shelf extending outwards from their archipelagic baselines. The Philippines and Indonesia benefit enormously from their special status. The Philippines' maritime space is not limited by the boundary established in the 1898 Spanish-American treaty but includes a continental shelf and EEZ outside of its straight baseline system.

With no basis in UNCLOS, the continental state of Ecuador has unilaterally drawn archipelagic baselines around its Galapagos Islands, provoking protests but no resolute counter-action from other states. Ecuador has good reasons for ignoring international law: the Galapagos form an ecosystem in need of protection; no important sea-lanes run through it; and the EEZ claim extending outward from the Galapagos does not overlap with any rival claims by other nations. The Spratly area could also benefit from protection of its vulnerable ecosystem but by contrast to the Galapagos it straddles some of the world's most important sea-lanes of communication, and maritime zone claims by several neighbouring states overlap to a very great extent.

Two nations have tried in the past to make claims to the Spratly area by drawing lines around an archipelagic perimeter. In 1930, France prepared the necessary maps and documents for claiming an area between the degrees of Longitude 111 and 117 East, and Latitude 7 and 12 North, but refrained from making this claim after the United Kingdom made it aware that such claims are not legally valid. Thus, in 1933, France instead officially claimed sovereignty over a number of specific islands, including Spratly Island itself. In 1956 a private citizen of the Philippines (Thomas Cloma) established a 'Freedomland' (*Kalaya'an*) covering most of the Spratly area (but not Spratly island), and in 1978 the Philippines government took over Cloma's Freedomland, and established a municipality to cover an area defined by geographic co-ordinates in the same way France had attempted in 1930. It took decades before the Philippines realised that its *Kalaya'an* claim was not legally sound. In 2009, however, it adopted new national legislation in consonance with the provisions of international law. It now claims a number of specific islands, with their 12 nm territorial waters, and a 200 nm EEZ and continental shelf extending outward from base points only on the Philippines' main islands, such as Palawan.

In 1996, China declared a system of straight baselines connecting the outermost points on its coast and its offshore islands, including Hainan. In addition, China followed the example set by Ecuador by drawing a separate, archipelagic baseline around the whole of the Paracels (*Xisha*) group. This group of islands has since 1974 been fully controlled by China but is also claimed by Vietnam. As with the Galapagos the proclamation of baselines around the Paracels has been met with protests but no resolute counter-action. If China were now to draw a similar set of baselines around the Spratlys (*Nansha Qundao*) this would be seen by the Philippines, Vietnam, Malaysia and Brunei as extremely provocative. There

are several possible reasons why China has not done this so far but has preferred to keep the option in reserve. One is probably its fear of undermining claims made on the basis of the nine-dash line, another that all the Spratly islands are occupied by other countries. China came late to the area and holds just small submerged reefs and low-tide elevations although nine of them have during 2013-15 been built into artificial islands, two of them with airstrips. A third reason could be that the publication of baselines around the Spratlys might elicit strong counter-actions from China's neighbours as well as external powers. These are three good reasons for China to show restraint.

Status quo is the best hope for now

In the short run, there is little reason to expect the Chinese to feel anything but resentment and contempt for the Europe-dominated Arbitral Tribunal. Its authority, however, is likely to be such that no future court or even negotiated agreement will directly defy its conclusions. Voices may again be heard in China suggesting that it should withdraw from UNCLOS. China might be tempted to challenge the Tribunal by abandoning its policy of restraint and declare straight baselines around the Spratlys, or declare an Air Defence Identification Zone (ADIZ) – as it did for the East China Sea in 2013. Both would lead to adverse reactions. An ADIZ would not need, however, to have any lasting negative effect, unless it were aggressively enforced. To declare an archipelagic baseline around the Spratlys would be infinitely more provocative. This would be the second worst thing for China to do. It would prevent conflict resolution for the foreseeable future. However, the worst thing China could do is to repeat what it did in the western Paracels in 1974, and refrained from doing in the Spratlys in 1988-89, namely to forcefully invade islands occupied by others. China remains unlikely to take control of the islands occupied by Vietnam, the Philippines, Malaysia or Taiwan. Beijing knows that these islands are impossible to defend against a determined counter-attack, and that occupation by force would weaken rather than strengthen its legal title. The best we can hope for in the short run is the preservation of the *status quo*; with China expressing its strong misgivings concerning the Arbitral Tribunal's recent and forthcoming rulings but refraining from provocative actions. And then it might perhaps be possible to negotiate a Sino-ASEAN Code of Conduct to prevent open conflict.

A gradual transformation

At some point in the future, the Chinese may tacitly realise that the Arbitral Tribunal is saving them some trouble. China has benefited enormously from integrating itself into a global system based on international law. Furthermore China could enhance its own security by treating its neighbours on the basis of equality and showing respect for international law. This would drastically reduce their perceived need for US military protection. Chinese legal experts have long known how difficult it is to find valid legal

arguments for seeing the nine-dash line as anything more than a signal of a claim to the islands inside it and their maritime zones. These same legal experts also know that the archipelagic baselines drawn around the Paracels (*Xisha*) have no basis in international law. Yet it has been more or less impossible to say these things openly in China. As in many other nations, patriotic sentiments stand in the way of constructive diplomacy. Yet at some point China will have to forget about its claim to historic rights within the nine-dash line, and also the idea of treating the Spratlys as if it were an archipelagic state. The Arbitral Tribunal is delivering a wake-up call to China. At first this will inevitably cause anger but China may eventually draw a deep breath, and begin to talk with its neighbours on the basis of a proper understanding of existing international law, in the way it did when negotiating its Tonkin Gulf agreement with Vietnam. It was signed in 2000 and has served both countries well. And then Chinese diplomats and decision-makers may discover that the Arbitral Tribunal's 29 October 2015 award, as well as the award that is soon going to follow, while not to their liking, may actually be helpful in removing some of the main obstacles to an equitable solution of the disputes in the SCS.

IV. A TEST CASE FOR CHINA'S ADHERENCE TO THE INTERNATIONAL RULE OF LAW

Matthieu Burnay

Introduction

The South China Sea (SCS) is a key arena in the construction of China's foreign policy strategy. It is in the SCS that Beijing has assumed an extremely assertive foreign policy posture, leading neighbouring countries to question China's strategy and intentions in the region. The increasing deployment of the People's Liberation Army Navy (PLAN) in the area, the erection of man-made structures on disputed islands and reefs, as well as the whipping up of nationalist sentiment to support China's sovereignty claims, are only some of the most visible examples of this growing assertiveness.

China's behaviour can be explained by the fact that the SCS disputes touch upon some of Beijing's top foreign policy priorities. These include the protection of China's national sovereignty, control over significant maritime routes in China's immediate neighbourhood, as well as the crucial importance of securing access to raw materials in the area. Nevertheless, China's policies in the SCS do not signify Beijing's exclusive turn towards a posture of greater assertiveness. China is aware of the need to clarify its overall intentions in the SCS, particularly in the light of the development of the 'One Belt-One Road' project. In terms of Beijing's attempt to enhance connectivity and interdependence between China and other regions in the world, the SCS appears as a central component of China's emerging global strategy. China continues therefore to recognise the importance of enhancing its soft power through various public and soft diplomacy instruments. President Xi Jinping's visit to Vietnam as well as the historical meeting with Taiwan President Ma Ying-jeou in November 2015 can be partly understood as attempts to reassure its close neighbours of China's 'peaceful' and 'mutually beneficial' intentions both in the SCS and in the development of the 'One Belt-One Road' project.

Rhetorical support for the rule of law

This chapter will focus primarily on assessing China's policy *vis-à-vis* the SCS disputes from the perspective of Beijing's support for the international rule of law. While the overhaul of the Chinese legal system provided a vital impetus for the opening-up and reform process initiated by Deng Xiaoping, China has recently paid renewed attention to the principle of the rule of law and its application in the international domain. The

rule of law – and legal affairs – was therefore identified as the main theme of the 2014 Plenum of the Chinese Communist Party (CCP). While China's legal system still continues to suffer from major deficiencies (i.e. weak constitutionalism, shortcomings in law implementation/enforcement, no separation of powers), the emphasis on the rule of law by the CCP presents the rule of law as a benchmark that increasingly conditions the legitimacy of the CCP. One expert has used the term the 'law-stability paradox' to describe the need for the CCP to find the right balance between the quest for gains emerging out of the strengthening of the rule of law and the challenges that the rule of law can potentially pose to the one-party system.[1] While some are very sceptical about the CCP having a genuine interest in enhancing the rule of law, it is arguable that the successful integration of the concept of rule of law in China's reform process largely conditions the ability of the CCP to tackle some of the most pressing domestic concerns that include growing income disparities across the country, environmental pollution, financial market instability, as well as endemic corruption.

Beijing's interest in promoting the rule of law within China has also been translated into rhetorical support for the development of the international rule of law and its two components: the rule of law at the national and international levels.[2] On the one hand, the rule of law at the national level relates to the international community's concern to improve the rule of law within states, more particularly in the context of post-conflict situations. On the other hand, the rule of law at the international level signifies the application of the rule of law principle to the relationship between states. In an attempt to explain China's joint support for the Five Principles of Peaceful Coexistence and for the international rule of law, President Xi Jinping recently stated that 'the key elements of the Five Principles, namely, "mutual" and "coexistence", demonstrate the new expectations the Asian countries have for international relations and the principle of international rule of law that give countries, rights, obligations and responsibilities'.[3]

A strategy of 'non-participatory participation'

It is very clear that support for impartial and independent international adjudication mechanisms constitutes a central component of the international rule of law. China's track record in this respect appears to be very uneven and strongly varies across jurisdictions and legal areas. While China's positive contribution to the World Trade Organisation Dispute Settlement Mechanism (WTO DSM) has demonstrated China's progressive socialisation

1. Benjamin L. Liebman, 'Assessing China's Legal Reforms', *Columbia Journal of Asian Law,* vol. 23, no. 1, 2009-2010, p. 17.

2. The distinction between the rule of law at the national and international levels is made by the United Nations. See: United Nations Secretary General, Report on 'Uniting our Strengths: Enhancing United Nations Support for the Rule of Law', A/61/636 and S/2006/980, 14 December 2006.

3. Address by H.E. Xi Jinping President of the People's Republic of China at the Meeting Marking the 60th Anniversary of the Initiation of the Five Principles of Peaceful Coexistence, 28 June 2014. Available at: http://www.china.org.cn/world/2014-07/07/content_32876905.htm.

in the international trade regime,[4] the resolution of territorial and maritime disputes through international adjudication remains much more problematic from a Chinese perspective. In this respect, China made it very clear that it rejected the establishment of an Arbitral Tribunal under Chapter VII of the United Nations Convention on the Law of the Sea (UNCLOS) to solve its disputes with the Philippines. China's argument against the Philippines' request is based on the view that the disputes are about sovereignty claims, which fall outside the jurisdiction of the UNCLOS. China affirmed in that context that the disputes with the Philippines should be solved through bilateral negotiations in conformity with the 2002 'Declaration of Conduct of Parties in the SCS between the Member States of ASEAN and the People's Republic of China'.[5] Despite its fundamental opposition to the establishment of the Arbitral Tribunal, China developed a strategy of 'non-participatory participation' when the debate focused on the actual jurisdiction of the Arbitral Tribunal.[6] While China strongly opposed the establishment of the Arbitral Tribunal, it presented its position through various initiatives including the release of a Position Paper on the 'Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines' that introduced not only political but also legal arguments defending China's claims in the area.[7] The SCS disputes and their resolution are and will continue to be a very strong test case for China's rhetorical support for the international rule of law. China's 'non-participatory participation' in the debates of the Arbitral Tribunal demonstrates that Beijing has clearly not completely ruled out the rule of law argument in the resolution of the SCS disputes. China's reaction and the extent to which it actually complies with the ruling of the Arbitral Tribunal will be, in this respect, an ultimate test from the perspective of the international rule of law.

As this chapter has endeavoured to show, there is finally a strong argument to be made for the EU to become further engaged in the post-arbitral ruling phase. The EU and China agreed at the occasion of the 17th EU-China Summit (2015) that they would create a new dialogue on 'legal affairs' as part of the EU-China Strategic Partnership.[8] While the exact focus of this initiative still needs to be agreed upon, the EU should seriously reflect upon including debate on international disputes resolution (i.e. maritime disputes resolution) as part of this new dialogue.

4. See Matthieu Burnay and Jan Wouters, 'The EU and China in the WTO: What Contribution to the International Rule of Law? – Reflections in Light of the Raw Materials and Rare Earths Disputes' in Jianwei Wang and Weiqing Song (eds.), *China, the European Union, and International Politics of Global Governance* (Palgrave MacMillan, forthcoming 2016).

5. 8th ASEAN Summit, 'Declaration of Conduct of Parties in the SCS between the Member States of ASEAN and the People's Republic of China', 4 November 2002, Phnom Penh, the Kingdom of Cambodia.

6. Wim Muller, 'China's Missed Opportunity in SCS Arbitration', Chatham House, 19 March 2015. Available at: https://www.chathamhouse.org/expert/comment/17237#sthash.O3s5GJpz.dpuf.

7. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines, 7 December 2014. Available at: http://www.chinamission.be/eng/zt/southsea/t1217147.htm.

8. EU-China Summit Joint Statement, 'The Way Forward after Forty Years of EU-China Cooperation', 17th EU-China Summit, 29 June 2015, para. 23.

V. CHALLENGES FOR JOINT DEVELOPMENT IN THE SCS

Christian Schultheiss

Joint resource development projects, such as joint development agreements and joint fishery agreements, are often cited as a prerequisite for cooperation, dispute settlement and de-escalation in the South China Sea (SCS). There are several reasons for this. First, both economic and security interests dictate that a concerted approach to the development of hydrocarbon resources and fisheries management in these disputed waters is desirable and necessary. Second, all states adjacent to the SCS have experience of joint resource development. Third, there have been recurrent high-level calls for joint development initiatives – for example in June 2015 President Ma of Taiwan urged all parties to put aside their differences and to focus on the joint development of resources in the SCS. However, if we look at how such initiatives are implemented in practice, we find that the mechanism is not applied in areas where it is most needed whereas some progress is being made in areas where it is less needed. This begs the question: why is joint development in the SCS so difficult?

Although states can readily agree on the aspiration to shelve a territorial or boundary dispute, it is difficult in many cases to come to a consensus on how to define an exact area for joint development. Clearly, without agreement on an area for joint development, cooperation cannot take place and hence there can be no prospect of dispute settlement. The big challenge and obstacle to joint development in the SCS is the question of how to define a joint area for disputed waters. This is as much a technical problem as it is a political one. The concept of joint development needs to be rethought, if it is to play a role in the SCS: a joint development policy needs to be designed on a case-by-case basis that makes provisions not just for shelving disputes, but also takes into account the conflicting claims and the perceived claim strength of the respective claimant states and reflects the intangibles of domestic politics. This chapter will define the problem of implicit recognition, demonstrate how the geography of the SCS makes joint development difficult and focus on one case study, the Joint Seismic Undertaking of 2005 between the national oil companies of China, Vietnam and the Philippines, to show how domestic politics constrains joint development agreements.[1]

1. In the context of increased great power competition, China expanded its artificial islands construction projects and militarised the islands in 2015. The US started Freedom of Navigation exercises in November 2015 and pledged to increase its presence and its military assistance to the region in the Asia Pacific Maritime Security Strategy released in August 2015. Against this backdrop, the question arises of how increased great power competition affects the chances of applying dispute settlement mechanisms such as joint development.

The concept of joint development and joint fisheries agreements

The basic idea of joint resource development in disputed areas is simple. States that are deadlocked in territorial or maritime boundary disputes find themselves confronted with three options with regard to the use of natural resources: (i) States could resolve the boundary dispute and divide the resources between them. However, resolving boundary disputes may take a long time during which the claimant states are not free to exploit the resources of a disputed area, thus creating a source of tension; (ii) States could try to unilaterally exploit the resources. This, however, entails the risk of resistance from the disputing state and could escalate the dispute; (iii) States could shelve the dispute and share the resources. This would mean that the various states would have access to the natural resources, unhindered by naval and coastguard vessel patrols, and could jointly establish a stable legal framework for investment in hydrocarbon exploitation, thereby surmounting a key obstacle that strains bilateral relations in the SCS. Since one prerogative deriving from a state's jurisdiction over an exclusive economic zone (EEZ) or continental shelf is access to natural resources, a joint approach to regulating resource exploitation effectively removes one underlying incentive for disputing sovereignty or control over an area. Over time the dispute itself may fizzle out since the prized natural resources at stake are henceforth jointly regulated. There is thus a certain inescapable logic to joint development since economic and security interests – namely, access to resources and the reduction of concrete sources of tensions – are closely aligned.

The concept of a joint fishery or joint development agreement is defined in the UN Convention on the Law of the Sea in Art. 74(3) and Art. 83(3): 'Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.' Joint fishery and joint development arrangements are comparable since the same logic applies to both, something which is recognised by UNCLOS which uses exactly the same wording in Art.74(3) and Art. 83(3) for EEZ and the continental shelf delimitation.[2]

The regional experience

Tables 1, 2 and 3 (see pages 43-44) provide an overview of joint development and fishery agreements in the South and East China Sea as well as ongoing negotiations. All these cases provide insights into the political conditions for applying joint development

2. International lawyers often refer specifically to the text 'every effort not to jeopardize or hamper the reaching of the final agreement' in order to establish the unlawfulness of unilateral and irreversible changes in a resource deposit or stock. For an overview of the legal issues involved in joint development, see Masahiro Miyoshi, 'The Joint Development of Offshore Oil and Gas in relation to Maritime Boundary Delimitation', *Maritime Briefing*, vol. 2, no. 5, International Boundaries Research Unit, University of Durham, 1999.

agreements in the SCS. Clearly, all claimant states in the SCS have experience with the concept and it has been widely practised.

This brings us to the question of the definition of the area for joint development. The simplest paradigm supposes the following constellation: if the sea between two states is less than 400 nm wide and if both states claim an EEZ and continental shelf of 200 nm, there will be an overlapping area in the middle of the sea. Since claiming an EEZ of 200 nm is not an unreasonable claim, both states may contend that they have a 'good faith' claim to the overlapping area. The area for joint development is then readily identified as the overlapping area and the states agree to jointly develop the resources without prejudice to final delimitation.

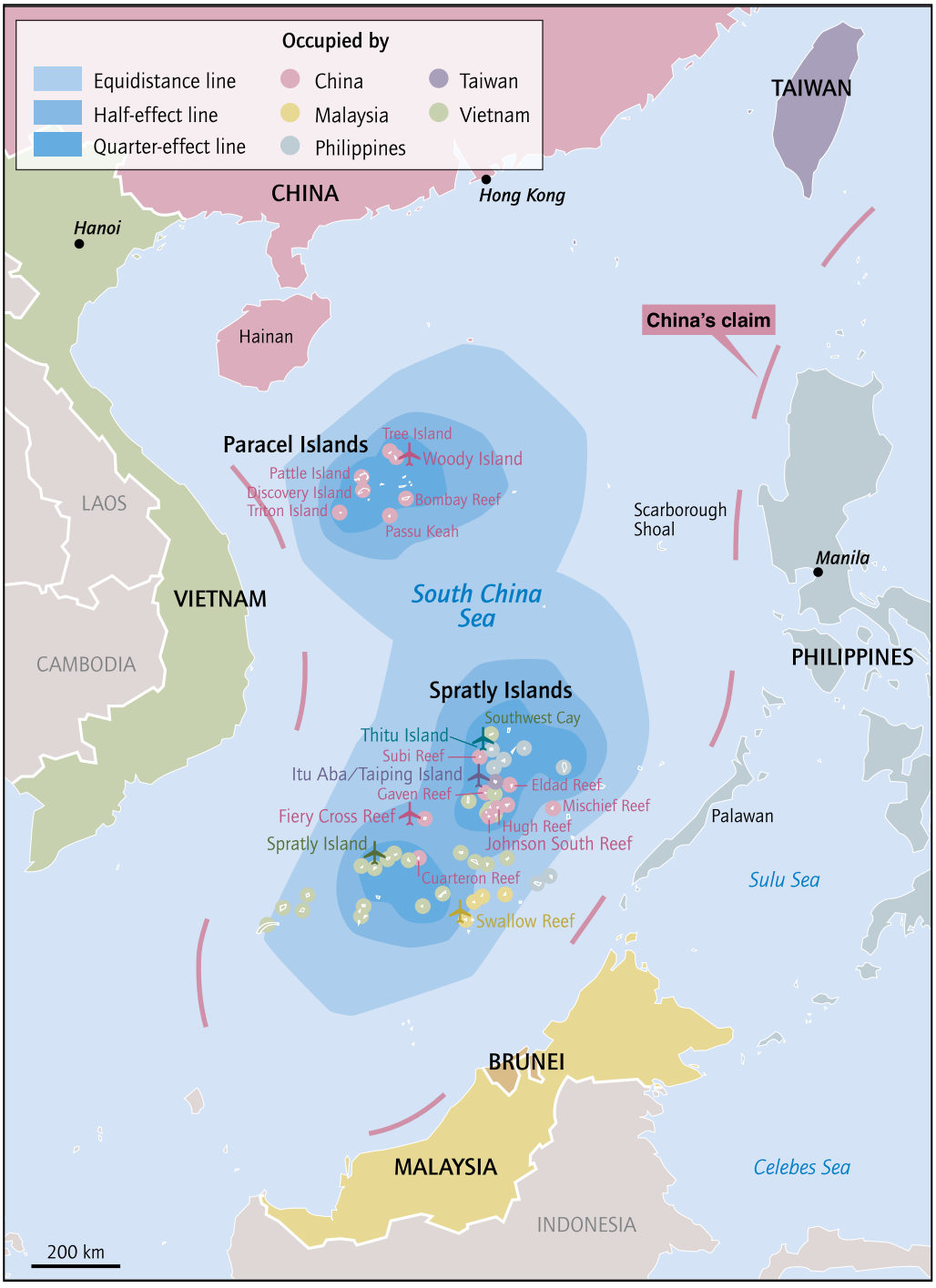
It is clear that the application of this simple joint development or joint fishery model to the SCS presents several challenges. Some claims to portions of the SCS are vaguely defined, the legal status of insular features such as islands, rocks, reefs or submerged landforms is unclear, hence there is uncertainty about which maritime zone a specific island feature is capable of generating. Additionally, the issue of which countries exert sovereignty over these island features is disputed. For example, the Philippines does not acknowledge that China has reasonable claims and both claimants maintain that their claims are undisputable. Some lawyers conclude that as long as these four conditions pertain – vaguely defined claims, undefined status of island features, disputed sovereignty over insular features and uncertainty over the implications of such features for maritime boundaries – joint development agreements are not feasible.[3] Clearly, these four factors of uncertainty in the SCS disputes present the joint development planners and negotiators with difficult challenges.

The problem of implicit recognition in the SCS

The four abovementioned conditions mean that states perceive joint development agreements as entailing implicit recognition of the legitimacy of other states' claims. Thus claimant states believe that areas for joint development imply certain pre-commitments with respect to the disputed area despite without prejudice clauses in an agreement. States fear that their acceptance of a joint development area may be interpreted as implying political recognition that another claimant has a valid interest in this area. At the very least, they express a recognition that the area is disputed – a big step given that claimant states insist on their 'undisputable claims'. Looking at Map 2, the difficulties of this implicit recognition effect can be illustrated. The map shows the larger Spratly islands: the small, coloured circle depicts the 12 nm territorial waters that may be claimed from the islands while the larger blue areas show the exclusive economic zones (EEZs) that may or may not be claimed from the islands in combination. The equidistance line shows the equidistance between an EEZ claim from the mainlands

3. See Robert C. Beckman, Ian Townsend Gault, Clive H. Schofield, Tara Davenport, and Leonardo Bernard, *Beyond territorial disputes in the SCS: legal frameworks for the joint development of hydrocarbon resources*, NUS Centre for International Law series (Cheltenham: Edward Elgar, 2013) .

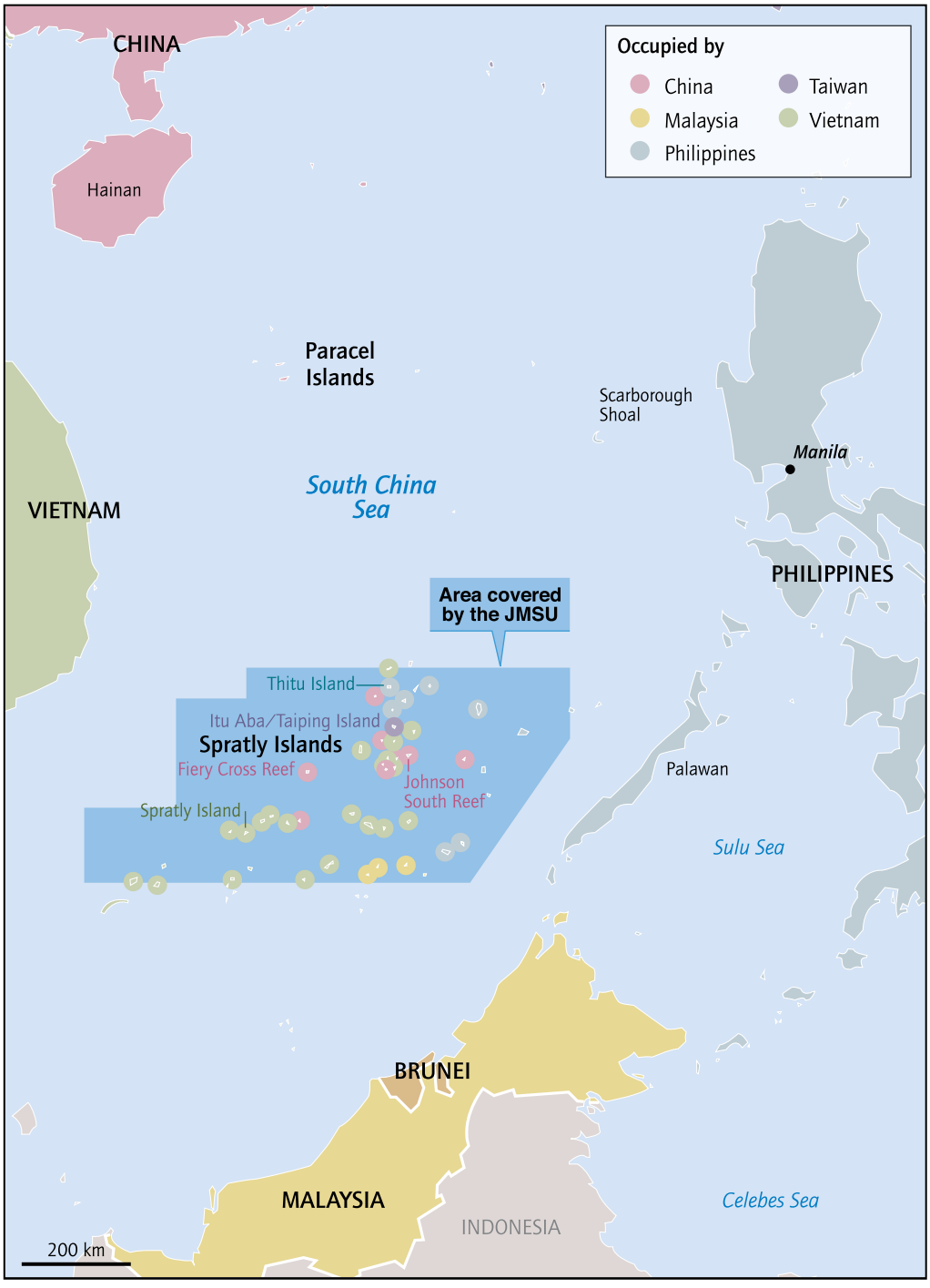
Map 2: Various possible maritime claims from islands



of the respective countries and the Spratly or Paracel Islands. The half-effect line and quarter-effect line gives the islands only a reduced effect for EEZ claims, assuming that only one country has sovereignty over the island groups. Any attempt to establish a joint development area around the Spratly Islands therefore will be confronted with the problem of how to deal with the islands. Should the territorial waters around the islands be excluded from any joint development area? Should a larger zone or no zone at all be excluded? Considering a hypothetical joint development area between Palawan and the Spratlys, the question arises how a joint development area should be defined – should it use the equidistance or the quarter-effect line as its eastern boundary? From the perspective of the Philippines any such line could establish a political pre-commitment concerning the validity of other states' claims in this area.

This description, however, does not yet fully reflect the complexities of the situation in the SCS, because currently five countries occupy the Spratly islands. Hence, a potential Malaysian-Vietnamese joint development area could include Fiery Cross Reef occupied by China, a Chinese-Vietnamese area could overlap with claims from islands occupied by the Philippines, and a Chinese-Philippines area could overlap with claims from Malaysian and Vietnamese-held islands. This is not to say that joint development is impossible. The joint development and joint fishery agreements listed in Tables 1, 2 and 3 (see pages 43-44) contain some lessons on how to circumvent these obstacles. It can be argued that the experience with joint development and joint fishery agreements already acquired in the region has proved capable of finding flexible solutions to some of these problems. The 2010 Japan-Taiwan Fishery Agreement, for instance, covers an area surrounding and excluding the disputed Senkaku islands. The China-Japan Fishery Agreement (1997) found a creative way of defining different areas with various formulas for joint or simultaneous jurisdiction without directly addressing the basis of the disputing claims. The Tripartite Agreement signed by China, the Philippines and Japan in 2005 covered a large part of the disputed Spratly Islands. Admittedly, the challenges that the agreements in the East China Sea needed to circumvent were on a smaller scale than those posed by the disputes in the SCS and the Tripartite Agreement failed in 2008, three years after it had been concluded, due to domestic protests, but the regional experience suggests that in other less strained circumstances the parties were able to find flexible solutions for defining an area for joint development. Moreover, the following short case study on the Tripartite Agreement demonstrates that the interaction of the four abovementioned uncertainties with domestic politics led to the failure of the agreement. Finally, if it were conceded that the states parties needed to clarify these four conditions before joint development becomes an option, then half the SCS disputes would need to be resolved before joint development could take place and therefore joint development could not contribute to the settlement of the disputes.

Map 3: Area covered by the Joint Marine Seismic Undertaking (JMSU)



Domestic politics and joint development in the Philippines

The 'Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the SCS' of 2005, also known as the Joint Marine Seismic Undertaking (JMSU), was concluded between the national oil companies of China, Vietnam and the Philippines – the China National Offshore Oil Corporation (CNOOC), PetroVietnam and the Philippine National Oil Company (PNOC). Map 3 shows the area and demonstrates that the JMSU overlapped with islands occupied by Malaysia. It would appear that Malaysia did not protest against the JMSU, maybe because the details of the agreement were not published. The JMSU did not exclude any territorial waters that could be claimed from the islands. This agreement covered a large area for joint exploration spanning 142,886 square kilometres (sq km). The area includes the northern, central and eastern parts of the Spratly islands, including most of the Philippine-claimed Kalayaan island group as one part of Spratly islands is called in the Philippines, which consists of 53 island features. This arrangement applied to a large area of the SCS over which China, Vietnam, the Philippines, Malaysia and Taiwan have staked claims without taking into consideration the status and effect of island features. However, the agreement failed in 2008.[4]

In 2008 a parliamentary opposition group declared that, of the total 142,886 sq km, an area of 24,000 sq km, 'was not a subject of any territorial or maritime dispute, and indisputably belongs to the Republic of the Philippines'.[5] They petitioned the Supreme Court to immediately declare the Tripartite Agreement unconstitutional since it allegedly allowed China and Vietnam to jointly explore with the Philippines oil resources in the country's 'undisputed and claimed areas' in the SCS. Despite street protests at home the government of the Philippines went ahead and signed off on the agreement. The arrangement was attacked for having effectively initiated China's claim to some parts of the Spratly islands. Subsequently, in 2011, former Philippines President Gloria Macapagal-Arroyo was accused of having effectively legitimised China's claim to the Kalayaan group. Edwin Lacierda, spokesman of the outgoing President Benigno Aquino III, said in July 2011 that China had always recognised the Philippines' claim to the West Philippine Sea (as the South China Sea is called in the Philippines). According to critics of the agreement it is only since the Tripartite Agreement was signed during the presidency of Arroyo that China started claiming these areas close to the Philippines. In 2014, a group of lawmakers asked the Supreme Court to immediately resolve the six-year-old petition seeking to declare the 2005 agreement as unconstitutional.

The government's detractors charged that by having accepted the Tripartite Agreement the Philippines gave validity to China's claim to the Kalayaan islands group despite the

4. A number of details tend to favour the conclusion that the Philippines government tried to attribute a commercial rather than a public international character to the agreement. It was negotiated between the national oil companies authorised by their governments. The agreement covered an area of 142,886 square kilometres. It was limited to joint exploration; any exploitation of any findings would have had to be agreed upon separately. For a detailed case study on the fall of the agreement, see Aileen S.P. Baviera, 'The Influence of Domestic Politics on Philippine Foreign Policy: The case of Philippines-China relations since 2004', RSIS Working Paper, 2012. Available at: https://www.rsis.edu.sg/wp-content/uploads/rsis-pubs/WP241.pdf.

5. See *Inquirer.net*, 31 May 2014, available at: http://globalnation.inquirer.net/105439/sc-urged-to-rule-on-exploration-agreement-with-china-vietnam; see also *Manila Bulletin*, 6 July 2011.

explicit exclusion of any legal prejudice of the arrangement on the governments' position on the SCS. The agreement came under fire partly for domestic political reasons. Nevertheless, with this example in mind, leaders, especially in the Philippines, are careful about committing to joint development in the SCS. Since this controversy it has been the Philippines' position to accept joint development only outside maritime areas claimed by Manila.[6] Vietnam adopted a similar position when China offered joint development negotiations in central areas of SCS waters claimed by Vietnam. Of course, if two states claim one area and accept joint development only outside their 'undisputed' area, joint development is impossible. The example of the JMSU shows how domestic political competition and the implicit recognition problem interact in such a way as to jeopardise a joint development agreement.

Moving forward with joint development in the SCS

The logic of joint development appears inescapable at first glance. Both economic and security interests support joint development. The uncertainty and complexity of the SCS claims in combination with competing domestic approaches produces a situation where a joint development or joint fishery arrangement comes to be seen as weakening a state's claim up to a point where a domestic audience interprets a joint development arrangement as implicitly recognising the disputing state's claim. It seems evident therefore that despite the explicit exclusion of any legal prejudice, joint development arrangements need to reflect the competing claims. Careful analysis of other agreements in the East China Sea and elsewhere shows how states were able to circumvent this implicit recognition problem under similar albeit potentially less complex conditions. In these examples, the anticipated impact of a joint development area on a state's claim, that a without prejudice clause is meant to preclude, resurfaces as a contentious issue in the negotiations. Moreover, the problem of circumventing or balancing any perceived implicit recognition may resurface even after an arrangement is reached in the interpretation or implementation of a joint development agreement, as the case of the JMSU demonstrates; unilateral statements accompanying the conclusion of arrangements need therefore to be carefully orchestrated. The definition of a joint development area is the key issue for settling disputes in the SCS with joint development arrangements. This definition requires policymakers to take into consideration lessons from other cases where flexible solutions circumvented the implicit recognition problem.[7]

The Arbitral Tribunal's award in the Philippines vs. China Arbitration is likely to offer some legal clarifications with regard to which claims in the South China Sea may be lawfully made and which waters may be claimed from which islands. This could greatly improve the prospects for joint development provided the claimant states incorporate the Tribunal's findings in their approach to joint development.

6. 'Philippines foreign secretary refuses joint development of Reed Bank with China', *Philippine Daily Inquirer*, 27 February 2012.

7. The author is currently preparing a more detailed analysis that describes different perceived implicit recognition effects and how these have been successfully circumvented in other cases.

TABLE 1: JOINT DEVELOPMENT AND JOINT FISHERY ARRANGEMENTS IN THE SCS[8]

Arrangement	Scope	Status of territorial/ boundary dispute	Status of arrangement
Malaysia-Thailand MoU/ Agreement 1979/1990	JD, exploration and exploitation of hydrocarbons with a strong joint authority	Shelved, pledge to continue delimitation of continental shelf	Production sharing formula introduced
Australia-Indonesia (East Timor) MoU/Agreements 1981/1989/1997/2003	Fishery surveillance/ three zones for JD/EEZ and Western end of Seabed Boundary/one zone	Shelved or partly delimited	Implemented/East Timor Sea Treaty replaced Timor Gap Treaty in 2003
Malaysia-Vietnam MoU 1992	JD, exploration and exploitation of hydrocarbons	Shelved	Implementation ongoing
China-Vietnam Fishery Agreement 2000 (historic precedents1957/1963)	Joint fishery; access to fishing grounds traded against boundary delimitation	Boundary in Gulf of Tonkin partly delimited	Implemented
China-Philippines-Vietnam Tripartite Agreement 2005	Joint seismic surveys, agreement between NOCs 'under authorisation' of governments	Shelved	Failed in 2008 after domestic protests in the Philippines
Brunei-Malaysia Exchange of Letters 2009*	JD, exploration and exploitation of hydrocarbons; access to joint blocks traded against boundary	Delimited	Unknown; controversy between two former Prime Ministers of Malaysia
Taiwan-Philippines 2015	1 hour prior notice for detention of fishing vessels	Shelved	

* The Brunei-Malaysia Exchange of Letters has not yet been published and came to be known to the public via a social media controversy involving two former Prime Ministers of Malaysia. The information given here is based on media reports of this controversy

8. Author's own compilation based on an analysis of the arrangements, the relevant literature, media reports and interviews. The selection criterion for this table is that at least one state has a territorial claim to the SCS.

TABLE 2: NEGOTIATIONS ON JOINT DEVELOPMENT IN THE SCS

Ongoing talks	Scope	Earlier proposals	Status of talks
Brunei-China since 2010	Maritime cooperation	China's proposal rejected in early 2000s as Brunei feared JD could prejudice Brunei's claim	MoU on maritime cooperation, NOCs oilfield services joint venture
China-Vietnam	JD in Gulf of Tonkin and boundary delimitation	Hydrocarbons excluded from fishery agreement; JD in the Tu Chinh (Vanguard) Bank rejected by Vietnam as joint area would be in Vietnam's claimed continental shelf	Working groups set up, joint survey completed in 2013
China-Philippines	JD	China's proposal 2013, 'unofficial' talks in 2014, company-level contacts	Philippine's stated position since the 2008 experience is to engage in JD only outside its claimed EEZ or as a joint venture under Philippine law

TABLE 3: JOINT DEVELOPMENT AND JOINT FISHERY ARRANGEMENTS IN THE EAST CHINA SEA[9]

Arrangement	Scope	Status territorial/ boundary Dispute	Status of arrangement
Japan-South Korea Agreement 1974	JD, Exploration and exploitation of hydrocarbon resources under 'one operator' formula	Partly delimited, partly shelved	Joint surveys resumed; no economically viable discoveries
China-Japan Agreement 1997 (historic precedents 1955/1963/1965; 1975)	Joint fishery regulation, different fishing zones (non-governmental; governmental)	Shelved (not a boundary dispute, but high seas fisheries dispute)	Implemented
Japan-South Korea Agreement 1998	Joint fishery regulation, provisional waters zone	Partly delimited, partly shelved	Implemented
China-South Korea Agreement 2000	Joint fishery regulation, provisional measures zone	Shelved	Implemented
China-Japan Principled Consensus 2008	Joint exploration in a block; Japanese participation in exploitation of Chunxiao gas field under Chinese law	Shelved	Failed
Japan-Taiwan Agreement 2010	Joint fishery regulation, flag state jurisdiction	Shelved; excluding waters within 12nm surrounding Senkaku/ Diaoyutai islands	Implemented

9. Author's own compilation based on an analysis of the arrangements, the relevant literature, media reports and interviews. The selection criterion for this table is that at least one state has a territorial claim to the East China Sea.

VI. LARGE MARINE ECOSYSTEM GOVERNANCE – ANOTHER APPROACH

Werner Ekau

The management of the global commons has always been a difficult task. Free access to common resources normally leads to the indiscriminate exploitation of such resources for the short-term benefit of a few privileged people or groups. The world is already well-acquainted with this problem with regard to terrestrial land use but the issue is also of rising importance for our oceans.

Three main uses of the ocean have been identified: the ocean as a resource provider, as a transport medium and as a battlefield.[1] All three uses reach back thousands of years. To these might be added a fourth one that unfortunately is becoming more and more visible: the ocean as a dumping ground for all kinds of waste. Research is also being conducted into another potential use of the ocean as an alternative human habitat, and such 'ocean urbanisation' projects may gain importance in the future. Space, water and resources (both living and non-living) are still seen and treated as commons even if under the sovereignty of coastal states.

The Large Marine Ecosystem (LME) approach to ocean governance has evolved from the management of one of these commons, the fish resources in the sea.

The impact of fishing on marine ecosystems

Fish populations and catches are not distributed evenly in the ocean. More than 90% of landed fish is caught in coastal waters or in deeper offshore waters. The North Atlantic with the Norwegian coast and the North Sea, waters around Japan, and upwelling areas off Namibia and Peru provide the highest catches. The South China Sea (SCS) is heavily exploited by commercial fisheries and accounts for around 10% of global fisheries production because of the huge area it covers.

Areas such as the Norwegian Sea or the North Sea have been intensively exploited for more than 150 years with the result that the first problems of overfishing had already become apparent in the late nineteenth century. Awareness of this problem led to the first joint research and management initiatives, manifested in the foundation of the first International Council for the Exploration of the Sea (ICES) in 1902. It was already clear at that time that sustainable management of fish stocks could only be achieved

1. See Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge University Press, 2001).

through international cooperation merging scientific knowledge and instruments to provide a solid basis for the protection and conservation of fish resources. It was also understood that fish migrate within the North Sea and fish stocks move from the territorial waters of one country to those of another (at that time the territorial sea limit was only three nm).

After World War II fisheries underwent extensive technical modernisation driven by growing consumer demand that peaked in the early 1970s and led again to massive overfishing in the North Sea, this time for herring. Cod and other species were also declining and countries were intensifying their fishing activities, including by extending their operational areas. This led to international conflicts, e.g. when Iceland provoked British fishermen by unilaterally extending its territorial fishing limit from 12 to 50 nm in 1972 (having already extended it from 4 to 12 nm in 1958), and to 200 nm in 1975.

Facing the decline of commercially important stocks and the upcoming regulations and constraints originating from the new United Nations Convention on the Law of the Sea (UNCLOS), it became very clear to fisheries scientists from the ICES that old methods of stock management dealing only with single species were no longer functional and that multispecies and a more holistic approach needed to be developed.

Taking into account the migration patterns of fish and issues of species interaction, the interrelationship of species with the environment, and the impact of fisheries on the ecosystem, as well as the needs of the fishing industry and consumers, the approach of the ICES was to develop a multispecies, multisectoral and multinational management scheme that is ecosystem-based and respects the distribution area of the target species.

A series of workshops and symposia was launched in 1984 to structure and shape such an approach along holistic principles. An important milestone was the first Intergovernmental Oceanographic Commission (IOC) of UNESCO LME meeting in 1991 which strongly recommended overcoming the sectoral approach in marine resources management and specifically in the UN agencies, and developing a transboundary LME multisectoral and multidisciplinary ecosystem-based strategy. In the symposium in 1993, a set of criteria for defining LMEs was agreed upon: LMEs should be of large area (greater than 200,000 sq km), have topographically/morphologically defined boundaries, and a unique hydrography. They can be current-driven systems (e.g. the Benguela and Canary Currents) or semi-enclosed seas (e.g. the Baltic, Mediterranean, the Yellow Seas, etc.). A total of 66 LMEs are defined under this framework, distributed mainly along the coast and covering about 40% of the ocean area. About 90% of world fish catches originate from LMEs.

The LME approach

The LME approach includes five modules covering all aspects of management of marine resources:

1. The productivity module deals with basic processes in the ecosystem and its functioning, including aspects of biodiversity and physico-chemical processes in the ecosystems;

2. The pollution & ecosystem health module covers natural and human impacts on the ecosystem such as eutrophication, pollution and diseases;

3. The fish & fisheries module may be compared with classical fisheries management assessing the state and productivity of the fish stocks;

4. The socio-economic module includes economic, cultural and social aspects. It should identify human drivers of ecosystem change;

5. The governance module is related to administrative, political and legal issues connected to the management of the LME and strives to involve all relevant stakeholders.

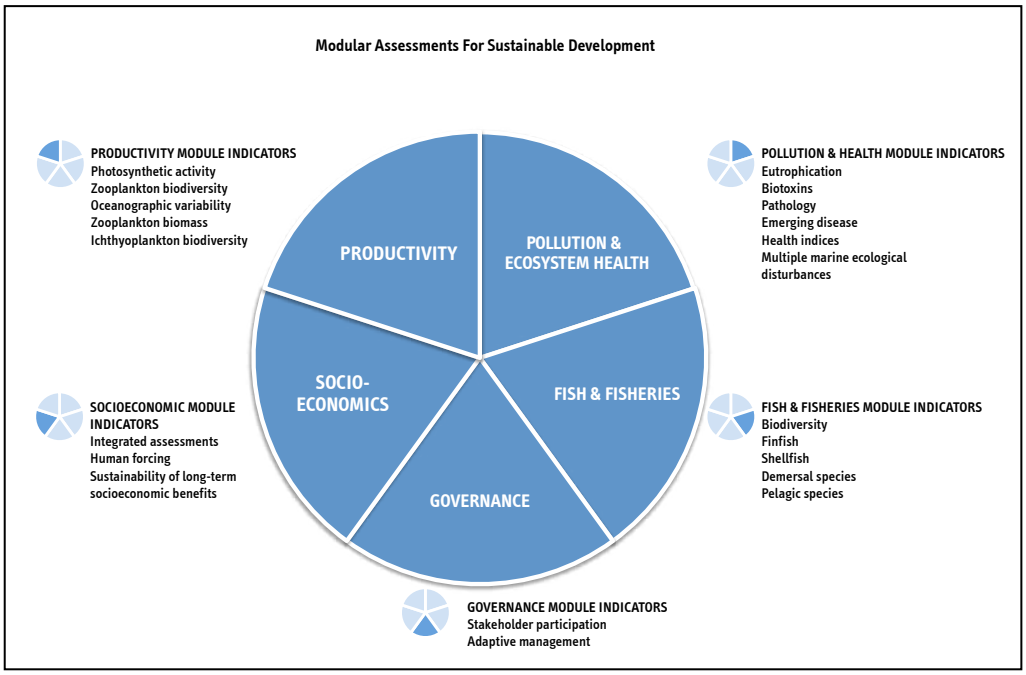
The LME approach makes use of principles and instruments developed in Integrated Coastal (Zone) Management and Marine Spatial Planning procedures.

The process of LME management is supported substantially by the United Nations Development Programme (UNDP) via Global Environment Facility (GEF) funds with 22 projects approved so far involving 112 countries.[2] One of the first projects to be funded, and in the meantime one of the most successful, is the Benguela Current Large Marine Ecosystem (BCLME). This marked the beginning of a long process which eventually culminated in the signing of the Benguela Current Convention. After gaining independence from South Africa in 1990, Namibia strove for the development of a profitable and sustainable fisheries industry to make use of the rich living resources along its coast. The IOC together with international experts drew up a first plan for a development project. The science-driven Benguela Environment Fisheries Information and Training (BENEFIT) programme provided the basis for the preparation for the BCLME project funded by the GEF.

During the first funding phase of the LME project a Transboundary Diagnostic Analysis (TDA) is performed and a Strategic Activities Programme (SAP) developed. The TDA in particular is a process, where all participating countries are challenged to think beyond their own borders, identify common problems and respect the interests of neighbouring countries. The process is most successful if accompanied by solid scientific work on the living resources aimed at implementing a joint, LME-wide environmental monitoring programme.

2. Alfred M. Duda, 'Strengthening global governance of Large Marine Ecosystems by incorporating coastal management and Marine Protected Areas', *Environmental Development*, 2015.

Figure 1: The five modules of the Large Marine Ecosystem management approach



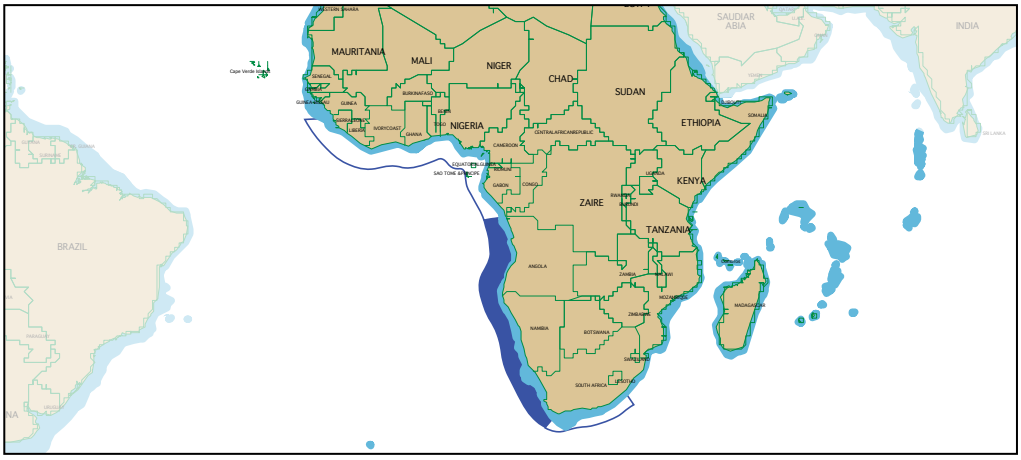
Source: Derived from Lewis M. Alexander, 'Large marine ecosystems: A new focus for marine resources management', *Marine Policy*, vol, 17, no. 3, May 1993, pp. 186-98.

This combination of support projects, scientific research and a TDA/SAP was applied in the Benguela Current area, and led to the formation of the Benguela Current Commission (BCC) at the end of the first BCLME project phase. The commission is a regional body designed to coordinate regional cooperation in all fields of sustainable development, resource use, management and conservation of the BCLME. The BCC was able to smoothly continue its work into a second phase, and prepare the political ground for the Benguela Current Convention, signed in 2013 by the governments of Angola, Namibia and South Africa.

The South China Sea Large Marine Ecosystem (LME)

The South China Sea Large Marine Ecosystem (SCSLME) flanks seven countries (China, Philippines, Malaysia, Brunei, Indonesia, Singapore, Vietnam) and extends over 3.1 million sq km. Due to a large shelf area (1.9 million sq km) fish productivity is very high. With annual landings of 12-14 million tonnes, the SCSLME contributes around 10% of total world fish production, with Thailand and China accounting for the largest share. Nearly 3,800 fish species are listed for the area, concentrated especially in the small-scale

Map 4: The range of application of the Benguela Current Convention including the exclusive economic zones of Angola, Namibia and Western South Africa



Source: Based on GEBCO data.

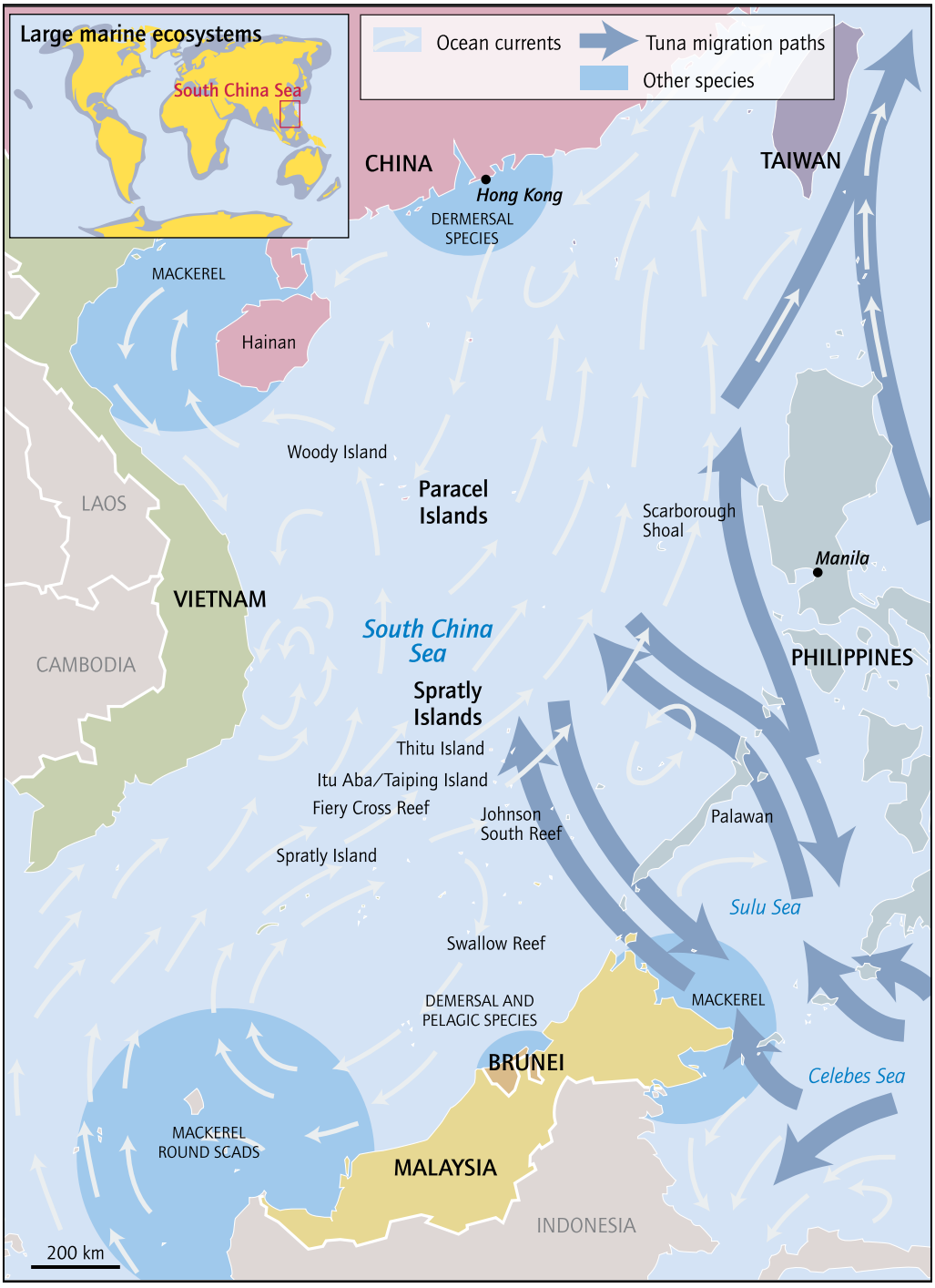
fisheries along the coastlines but also serving as feeding grounds for tuna species migrating through the area and thus being of high regional ecological importance. Tuna fisheries contribute approximately 350,000 tonnes to the world catch, valued at more than USD 400 million.

Major conflicts of interest in the SCSLME are emerging due to growing fishing fleets in the different countries leading to overexploitation of living marine resources, and increasing demand for and exploitation of non-living marine oil and gas resources.

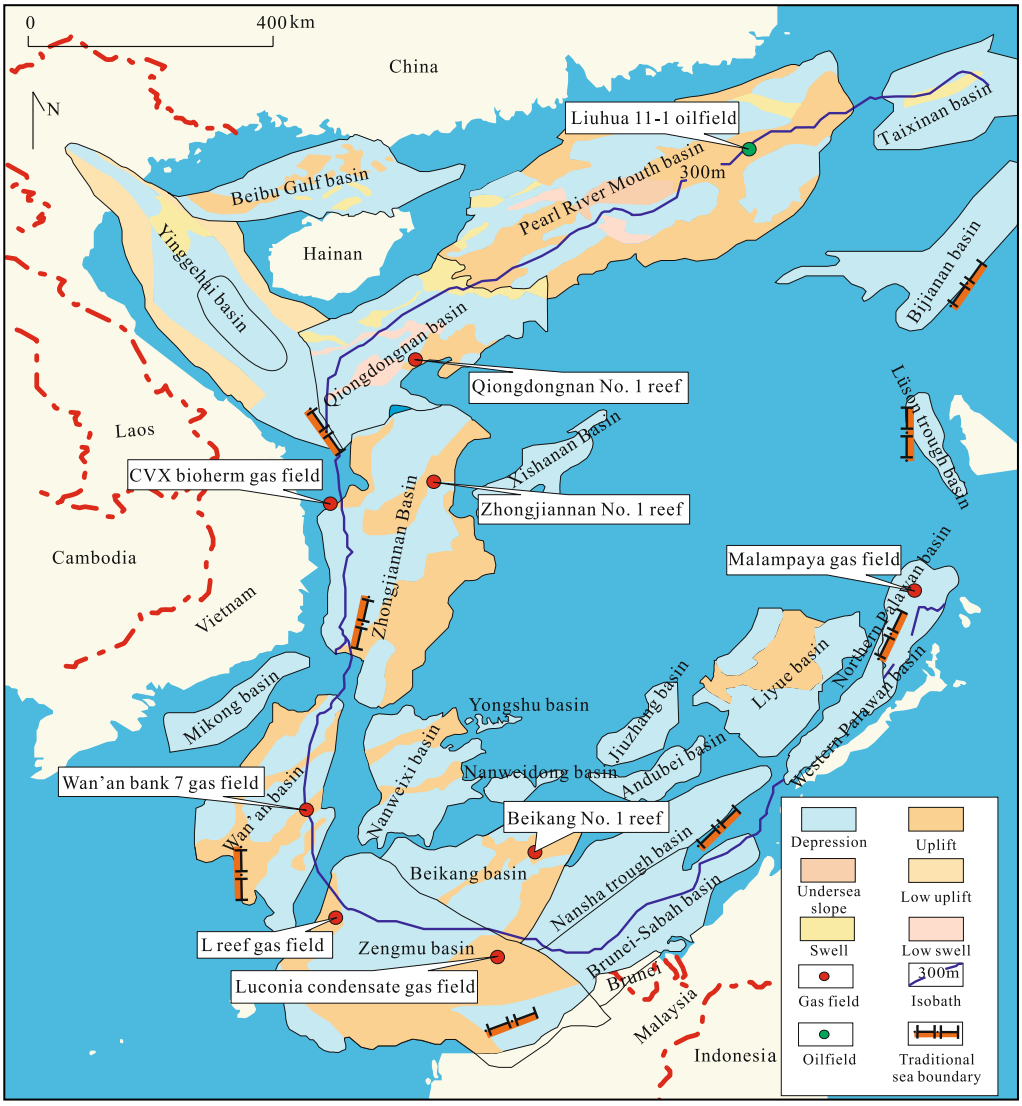
The coastal waters along Vietnam, Hainan and Malaysia are highly productive fishing grounds. However, the pattern of water currents and tuna migration routes show how deeply interconnected the seas in this entire area are. Nutrients, organisms and pollutants are all distributed in the SCSLME, interacting with one another to different degrees. The ongoing prospection of oil and gas fields and the potential for future exploitation as indicated in the map of seafloor characteristics (see below) indicates potential future areas of conflict when oil and gas rigs begin to impact negatively on biodiversity and fishing grounds.

The SCSLME is beset by many difficult problems and large areas are the subject of ongoing territorial disputes. As it constitutes one of the richest areas in the ocean concerning living (and perhaps also non-living) marine resources, sustainable development requires a transboundary and trans-sectoral ecosystem approach. The LME approach to marine resource management has been adopted by the UN as an effective way to implement sustainable development and it supports it via UNDP and GEF. It is seen as the only or one of the very few ways to bring nations together and solve their common problems.

Map 5: The South China Sea Large Marine Ecosystem (LME)



Map 6: Oil and gas fields in the SCS and patterns of deep-water sediment distribution indicating potential future exploration sites



Source: Hong Xu et al, 'Bioherm Petroleum Reservoir Types and Features in Main Sedimentary Basins of the SCS', *Journal of Earth Science*, vol. 23, no. 6, December 2012. © 2012 China University of Geosciences and Springer-Verlag Berlin Heidelberg.

Conclusion

The implementation of an LME approach in the SCS is seen as extremely complicated due to the overall political context in the area. The Regional Seas Programme (RSP) initiated by the United Nations Environment Programme (UNEP) and the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) programme initiated by the UNDP could be used to further introduce, support and strengthen transboundary developments on a regional scale on the basis of an ecosystem approach. Several initiatives in the SCS over the last couple of decades have shown that measures concentrating on certain issues and of restricted spatial extent can be successful:

- The RSP is supported by the UNEP and deals mainly with environmental issues. The RSPs covering environmental issues in the area (South Asian Seas Action Plan - SASAP) focus on Integrated Coastal Zone Management (ICZM), oilspill contingency planning, human resource development and the environmental effects of land-based activities.

- PEMSEA is supported by the UNDP and designed to strengthen partnerships, networking and collaboration as well as stimulating governance and management changes. PEMSEA is a regional partnership programme implemented by the UNDP and executed by the United Nations Office for Project Services (UNOPS). The project, started in 1994, was originally known as Prevention and Management of Marine Pollution in the East Asian Seas. Its objectives are strengthening partnerships, networking and collaboration and stimulating governance and management changes in the seas of the East Asia region. PEMSEA has already been instrumental in the adoption of several national and regional agreements, including the following:

  - The Putrajaya Declaration of Regional Cooperation for the Sustainable Development of the Seas of East Asia adopted by Brunei Darussalam, Cambodia, People's Republic of China (PRC), the Democratic People's Republic of Korea (DPRK), Indonesia, Japan, Malaysia, the Philippines, the Republic of Korea (ROK), Singapore, Thailand and Vietnam on 12 December 2003.
  - The Haikou Partnership Agreement was signed in 2006 by the signatories of the Putrajaya Declaration and Japan.
  - The Manila Bay Declaration signed in 2001.
  - The Bohai Sea Declaration on Environmental Protection (only China).

The disadvantage of many of those sectoral agreements lies in the difficulties in harmonising rules and overcoming contradictions in regulations and policies, which stem mostly from a general lack of attention by governments to environmental solutions when sensitive political issues are at stake. A successful implementation of the LME approach to the management of the SCS requires due coordination of policies at the local, national and regional level, as well as a sufficient degree of institutional cooperation. According to the principles of good ocean governance, the ultimate goal should be to strive for a holistic approach in addressing transboundary and transsectoral issues espoused by all countries.

VII. THE EUROPEAN UNION'S 'PRINCIPLED NEUTRALITY' – CAN IT ACHIEVE ANYTHING?

Mathieu Duchâtel

Introduction

Whether the European Union has a *policy* towards maritime security in the South China Sea (SCS) is highly questionable. However, the European Union has clearly elaborated a common *position* regarding developments in the SCS as a result of rising tensions between China, Vietnam and the Philippines since 2010. This position is encapsulated in a number of policy documents: statements of the European External Action Service (EEAS), joint statements with ASEAN partners and the G7 Statement on Maritime Security, which was also endorsed by the EU. This chapter argues that the EU should focus its limited diplomatic resources on achieving maximum added value. In the case of the SCS, the European added value lies almost entirely in its international legitimacy as a strong proponent of a global order based on international law. However despite clear statements in support of the United Nations Convention on the Law of the Sea (UNCLOS) – the cornerstone of Europe's stance of 'principled neutrality' in the SCS – it seems that the EU could do more diplomatically to increase the international visibility and the political credibility of crisis management and resolution through international law processes. How to maximise the impact of Europe's support for international law is now key to transforming a common position into a policy. In that regard, the ongoing case brought by the Philippines to the Permanent Court of Arbitration will be a critical moment for the EU.

Principled neutrality: the general principles

The EU follows an approach of 'principled neutrality' on maritime disputes in Asia.[1] It is 'principled' in the sense that the EU constantly reiterates principles – international law, especially UNCLOS, self-restraint, crisis management diplomacy and the importance of clarifying claims. But most of all, it is principled because it unspecific. For many years, there has been a voluntary ambiguity regarding the particular instruments of international law that could be used or which aspects of international law are relevant in the case of the SCS. The EU has never provided clear-cut political support to the Philippines for its decision to submit a case to the Permanent Court of Arbitration (PCA). Similarly, when the PCA rendered its positive judgement on jurisdiction and competence in November 2015, the EU remained silent. The only exception to this rule of staying at the

1. Mathieu Duchâtel and Fleur Huijskens, 'The European Union's Principled Neutrality on the East China Sea', SIPRI Policy Brief, February 2015.

level of generalities was provided by Chancellor Merkel, who at a Körber Stiftung event in Berlin in October 2015 specifically mentioned respect for the ruling of the PCA – but in off-the-record remarks.

More recent statements have become more specific but remain at the level of a key principle – respect for international law. A March 2016 EEAS statement on the SCS calls on claimant states to pursue their claims 'in accordance with international law including UNCLOS and its arbitration procedures'.[2] The April 2016 G7 Foreign Ministers' summit issued a declaration calling on states to 'fully implement any decisions rendered by the relevant courts and tribunals which are binding on them, including as provided under UNCLOS'.[3] The degree to which future European political statements may become even more specific will be a key feature of the EU's involvement in Asian maritime security.

The second main aspect of the EU's common position is neutrality. Like other non-claimants, the EU does not have a position on territorial sovereignty. European officials have been careful to avoid comments on sovereignty issues, apart from the standard line that China should clarify its claims. At a more general level, there has been no European position on the extent to which the South China Sea conundrum is an issue of maritime delimitation versus a question of territorial sovereignty – or a combination of both, as this is a matter still to be clarified. This lack of analytical clarity on the nature of the dispute is a key factor explaining the European choice of principled neutrality. In the absence of a legal clarification regarding which features in the SCS qualify to generate territorial seas (rocks under UNCLOS), exclusive economic zones (islands under UNCLOS) or only a navigation safety perimeter (low-tide elevations under UNCLOS), Europe can hardly produce more specific statements. This is also the reason why the ongoing case at the PCA will be a critical moment and a real diplomatic challenge for Europe. Once a number of features are defined legally by an international tribunal, Europe will be forced into choosing sides between China and the Philippines.

It could be argued that European neutrality is only a façade in the sense that a number of European states have an emerging record of selling arms to Vietnam and the Philippines, while the EU maintains very tight restrictions on arms sales to China. In recent years, Vietnam placed an order for Dutch Sigma frigates and French Exocet anti-ship missiles, while the Philippines is importing French and Italian armed light helicopters.[4] However, these transfers remain modest and have certainly not affected the balance of military power between China and its neighbours, given that the annual increase in China's military expenditure exceeds by far the combined defence budgets of Vietnam and the Philippines. In addition, Europe's neutrality is a diplomatic posture related to the sovereignty question and is not linked to the political support that exists in a number of member states for arms exports to South East Asia.

2. Declaration by the High Representative on behalf of the EU on Recent Developments in the SCS, 11 March 2016.
3. G7 Foreign Ministers' Statement on Maritime Security April 11, 2016 Hiroshima, Japan
4. Source: SIPRI arms transfer database, http://armstrade.sipri.org/armstrade/page/trade_register.php

Principled neutrality: any impact?

The discussion on whether 'principled neutrality' has any impact should start with an assessment of what would be the consequence of the EU failing to articulate a common position on behalf of the member states. Clearly, it prevents the sort of European cacophony that has been observed on other foreign policy issues. It could be argued that a common position based on general principles is cost-free and easy to articulate. However, this would be to underestimate the potentially divisive nature of the SCS issue given that the assertion of its maritime claims there is a strategic priority for China. EU member states without a position on East Asian maritime security or a specific interest in freedom of navigation have been provided with talking points and a general diplomatic line to follow. As a result, no state can exploit the strong potential for discord that exists in the EU, with the risk that several European states could be offered economic inducements to support one or other of the claimants. Similarly, the collective EU position protects weaker European states and gives them space to raise maritime security with their partners in Asia without fearing diplomatic consequences. In a nutshell, 'principled neutrality' has prevented the SCS from becoming a problem in Europe-China relations.

The main impact of Europe's principled neutrality is to help maintain international law solutions in the discussion. The Philippines' decision to go to the PCA has been met by aggressive criticism from China. A recent *People's Daily* editorial qualified the PCA's ruling on jurisdiction and competence as 'fraught with far-fetched and unfounded assumptions', 'by no means based on facts, common sense or justice' and 'neither fair nor impartial'.[5] The Chinese Foreign Ministry has maintained a tough line despite the ruling, essentially reiterating the arguments of its 2014 Position Paper on the SCS, based on three points: (i) the SCS is essentially an issue of territorial sovereignty and thus outside the competence of UNCLOS; (ii) The Philippines has breached its treaty obligation to settle the issue bilaterally with China through negotiations; (iii) even if it were an issue of maritime delimitation, China opted out of compulsory dispute settlement under UNCLOS when it ratified the Treaty.[6] However, the Award on Jurisdiction and Admissibility of the Court has precisely addressed these three arguments, showing their lack of validity.[7] Thus at this stage, China's refusal to accept the Court's ruling on jurisdiction poses a direct challenge to an international maritime order based on the rule of law.

As constantly repeated in international conferences and track 2 dialogues, the US's failure to ratify of UNCLOS is a diplomatic weakness in the sense that it deprives the US of the moral high ground in addressing freedom of navigation issues with China – any US statement is met by criticism that it exercises double standards because of the ratification issue. At the same time, Europeans as external stakeholders with legitimacy to defend UNCLOS are only issuing statements that reiterate the importance of

5. 'Op-ed IV on the Philippines' SCS Arbitration Farce', *People's Daily Online*, 18 December 2015.

6. Chinese Foreign Ministry, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the SCS Arbitration Initiated by the Republic of the Philippines', 7 December 2014.

7. PCA Case No 2013-19, 'The Republic of Philippines v. The People's Republic of China', Award on Jurisdiction and Admissibility, 29 October 2015.

international law. This line is also conveyed in Beijing through the EU delegation and European embassies, despite the fact that China clearly wants the SCS issue off the EU-China agenda. Between America's self-inflicted wound and the lack of European teeth in enforcing an international order based on the rule of law, there is an absence of credible Western leadership to defend the UNCLOS regime.

From a position to a policy?

Can the EU do more to leverage its strength as a legitimate advocate of international law solutions? The critical test will be the PCA's ruling on the merits of the case raised by the Philippines, which is expected during the spring of 2016. It will give the EU a unique opportunity to clarify its stance on the contentious issues it has avoided so far. Now that the legitimacy of the arbitration procedure and the key importance of complying with the ruling have entered the EU's language, the remaining issues concern the legal status of specific features in the SCS, the compatibility of the nine-dash line with international law, the legal value of 'historical rights' as well as of some military activities in the SCS (such as the militarisation of artificial islands but also what constitutes freedom of navigation operations). The EU should continue to raise these issues with China at the diplomatic level. It appears particularly important to reach out to the PLA, which is a key actor in the equation and with which the EU currently has only very few interactions – the PLA is the right interlocutor to discuss the SCS.

The alternative to strengthening the European voice in support of UNCLOS is not very attractive. Joining the United States on Freedom of Navigation Operations is unlikely to gain support at the EU level. It is not entirely impossible that the French and the British navies may sail through maritime zones around the Spratly Islands once they are clarified by the ruling of the PCA, but these would be national initiatives in support of freedom of navigation. Joining US patrols would be perceived as highly escalatory in Beijing. The other alternative is to look the other way and focus on Europe's periphery. There are currently mounting voices in Europe arguing in policy discussions that the EU has no important interest in the South China Sea. However, this would further weaken the posture of Europe as a proponent of an international order based on the rule of law, which from the outset was defined as a key strategic interest by the EU.

CONCLUSION: ON THE EVE OF THE EU STATEMENT

Eva Pejsova

At the time that this Report goes to press, most regional countries, as well as major global players, are preparing the political statements they will issue in reaction to the PCA award which is due to be delivered in mid-2016. Most likely, the capitals will highlight their stakes in regional stability, underscore the importance of a rules-based international order, and urge the claimant parties to exercise self-restraint, continue dialogue, and cooperate in the peaceful settlement of their disputes. Most of them will also most likely try to avoid using coercive language in order not to alienate China, refraining from taking sides or from mentioning the issue of sovereignty.

The European Union will be no exception. Eager to play a greater political and security role in the region, Brussels' position on the South China Sea (SCS) and its reaction to the upcoming ruling is awaited in Asia with great expectations and high hopes. As a party with no territorial claims in the region, yet still a player with significant international economic and political influence, many Southeast Asian countries, as well as Japan, the US and India, believe that the Union is well-positioned to present a united front in promoting the primacy of international law. Its statement will be viewed as a test of its determination and capacity to uphold its promise of greater strategic engagement in the region. At a time when Brussels is seeking to actively engage in some of the key regional security fora, including the East Asia Summit, and gain recognition for its contribution to regional stability, its reaction to the landmark decision will come under close scrutiny

So far, the statements made by Brussels on the situation in the SCS – whether unilaterally or within various multilateral settings – have been quite consistent. The latest declaration by the EU High Representative/Vice President Federica Mogherini on the developments in the SCS in March 2016 is straightforward: *'[w]hile not taking a position on claims to land territory and maritime space in the SCS, the EU urges all claimants to resolve disputes through peaceful means, to clarify the basis of their claims, and to pursue them in accordance with international law including UNCLOS and its arbitration procedures.'* The declaration opposes any attempt to assert claims through the use or threat of force, and voices concerns at increasing militarisation and large-scale land reclamations, also in view of the ecological damage that this may cause to the Sea's marine environment.

While the exact content of the future European statement will understandably depend on the Tribunal's verdict, the EU's adherence to various regional and global political and legal frameworks, as well as its earlier declarations (see extracts in the Annex to this publication), provide significant clues. As a contracting party to UNCLOS, the Union is bound by its provisions and committed to defend its principles. This is reflected in its

own Maritime Security Strategy and Action Plan from 2014, which supports peaceful settlements of disputes according to international law, noting that freedom of navigation and overflight are core principles essential not only to preserve peace but also to foster economic and diplomatic relationships. In 2012, the Union signed the Treaty of Amity and Cooperation (TAC) in Southeast Asia, to which China is also party, which legally binds it to maintain regional peace and stability. As a founding member of the ASEAN Regional Forum (ARF) and of the Asia-Europe Meeting (ASEM), the EU reiterated its interest in the situation in the South China Sea in its East Asia Policy Guidelines (2012), encouraging ASEAN and China to resolve their disputes through peaceful and cooperative means and step up efforts towards agreeing a legally binding Code of Conduct.

Perhaps the most significant latest development in terms of formulating a united international position on the SCS has been the G7 Foreign Ministers' Statement on Maritime Security issued in Hiroshima in April 2016. The Group of the world's most industrialised countries, to which the EU is also party, issued its strongest and most explicit message so far, condemning all intimidation, provocations and unilateral actions, and calling on parties to 'fully implement any decisions rendered by the relevant courts and tribunals which are binding on them, including as provided under UNCLOS' – obviously alluding to the upcoming arbitration award. Although no country was specifically pointed at, the statement ruffled feathers in Beijing, which felt targeted and urged the G7 countries not to take sides on the issue of sovereignty. The fact that the G7 meeting was orchestrated by Japan only reinforced long-standing historical grievances and added to China's feeling of alienation.

The insistence of most key global players (and of a large part of the international community) on the importance of a rules-based international order and the respect of dispute settlement mechanisms *a priori* indicates their faith in and support of the upcoming verdict. While the statements may vary in terms of the language and the degree of pressure applied on parties to abide by the ruling, the underlying core message will be the same. If the Tribunal's decision reflects the position of international law, all actions taken contrary to the decision are therefore effectively illegal. Such a perspective removes the scope for ambiguity, framing the question in black or white terms rather than in nuances of grey – something of which experts in Beijing are becoming increasingly aware.

There is no doubt that Brussels has full confidence in the PCA ruling and will support its decision – whichever that might be. Promoting the rule of law is one of the pillars of the EU's foreign and security policy, strongly emphasised in the HR/VP's March statement on the SCS, as well as in its upcoming Global Strategy. However, the biggest challenge for the Union in this respect may be faced at home. Formulating a united statement in concert with 28 member states with differing national interests and priorities is not a new exercise for Brussels. On the one hand, in light of more pressing security concerns in the EU's neighbourhood, the relatively distant issue of the SCS should more likely generate consensus. On the other hand, many member states maintain strong historical, diplomatic and economic ties with China, and will not want to put the benefits that they have garnered from the rise of the Asian giant in jeopardy. The EU's policy

towards China has always been focused on promoting economic interests, all the while maintaining a strong position on principled issues such as human rights, which has not prevented trade and investments between the two entities from flowing and growing. When negotiating their stance on the SCS, the member states should realise it is not about choosing between Brussels and Beijing, but between the rule of law and the absence of it.

Clearly, the award will not appease regional tensions overnight. Although the PCA's ruling will represent a significant step forward in addressing the problem, China will not suddenly drop its claims and halt its land reclamation and construction activities in the SCS, nor will it abandon its rhetoric on indisputable sovereignty and historical rights over the tropical waters. Defending its territorial integrity against the 'abuses' of the Western system is deeply rooted in its domestic political discourse and identity. Most likely the ruling may trigger the opposite response: in the immediate term, wider international support for the ruling may reinforce China's mistrust and criticism of the current global system. However the world is in constant evolution and China's rise as an economic powerhouse is currently central to the dynamism of the global economy. And as much as the world needs China, China needs the global system to enable and sustain its growth. While some reforms may be necessary to better accommodate Beijing as a global actor, the latter will need to realise that international norms and rules are not there to harm its interests, but can be used to achieve its long-term goals.

Annexes

EXTRACTS FROM KEY OFFICIAL DOCUMENTS AND STATEMENTS RELATIVE TO THE POSITION OF THE EUROPEAN UNION ON THE SOUTH CHINA SEA

1. The European Union

1.1. Declaration by the High Representative on behalf of the EU on Recent Developments in The South China Sea (11 March 2016)

The EU is committed to maintaining a legal order for the seas and oceans based upon the principles of international law, as reflected notably in the United Nations Convention on the Law of the Sea (UNCLOS). This includes the maintenance of maritime safety, security, and cooperation, freedom of navigation and overflight.

The EU is concerned about the deployment of missiles on islands in the South China Sea (SCS). The temporary or permanent deployment of military forces or equipment on disputed maritime features, which affects regional security and may threaten freedom of navigation and overflight is a major concern. The EU therefore calls on all claimants to refrain from militarisation in the region, from the use or threat of force, and to abstain from unilateral actions.

The EU encourages further engagement in confidence building measures which seek to build trust and security in the region. The EU fully supports regional ASEAN-led processes and is looking forward to a swift conclusion of the talks on a 'Code of Conduct' which will further support a rules-based regional and international order. In this connection, the EU reiterates its offer to share best practices on maritime security

1.2. Guidelines on the EU's Foreign and Security Policy in East Asia (15 June 2012)

32. The EU and its Member States, while not in any sense taking position on these various claims, should nevertheless:

- recall the great importance of the SCS for the EU (*inter alia* in the perspective of promoting the rules-based international system, the principle of freedom of navigation, the risk of tensions impacting on the consistent increase in trade and investment, with negative consequences for all, energy security);

- continue to encourage the parties concerned to resolve disputes through peaceful and cooperative solutions and in accordance with international law (in particular UNCLOS), while encouraging all parties to clarify the basis for their claims;

- recall previous work to build a collaborative diplomatic process on these issues at the regional level, and encourage ASEAN and China to build on this foundation and agree on a Code of Conduct;

- and, if welcomed by the relevant parties, offer to share the experience of the EU and its Member States in relation to the consensual, international-law-based settlement of maritime border issues, and to the sustainable management of resources and maritime security cooperation in sea areas with shared sovereignty or disputed claims.

1.3. European Union Maritime Security Strategy (24 June 2014)

III. c) Respect for rules and principles: respect for international law, human rights and democracy and full compliance with UNCLOS, the applicable bilateral treaties and the values enshrined therein are the cornerstones of this Strategy and key principles for rules-based good governance at sea. The EU and its Member States support the settlement of maritime disputes arising from the interpretation and application of UNCLOS through competent international courts and tribunals provided therein, which play an important role in implementing the rule of law at sea;

IV. b) The preservation of peace in line with the Charter of the United Nations, the peaceful settlement of maritime disputes in accordance with international law, the prevention of conflicts and the strengthening of international security, including through EU engagement with international partners, without prejudice to national competences. This promotes international maritime cooperation and the rule of law and facilitates maritime trade and sustainable growth and development;

VI.1. f) Promoting the dispute settlement mechanisms according to the UNCLOS, including the International Tribunal for the Law of the Sea, in the political dialogues of the EU with third countries and regional organisations.

1.4. European Union Maritime Security Strategy– Action Plan (December 2014)

1.5.3. Mainstream maritime security into the Common Foreign and Security Policy agenda, in close cooperation with all relevant EU actors, in line with the EU's comprehensive approach, enhancing measures for conflict prevention and crisis management.

2. The G7

2.1. G7 Foreign Ministers' Statement on Maritime Security (Hiroshima, 11 April 2016)

We call on all states to pursue the peaceful management and settlement of maritime disputes in good faith and in accordance with international law, including through applicable internationally recognized legal dispute settlement mechanisms, including

arbitration, recognizing that the use of such mechanisms is consistent with the maintenance and enhancement of the international order based upon the rule of law, and to fully implement any decisions rendered by the relevant courts and tribunals which are binding on them, including as provided under UNCLOS.
We are concerned about the situation in the East and SCSs, and emphasize the fundamental importance of peaceful management and settlement of disputes.

We express our strong opposition to any intimidating, coercive or provocative unilateral actions that could alter the status quo and increase tensions, and urge all states to refrain from such actions as land reclamations including large scale ones, building of outposts, as well as their use for military purposes and to act in accordance with international law including the principles of freedoms of navigation and overflight. In areas pending final delimitation, we underline the importance of coastal states refraining from unilateral actions that cause permanent physical change to the marine environment insofar as such actions jeopardize or hamper the reaching of the final agreement, as well as the importance of making every effort to enter into provisional arrangements of a practical nature, in those areas. We encourage further engagement in confidence building measures such as dialogue which seek to build trust and security in the region. We call for the full and effective implementation of the Declaration on the Conduct of Parties in the SCS (DOC) in its entirety and the early establishment of an effective Code of Conduct in the SCS (COC).

2. 2. G7 Summit Leaders' Declaration (Schloss Elmau, 7 June, 2015)

Maintaining a Rules-Based Maritime Order and Achieving Maritime Security

We are committed to maintaining a rules-based order in the maritime domain based on the principles of international law, in particular as reflected in the UN Convention on the Law of the Sea. We are concerned by tensions in the East and SCSs. We underline the importance of peaceful dispute settlement as well as free and unimpeded lawful use of the world's oceans. We strongly oppose the use of intimidation, coercion or force, as well as any unilateral actions that seek to change the status quo, such as large scale land reclamation. We endorse the Declaration on Maritime Security issued by G7 Foreign Ministers in Lübeck.

2.3. G7 Foreign Ministers' Declaration on Maritime Security (Lübeck, 15 April, 2015)

We are committed to maintaining a maritime order based upon the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). We continue to observe the situation in the East and SCSs and are concerned by any unilateral actions, such as large scale land reclamation, which change the status quo and increase tensions. We strongly oppose any attempt to assert territorial or maritime claims through the use of intimidation, coercion or force. We call on all states to pursue the peaceful management or settlement of

maritime disputes in accordance with international law, including through internationally recognised legal dispute settlement mechanisms, and to fully implement any decisions rendered by the relevant courts and tribunals which are binding on them. We underline the importance of coastal states refraining from unilateral actions that cause permanent physical change to the marine environment in areas pending final delimitation.

3. Asia-Europe Meeting (ASEM)

3.1. 12th ASEM Foreign Ministers Meeting – Chair's Statement (November 2015)

22. Ministers reaffirmed their commitment to maintaining peace, promoting maritime security and stability, safety and cooperation, freedom of navigation and overflight and unimpeded lawful commerce, and to combating piracy and armed robbery at sea in full compliance with international law. They agreed on the critical importance of refraining from the use or threat of force, of abstaining from unilateral actions and of resolving maritime disputes through peaceful means in accordance with universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The relevance of confidence building measures for strengthening trust and security in the region was also emphasised.

3b) 10th ASEM Summit (October 2014)

39. Leaders reaffirmed their commitment to ensure peace, stability and prosperity and to promote maritime security, safety and cooperation, freedom of navigation and overflight and unimpeded commerce and to combat piracy and armed robbery at sea in full compliance with the principles of international law. Leaders agreed on the critical importance of refraining from the use or threat of force and of disputes being resolved in accordance with principles of international law, including the UN Convention on the Law of the Sea (UNCLOS).

4. Asia - multilateral

4.1. Treaty of Amity and Cooperation (TAC)

CHAPTER IV : PACIFIC SETTLEMENT OF DISPUTES

Article 13

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise,

especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

Article 14

To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

Article 15

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of adeterioration of the dispute or the situation.

Article 16

The foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other High Contracting Parties not party to the dispute from offering all possible assistance to settle the said dispute. Parties to the dispute should be well disposed towards such offers of assistance.

Article 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(l) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

4.2. Declaration on the Conduct of Parties in the SCS (2002)

1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;

2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;

3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the SCS as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

a. holding dialogues and exchange of views as appropriate between their defense and military officials;

b. ensuring just and humane treatment of all persons who are either in danger or in distress;

c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and

d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

- marine environmental protection;
- marine scientific research;
- safety of navigation and communication at sea;
- search and rescue operation; and
- combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. The Parties concerned reaffirm that the adoption of a code of conduct in the SCS would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

4. 3. 26th ASEAN Summit (Kuala Lumpur, 27 April 2015)

South China Sea

59. We share the serious concerns expressed by some Leaders on the land reclamation being undertaken in the SCS, which has eroded trust and confidence and may undermine peace, security and stability in the SCS.

60. In this regard, we instructed our Foreign Ministers to urgently address this matter constructively including under the various ASEAN frameworks such as ASEAN-China relations, as well as the principle of peaceful co-existence.

61. We reaffirmed the importance of maintaining peace, stability, security and freedom of navigation in and over-flight over the SCS. We emphasised the need for all parties to ensure the full and effective implementation of the Declaration on the Conduct of Parties in the SCS in its entirety: to build, maintain and enhance mutual trust and confidence; exercising self-restraint in the conduct of activities; to not to resort to threat or use of force; and for the parties concerned to resolve their differences and disputes through peaceful means, in accordance with international law including the 1982 United Nations Convention on the Law of the Sea.

62. While noting the progress made in the consultations on the Code of Conduct in the SCS (COC), we urged that consultations be intensified, to ensure the expeditious establishment of an effective COC.

ABBREVIATIONS

ADIZ	Air Defence Identification Zone
ADMM-Plus	ASEAN Defence Ministers' Meeting Plus
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Meeting
BCC	Benguela Current Commission
BCLME	Benguela Current Large Marine Ecosystem
CCP	Chinese Communist Party
COC	Code of Conduct in the South China Sea
CSCAP	Council for Security Cooperation in the Asia Pacific
DoC	Declaration on the Conduct of the Parties in the South China Sea
DSM	Dispute Settlement Mechanism
EAMF	Expanded ASEAN Maritime Forum
EEAS	European External Action Service
EEZ	Exclusive economic zone
GEF	Global Environment Facility
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
IMO	International Maritime Organisation
IOC	Intergovernmental Oceanic Commission
ITLOS	International Tribunal for the Law of the Sea
JD	Joint Development
JMSU	Joint Marine Seismic Undertaking
LME	Large Marine Ecosystem
MoU	Memorandum of Understanding
nm	nautical mile(s)
NOC	National oil company
PCA	Permanent Court of Arbitration
PEMSEA	Partnerships in Environmental Management for the Seas of East Asia
PLA	People's Liberation Army
PLAN	People's Liberation Army Navy

PRC	People's Republic of China
RSP	Regional Seas Programme
SAP	Strategic Activities Programme
SCS	South China Sea
SCSLME	South China Sea Large Marine Ecosystem
TAC	Treaty of Amity and Cooperation
TDA	Transboundary Diagnostic Analysis
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
USD	United States Dollars
WTO	World Trade Organisation

NOTES ON THE CONTRIBUTORS

Matthieu Burnay is a Senior Researcher at the Leuven Centre for Global Governance Studies, University of Leuven. He is also a lecturer at the University of Leuven, Catholic University of Lille, University of Liège, and University Saint Louis-Brussels. He holds a PhD in Law from the University of Leuven and a double MSc degree in International Affairs from Peking University and the London School of Economics. His main research interests include the legal and political aspects of global governance, the study of Chinese perspectives on the rule of law at the national and international levels, and EU-China relations.

Mathieu Duchâtel is Senior Policy Fellow and Deputy Director of the Asia and China Programme at the European Council of Foreign Relations. Based in the Paris office of the ECFR, he works on Asian security, with a focus on maritime affairs, the Korean peninsula, China's foreign policy and EU-China relations. Before joining ECFR in November 2015, he was Senior Researcher and the Representative in Beijing of the Stockholm International Peace Research Institute (2011-2015), Research Fellow with Asia Centre in Paris (2007-2011) and Taipei (2004-2007). He holds a PhD in political science from the Institut d'études politiques (Sciences Po) in Paris. His latest book, *China's Strong Arm: Protecting Citizens and Assets Abroad* (co-authored with Jonas Parello-Plesner) was published in the Adelphi collection by IISS and Routledge in 2015.

Werner Ekau is a marine and fisheries biologist who trained at Bochum, Hamburg and Kiel universities. He has worked in Antarctica, Argentina, and the Azores. Since 1991 he has specialised in fish biology and ecology in tropical ecosystems (Brazil, Namibia, Senegal). His research focuses on environmental impact on stock recruitment processes and on the wider area of an ecosystem approach to fisheries in Large Marine Ecosystems. He is Director of the Operational Centre Germany of the International Ocean Institute (IOI), and member and chair of the Committee of Directors.

Ronán Long holds the Jean Monnet Chair of European Law and a Personal Professorship at the National University of Ireland, Galway. He worked previously for the European Commission (1994–2002), the Naval Service in Ireland (1981-1993) and is a Senior Distinguished Visiting Scholar-in-Residence at the Law of the Sea Institute, Berkeley, California. He has participated as both a member and adviser of the European Union delegation at numerous international negotiations on the codification and development of international Law of the Sea. His current research interests are in the fields of protecting marine biodiversity in areas beyond national jurisdiction, maritime security law, as well as human rights as they apply to activities that take place at sea.

Liselotte Odgaard is associate professor at the Institute for Strategy at the Royal Danish Defence College. She has published numerous articles, edited books and written

three monographs on Asia Pacific security, China's growing influence on international relations, and strategic theory and practice. She has been a visiting professor at institutions such as Harvard University, the Woodrow Wilson International Center for Scholars, and The Norwegian Nobel Institute. Her latest monograph is *China and Coexistence: Beijing's National Security Strategy for the 21st Century* (Washington, D.C.: Woodrow Wilson Center Press/Johns Hopkins University Press, 2012).

Eva Pejsova is a Senior Analyst at the EU Institute for Security Studies, where her research focuses on East Asia, EU-Asia relations and maritime security. She holds a PhD in Strategic Studies from the S. Rajaratnam School of International Studies (RSIS) in Singapore, and has previously worked with the Czech Ministry of Foreign Affairs, the French Prime Minister's Office, the OECD and the Asia-Europe Foundation (ASEF). At the EUISS, Eva manages regular think-tank dialogues with the EU's strategic partners in Asia and coordinates the EU member committee of the Council for Security Cooperation in the Asia Pacific (CSCAP EU). Her research focuses mostly on maritime security in East Asia, regional cooperative mechanisms, sovereignty disputes, preventive diplomacy, as well as questions of good ocean governance and environmental security.

Christian Schultheiss is a PhD candidate at the Department of Politics and International Studies at the University of Cambridge. He is a graduate research associate at the Cambridge Centre for Rising Powers. Previously he worked for the International Institute for Strategic Studies-Asia (IISS) in Singapore. His research focuses on the practice of maritime dispute settlement in the world's maritime disputes, especially in the East and SCS disputes.

Stein Tønnesson is a research professor and former director of the Peace Research Institute Oslo (PRIO), and adjunct professor at Uppsala University, Sweden. An international historian by training, he leads the six year (2011-16) East Asian Peace programme at Uppsala University. Among his publications on the South China Sea are 'The South China Sea: Law Trumps Power,' *Asian Survey,* vol. 55, no. 3, 2015 (with Song Yann-huei), 'The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the SCS', *Ocean Development and International Law,* vol.44, no. 3, 2013; and 'The South China Sea in the Age of European Decline,' *Modern Asian Studies,* vol.40, no. 1, 2006.

European Union Institute for Security Studies
100, avenue de Suffren | 75015 Paris | France | www.iss.europa.eu