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Strategy and law in the South China Sea disputes

Workshop report

14-15 OCTOBER 2019



UNSW Canberra Maritime Security Research Group

Strategy and law in the South China Sea disputes, 14-15 October 2019: Workshop report

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This workshop report (and its executive summary) is the sole responsibility of the Chair and does not necessarily reflect the views of other workshop participants. The workshop was conducted under the Chatham House rule. A list of workshop participants is appended.

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Executive Summary

Introduction

The South China Sea disputes concern the Chinese claim to rights within the nine-dash line it has drawn in the South China Sea. Within this line China has two objectives. First, it wishes to exercise control, or at least a veto, over resource exploitation, including both fisheries and oil and gas exploration. Second, strategically, China wishes through its island-building to push its defensive perimeter out, secure its sea lines of communication, and achieve area-denial capability. These ambitions cut deep into the rights of neighbouring coastal states over their Exclusive Economic Zones (EEZs). The mood within Chinese foreign policy elites appears, however, to have hardened on these questions. Chinese interests in the South China Sea and now framed in terms of asserting and defending Chinese claims rather than maintaining regional stability. Nonetheless, Chinese foreign policy scholars see the South China Sea largely as a diplomatic dispute, and see a greater risk of conflict in the East China Sea.

The South China Sea disputes are deadlocked. There is no reasonable prospect of China modifying its claims to special historic rights within the nine-dash line in the near future. There is also little likelihood of other coastal states relinquishing their own claims under the UN Convention on the Law of the Sea. In each case, national constituencies and domestic politics will make modification of adopted positions very difficult.

The Chinese approach to law and strategy

The Nine Dash Line was released into cartographic imagination between 1937 and 1943 and has since taken on a life of its own. A particular difficulty is that China has traditionally been a continental military power in terms of geography, strategic culture, and doctrine. As it becomes a great naval power - and a coastal state increasingly dependent on the maritime economy - it is having to develop a different outlook. Such a transition has not yet occurred. The risk is that the

Chinese island building campaign is seen by decision-makers in Beijing as having constructed a Great 'Wall of Sand' enclosing 'blue soil'. It significantly increases the stakes to regard the area enclosed by the line as one not of maritime rights but of territorial sovereignty. However, as a matter of public legal argument China has not yet gone so far. Nonetheless, it has found itself compelled to make legal arguments to justify the position it has publicly adopted. While Chinese legal argument on point (discussed further below) has shifted over time, China's legal strategy must nonetheless be taken seriously.

Regional coastal states

The South China Sea is now a theatre of a great power competition. However, beyond freedom of navigation operations it appears that American attention now lies elsewhere with the trade war, Hong Kong, and North Korea. Any path forward lies in the region.

Affected coastal states for their part have taken different approaches. The Philippines has taken steps towards joint development agreements with China. However, these will face significant difficulties being operationalised in national law due to both internal politics and potential constitutional law constraints.

Malaysia is taking a quiet approach, downplaying the existence of the dispute and any clashes between Chinese and Malaysian vessels. Malaysia's first priority is closer economic ties with China.

There is at present no active dispute between Indonesia and China, despite one of the dashes of the Chinese line seemingly cutting into Indonesia's North Natuna Sea. While there have been dramatic images of Indonesian authorities burning illegal fishing vessels, China is not the principal source of any such threat to Indonesian fisheries at present.

Vietnam remains the state under the greatest pressure, particularly given Chinese resource exploration vessel activity within its EEZ and China's ostensible licensing of oil and gas blocks therein. Under such pressure, it cannot afford to give ground.

In this context, how much faith can be placed in the ASEAN Code of Conduct? Fundamentally, the Code of Conduct provides no path forward to *resolve* the relevant disputes. Rather it is about 'dispute maintenance' and the prevention of escalation. To the extent that the Code succeeds in stabilising behaviour and expectations, and improving communications through the use of hot lines and procedures for dealing with unplanned incidents, it will represent a positive development. It will not, however, address underlying disputes or their causes.

International law and public diplomacy

What is the role for international law in public diplomacy in the South China Sea? Calls to uphold the 'rules based international order' or for all parties to respect the rulings of the international arbitration tribunal in the *Philippines v China* case are not necessarily helpful.

Such calls tend to suffer from three problems. First, appealing to a rules-based order is significantly weaker than invoking international law. A rules-based order begs the question: whose rules, and who gets to change them? China would certainly like to see a new rules-based order in the South China Sea. International law is binding in character, and has settled procedures for how it can be changed and how disputes should be adjudicated.

Second, the *Philippines v China* arbitral award may not be the final statement on relevant questions in the South China Sea. It contains a very narrow definition of those islands which generate maritime zones, and one which is incompatible with the practice of a number of states, including Australia.

However, the tribunal's findings that small rocks can generate no more than a territorial sea, and that reefs and other low tide elevations generate no zones and are not capable of sovereign appropriation, are uncontroversial and deserve support. These findings alone would dispense with many Chinese claims, as most disputed maritime features are not continuously above water or are too small to credibly be categorised as islands.

Finally, abstract invocations of international law or rules do nothing to indicate in concrete terms what we expect China to do. The danger in this approach is that it simply paints China as a rule-breaker and an illegitimate actor in the international community.

Instead, more should be done by middle powers in the region to push back against Chinese claims that it was insufficiently involved in the negotiation of the UN Convention on the Law of the Sea, or that the convention is a western construct. We should remind Chinese officials and scholars that China was an active participant in the negotiations, and was a strong advocate for developing States' interests in having EEZs. (A legacy its present behaviour challenges.) Further, UNCLOS was among the first major treaties negotiated following the decolonisation period and the global south exercised significant influence over the shape of the Convention. China and Chinese scholars also now claim that groupings of maritime features within the South China Sea can be bundled up and treated as archipelagoes capable of generating vast maritime zones (the 'four sha' claim). Not only are such claims based on poor legal scholarship, they ignore the fact that such arguments were made by China during UNCLOS negotiations, debated, and rejected by the international community at that time. It is too late now to reopen such arguments.

Alternatively, could legal mechanisms be found to foster cooperation in the South China Sea? Our discussion suggested that most models normally discussed do not withstand significant scrutiny. The UNEP program of scientific cooperation in the South China Sea in the early 2000s was successful because its activities never moved beyond (noncontroversial) areas of territorial seas. A regional fisheries management organisation (RFMO) could theoretically address some issues at stake. However, international experience of RFMOs as a means to prevent fish stocks collapsing is not encouraging. Analogies with either the Antarctic Treaty System or the Arctic Council are overstated. In neither case are there presently actively contested overlapping claims of sovereign jurisdiction.

Chinese legal strategy

China is using legal ambiguity to its advantages in pursuing a 'grey zone' conflict in the South China Sea. That is, in pursuing its strategic objectives it makes use of both non-traditional actors and actors with ambiguous legal status. First, there is the phenomenon of the 'maritime militia'. The maritime militia consists of both: purpose-built and specially equipped steel hulled 'fishing vessels' which report to the PLA or Chinese Coast Guard; and ordinary fishing vessels staffed by reservists and carrying specialised communications suites. Both may act at the direction of and in coordination with Chinese authorities. However, the ambiguous status of a vessel which fishes on five days of the week and acts in support of government vessels the other two, creates hesitation when other governments must respond. After all, the use of force against a rogue fishing vessel is simply law-enforcement, the use of force against a naval auxiliary is a much more significant matter.

China has also flooded the South China Sea with its own fishing vessels. Its fishing industry has a serious overcapacity problem and is heavily subsidised through fuel subsidies. While this serves the strategic end of crowding out other competitors, it has exacerbated the decline of stocks and the impact of destructive fishing practices.

What are the risks for middle powers?

There is a risk of normalisation of present Chinese activities and development of a new status quo. This is not a new Cold War, rather it is a greater power conflict or 'hot peace'. The risk for Australia and other middle powers is that if it does tip into overt conflict the consequences will be serious.

As a starting point, we must acknowledge that strategic control of the South China Sea has already passed to China. Its island bases give it the ability to deny access to foreign warships and foreign merchant ships in any high-intensity conflict. Admittedly, in a high-intensity conflict its artificial islands might go from being unsinkable aircraft carriers to immovable targets. Nonetheless, while theoretically easy to destroy or cripple militarily, ahead of any conflict that would be a very difficult decision to take. While they remain operational they provide significant advantages to China.

China could, for example, take action against Taiwan involving a naval blockade and curtailment of passage in the South China Sea. The immediate consequences would include significant disruption to trade compounded by the declaration of high risk or war risk zones by marine insurers further reducing carrying capacity. Australia, for example, lacks recent experience and relevant expertise in trade protection operations in the event of such a conflict. The decline of national merchant marines and global reliance on flags of convenience is also a potential strategic liability.

In the interim, simply accepting a new normal in the South China Sea threatens the international legal order of the oceans which is vital to Indo-Pacific prosperity. This unique situation may require new thinking on Australia's part and acknowledging the uncomfortable fact that at this historic juncture our interests may not precisely coincide with those of other actors. Indeed, across the region generally there is a tension between the need for better collective responses and a diverging individual interests.

1. Understanding the Chinese perspective

Overview: shifting tides

China's South China Sea policy has fundamentally changed since 2012, in line with growing national interests in the South China Sea. While the main Chinese interests remain questions of sovereignty and territorial integrity regarding its claims to various island groups, as well as unspecified historic rights asserted over the area, its interests have nonetheless expanded over time. For example, China's economic interest in the South China Sea have expanded considerably. China increasingly sees the maritime economy as an engine of economic development. Given its energy resources, some refer to the South China Sea as China's Persian Gulf.

Policy under President Xi has had three critical elements. First, use of selective escalation to change the status quo. Where once regional stability was given equal priority with Chinese interests in the South China Sea, China is now adopting a more assertive posture rather than pursuing a policy of delay or reacting to events.

Second, China has pursued a dual track approach focused on managing tensions with regional neighbours while excluding the United States from the dispute. This approach focuses on conflict management – that is, preventing or controlling the degree of any escalation – rather than conflict resolution. In part, this involves working with ASEAN while also pursuing bilateral negotiations with individual states.

Third, it seeks to manage tensions with the United States in the short term while accelerating military modernisation to prepare for the possibility of future conflict in the long term.

In any future conflict, the South China Sea will be important to Chinese national defence. China's major sea lines of communication pass through the South China Sea: notably in 1995 China was a net oil exporter, but by 2016 was importing 20% of its oil from the Middle East. The South China Sea provides a strategic buffer zone to defend against other major maritime powers. The building of artificial islands has provided important bases from which to project naval and air power, as well as for its space program.

The strategic picture: the great wall of sand

China is rapidly learning how to become a major maritime power, admittedly from a low doctrinal and cultural base. China must now balance complex continental concerns (It shares borders with 14 countries) against maritime defence. China is now dependent on its sea lines of communication for trade and profit, and is also critically dependent upon seaborne energy imports. This is a profound change in outlook for an historically self-sufficient continental power. In terms of the need to balance the protection of continental and maritime interests, Chinese naval strategists are now looking at the work of Alfred Thayer Mahan, an early geo-strategist who aimed to persuade the United States to turn to the sea.

However, when one looks at Chinese military strategic thinking in the South China Sea one sees an historical tradition of continentalism at work: pushing the defensive perimeter of the Middle Kingdom outward and creating a buffer against possible rivals. To the extent the campaign of artificial island building can be seen as constructing a 'Great Wall of Sand', this suggests a continentalist approach to Chinese defence has been extended seaward. Indeed, historically the

maritime domain was principally seen as a source of threats and the principal purpose of naval power was coastal defence. Thus the Great Wall of Sand may be seen as a form of (extremely) long-range coastal defence, attempting to make the South China Sea a no-go zone for other powers.

The chain of artificial islands established forms not only a defensive perimeter but also provides nodes for surveillance, forward operational bases for reconnaissance and fighter aircraft, deep water bastions for nuclear submarines, and bases for offensive and defensive missile capabilities. Further, through a combination of underwater arrays and satellites Chinese technical capabilities are reaching a level that allows them to track any actor entering the South China Sea, however covertly. Importantly, no actor can be completely confident of not being tracked.

Strategically, China is riding two horses: attempting to shore up both continental and maritime defences. While this may be necessary, it is expensive.

A key risk, however, is that decision-makers in Beijing grounded in a continentalist tradition of national defence may mis-interpret their near oceans and artificial islands as part of Chinese territory: blue soil. This view has profound implications militarily.

It would probably be in China's best interests to be happy in strategic terms with what it has achieved to date and to turn its attention to reassuring regional (and international) players as to its intentions. It may be possible for China to have his cake and eat it, but not if it takes further steps in the direction of insisting that it has full sovereignty to the exclusion of all others over the South China Sea.

Currents of opinion: How do Chinese foreign policy elites view the South China Sea?

The 2019 Chinese defence white paper emphasises that its South China Sea islands and Diaoyu Islands are considered inalienable parts of Chinese territorial integrity. Building defensive infrastructure upon them is thus simply an exercise of national sovereignty.

Chinese scholarship sees in the South China Sea dispute a much deeper difference between US and Chinese approaches to international order: the so-called rules based international order favoured by the US and its allies versus Chinese emphasis on sovereignty and territorial integrity as the founding principles of international law.

However, for many Chinese scholars while territorial disputes and international security are at the front of their minds, the South China Sea is generally perceived as a theatre in which tensions can be managed and only involving the risk of diplomatic escalation. Taiwan and North Korea rank as more important strategic concerns.

The South China Sea is not really seen as a potential battlefield between the US and China, but perhaps more of a playground of great power rivalry. There is, however, a concern that US involvement may encourage risky behaviour by regional allies and lead to unintentional escalation.

Otherwise, the principal Chinese goal is to manage freedom of navigation activities by the US and their warships. These have increased substantially under the Trump administration and are viewed as particularly provocative. While China publicly protests US FONOPs, in practice it seeks to monitor US activities while avoiding any large-scale clash that could trigger escalation or military conflict. This is essentially a process of trial and error on both sides. However, while the US and China have come close to incidents in past, the US has also breached Chinese 'red lines' with minimal consequences. Chinese actions are principally symbolic and intended for domestic audiences.

Fundamentally, China frames the South China Sea dispute as an issue of territorial integrity. While not necessarily defined as a core national interest, Beijing's actions there are intended to send clear messages to US and others. Otherwise, policy elites see more potential for conflict in the East China Sea, where the critical issues are Taiwan and with Japan. In particular, relations with Japan are always coloured by the complex historical relationship and the Japanese alliance with the US.

2. The regional strategic context

The US perspective

The views of US foreign policy elites on China and the South China Sea are divided. Two open letters were published in the Washington Post in July 2019. The first was by group of Sinologist scholars and was titled 'China is not the enemy'. A rebuttal open letter published under the title 'Stay the course' proposed that China *is* an enemy.¹ This rebuttal was drafted by a retired US naval intelligence officer and co-signed by a number of military and foreign policy analysts.

This is emblematic of the lack of consensus on how US should deal with the South China Sea dispute. There are essentially two views: the first being that China is not the enemy, it is a challenge – a new cold war should be avoided and engagement should be pursued. This camp, primarily composed of academics, denies that there is a consensus in Washington supporting an anti-China stance. The second anti-engagement camp claims there is a consensus that China is a strategic rival and that the Obama era strategy of engagement failed. This camp is composed primarily of policymakers and lawmakers. It does appear that the views in policy-making circles have hardened, and (according to Pew research on attitudes to China) that this reflects an increasingly hawkish approach by the US public. It is increasingly politically unfeasible to have a soft stance on China in the US.

Chinese activities in the South China Sea are perceived as indicative of Chinese efforts to rewrite the international order and revise international rules (especially in the maritime domain). It is hard to escape conclusion that the South China Sea is now viewed in the US as a testing ground for rule-breaking, rule-revision, or rule-ignoring by a rising power. The South China Sea thus has an important function in Washington policy narratives regarding the changing regional and global security order. The South China Sea is also seen as emblematic of Beijing's desires to become a hegemonic regional power and to push the US out of the region.

Yet, in Washington policymaking circles, there is almost universal agreement that the South China Sea has lost its potency as an issue compared to the trade war with China, protests in Hong Kong, and engagement with North Korea. This is perhaps indicative of the reactive nature of foreign policy making. There seems little appetite in the administration to go further than existing FONOPS.

The South China Sea dispute is really about the return of great power competition. The Quad is seeking to assert a narrative regarding the necessity of a continuing US-led global order in the Asia-Pacific. However, this involves a certain lack of self-awareness. The US tends to think that in comparison to China it's viewed as a benign hegemon - but it's not. The US has long history of international rule-breaking prior to the Trump administration.

¹ "Stay the Course on China: An Open Letter to President Trump", *The Journal of Political Risk*, 18 July 2019, <http://www.jpolorisk.com/stay-the-course-on-china-an-open-letter-to-president-trump/>.

The Indonesian perspective

Following the *Philippines v China* UNCLOS arbitration there are two essential points of concern for Indonesia. First, does the nine-dash line represent a dispute with Indonesia? Second, the consequences of legal definition of islands put forward by the arbitration tribunal for Indonesia.

As to the legitimacy of the nine-dash line, a key problem is its ambiguity. Does the nine-dash line reflect China's view of its historical rights? While China did not participate in the arbitration it did submit a paper generally interpreted as laying out the Chinese position. China claims historic rights to fisheries and hydrocarbon resources within the line.

However, such claims of historic rights under international law must be supported by longstanding practice to the exclusion of other states *and* the claim must be recognised by other states. The *Philippines v China* arbitral tribunal found China's claim meets neither threshold. Chinese fishermen have fished in South China Sea for a long time, but so have fishermen from other countries.

Indonesia's maritime zone overlaps with China's nine-dash line, even though Indonesia isn't otherwise a claimant state in the South China Sea dispute. Indonesian officials have, on this basis, conducted quiet diplomacy to ascertain whether China considers there to be a dispute. At present, the official Chinese answer is that there is no dispute.

This, however, leaves open the question of whether there is a dispute in practice or whether there is the prospect of a legal dispute in future. While Indonesia has a problem with illegal fishing in its northern seas, vessels under the flags of Thailand and Vietnam probably represent a bigger problem in this regard than China.

Second, the arbitral tribunal's narrow definition of islands which generate 200nm exclusive economic zones is potentially advantageous to Indonesia. The tribunal found that no maritime features in the South China Sea warrant EEZs; rather they are all, at best, 'rocks' which cannot support human habitation which enjoy only 12 nautical mile territorial seas. So, on this basis, from the Indonesian legal perspective there are no overlapping claims with China to delimit. Further, there is scope for Indonesia to utilise this ruling on the definition of islands in maritime boundary discussions with other countries. Indonesia can say, for example, to Palau: 'Helen Reef cannot generate an EEZ'.

Overall, Indonesia views itself a neutral player in the South China Sea despite the overlap between nine-dash line and Indonesia's EEZ. Indonesia champions cooperation through ASEAN on South China Sea issues. In respect of China, the Indonesian government and public see the principal issue as illegal fishing, not a maritime boundary dispute. (And while Indonesia has blown up illegal fishing vessels in recent years, it has blown up relatively few Chinese vessels compared to those from Thailand and Vietnam.)

The Philippines' perspective

There is a trend in the region towards greater conformity with the international law of the sea and UNCLOS. In the Philippines, questions of national maritime entitlements have been resolved in favour of current international law. That is, in 2011 the Supreme Court upheld the 2009 national law on baselines which brought the Philippines claims into line with UNCLOS rules rather than the 1898

Treaty of Paris. The Philippines is thus accustomed to the idea that UNCLOS prevails over claims to historic rights.

As an archipelagic state, the Philippines obviously does not accept that China can draw straight baselines around maritime features and call them archipelagoes in law. Indeed, China did not do so in 1996 when it declared its baselines, it drew straight baselines around the Paracels but claimed the enclosed waters only as internal, not archipelagic, waters under its Territorial Sea Law 1992.

The practice of regional states also supports the idea that maritime features in the South China Sea do not generate extensive zones or entitlements. The joint submission of Malaysia and Vietnam on their continental shelf entitlements is premised on this view, as is the Indonesian submission to the UN Commission on the Limits of the Continental Shelf.

There is thus a convergence of ASEAN coastal states' views on which maritime features are capable of generating zones. On this basis, ASEAN coastal states can adopt a common approach to the outer limits of EEZ claims, and could do so without having to first resolve lateral boundaries or overlapping entitlements among themselves. On such an approach Reed Bank, for example, becomes a purely bilateral Philippines/China dispute.

The tribunal ruling also opens the possibility of multilateral approaches on other issues. For example, to the extent that the ruling opens the door to the exercise of historic fishing rights by fishermen of varying nationalities in the territorial seas around features such as the Scarborough Shoal.

All claimant states have duty to cooperate and respect UNCLOS in areas such as pollution control, protection of the marine environment, and regarding resource management. While China does not acknowledge there is a high seas 'donut hole' in the middle of the the South China Sea, duties of cooperation also arise under provisions of UNCLOS dealing with cooperation among coastal states bordering semi-enclosed seas. Cooperation is certainly needed. All regional states are underperforming, for example, on their targets for preserving biodiversity.

There is a need to broaden the discourse to one not only based on security and hard law (as represented by UNCLOS) but also 'soft issues' like governance and sustainable development.

While there has been significant attention paid to the MOU on joint development of oil and gas resources the West Philippine Sea signed by Presidents Xi and Duterte in 2018, it still faces obstacles. The proposal is for a 60-40 split in revenues (favoring the Philippines) but the Philippines constitution requires that EEZ resources be reserved 'exclusively' for the 'use and enjoyment' of Filipino citizens. If such an agreement is entered by the Philippines President without Senate ratification there would be a clear path for a legal challenge.

The Vietnamese perspective

The South China Sea continues to be among Vietnam's foremost security concerns especially as regards repeated Chinese activities in Vietnam's EEZ. Most recently, the *Haiyang Dizhi 8*, a survey vessel belonging to a Chinese government-run corporation, began an oil and gas survey across a large swath of seabed on 3 July 2019 northeast of Vanguard Bank. This activity occurred across two blocks falling within Vietnam's EEZ under the UN Convention on the Law of the Sea. While the Vietnamese Foreign Ministry repeatedly requested it cease these activities and leave the vessel remained, protected by a maritime militia and coastguard escort.

The only international actor that issued a clear response was the US, making two statements naming China and asking it to respect longstanding international law rules regarding Vietnam's rights.

The *Haiyang Dizhi 8* incident highlights four points. First, Vietnam is in the most challenging position of all South China Sea claimant States at present because of such recurrent incursions by China. China's actions pose a legal challenge. Its recurring and incremental exercises of coercion regarding resource exploration demonstrate China is pursuing administrative control within its 9-dash line despite that claim's inconsistency with international law. This is a particular threat for a country like Vietnam which is moving towards 50-55% of GDP being reliant on the maritime economy.

Second, China also poses a diplomatic challenge. There are limits to the diplomatic measures that Vietnam can undertake. Previously, diplomatic responses to Chinese incursions into Vietnam EEZ have had some success as in the May 2014 standoff over the *Hai Yang Shi You 981* drilling rig. However, international attention is now on other issues and China's coercive activities appear to be becoming normalized. Vietnam thus faces a lack of international diplomatic support compounded by its lack of supportive international alliances. China is also bolder now, and appears to care less about international perceptions (for example, in its reaction to international criticism of the Hong Kong situation). There is a difficult balance for Vietnam to strike: it cannot afford to escalate in response to Chinese incursions but it also cannot afford to de-escalate and be seen to give ground, as that simply permits further incursions.

Third, Vietnam lacks current support from fellow ASEAN and South East Asian claimants. There is an underlying pressure to downplay Chinese incursions for the sake of stability. There is a growing narrative that the situation is under control and that continuing negotiations towards a regional Code of Conduct represent progress (see below). Domestic considerations also constrain Vietnam. January 2021 will see a party congress which will result in a changing of the guard. Vietnamese party elites are preparing for this event and have limited attention and energy for international issues. They too desire to keep things peaceful for the time being.

Fourth, nonetheless, 2020 will be an important year for Vietnam. Vietnam will hold the ASEAN chairmanship and also a non-permanent seat on the UN Security Council. Vietnam will therefore be in a position to utilize different international platforms to advance its interests. Vietnam, like others, refers to principles perceived to be violated without naming US. Will be interesting to watch defence cooperation between Vietnam and US.

The Malaysian perspective

Malaysia is one of five claimant states in the South China Sea, claiming some 10 or 11 features and physically occupying five in the Spratly Islands. In 2009, it gave up its claim to Louisa Reef in favour of Brunei. Malaysia has overlapping claims with Philippines and Vietnam, but the Malaysian Foreign Minister has said in Parliament that Malaysia doesn't recognize the nine-dash line, and therefore it has no dispute with China.

Malaysia has four key interests. First, it seeks to protect its EEZ and sovereign rights. Malaysia's EEZ holds significant reserves of oil and gas, making Malaysia the world's third largest exporter of LNG. Simply put, the South China Sea is a significant source of government revenue.

Second, Malaysia wishes to keep trade routes open and thus to maintain freedom of navigation and overflight. Sea lines of communication via the South China Sea connect Malaysia's continental and island elements.

Third, Malaysia wishes to maintain peace and stability in the South China Sea.

Fourth, Malaysia seeks to uphold international law, especially UNCLOS. Malaysia has a good track record of taking maritime boundary disputes to international arbitration and abiding by the rulings.

Similarly, in pursuing its interest Malaysia has four key strategies. First, it continues to maintain its maritime claims. Thus, Malaysian armed forces and coast guard have continued to monitor Chinese activities in SCS and to assert its claims.

Secondly, Malaysia seeks to maintain good relations with China while discreetly advancing its own interests via diplomacy, in contrast to Vietnam and Philippines. To this end it has avoided media coverage of South China Sea incidents and has downplayed nationalist rhetoric to avoid inflaming national sentiment. There have been a number of tense incidents between Malaysia and China, but these haven't been reported by news media. There is effectively an unwritten agreement between both countries to keep such incidents out of the press. In principle, Malaysia supports the idea of joint development as a model for South China Sea claimants. But in practice, Malaysia is unlikely to pursue joint development with China—as it seeks to maintain the revenue from its EEZ for itself.

Third, Malaysia supports efforts toward speedy conclusion of a Code of Conduct for the South China Sea. Malaysia views the presence of foreign warships in South China Sea (both Chinese and US) as de-stabilising and has called for 'non-militarisation' of the South China Sea. It has floated the idea, for example, of ASEAN joint piracy patrols.

Fourth, nonetheless, Malaysia has quietly facilitated the US military present in South East Asia. It has, for example, hosted joint drills with the US Navy and Coast Guard in August 2019.

Malaysian official statements, including from President Mahathir, have been very clear: Malaysia cannot afford to imperil its trade relationship with China by adopting a hardline approach on the South China Sea. This reflects many other countries' policies de facto, but Malaysia is explicit about it. Military confrontation is not an option for Malaysia. In any event, it is more focused on other maritime security issues such as illegal migration, piracy, etc.

The China-ASEAN South China Sea Code of Conduct

A first single draft negotiating text (SDNT) of the Code of Conduct was concluded on 3 August 2018. At present the SDNT is a compilation of inputs from nine countries, eight ASEAN members states and China. (Laos and Myanmar did not submit any inputs.)

The SDNT declares at the outset that it is 'not an instrument to settle territorial disputes or maritime delimitation issues.' The most important part of the SDNT are the General Provisions in Section 2. Section 2(c) contains six 'Basic Undertakings' being: (1) the UNCLOS duty to cooperate to protect the marine environment in a semi-enclosed sea; (2) the UNCLOS duty to, pending settlement of boundary disputes, enter into arrangements of a practical nature regarding resource exploitation; (3) the exercise of self-restraint and the promotion of trust and confidence; (4) the prevention of maritime incidents; (5) management of incidents; and (6) other undertakings, in accordance with international law, to fulfil the objectives and principles of the Code of Conduct.

The content of the Basic Undertakings remains unsettled and different formulations of the duty to cooperate have been suggested. The non-Chinese proposals all consider areas of cooperation should include: marine environmental protection, marine scientific research, safety of navigation and communication at sea, and combatting transnational crime. Transnational crime is generally

understood here to include trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms. Indonesia has proposed adding illegal fishing to this list.

China has presented a detailed proposal on six areas of cooperation: conservation of fishing resources, maritime law and security cooperation, navigation and search and rescue, maritime scientific research and environmental protection, the marine economy (including aquaculture and oil and gas), and marine culture. Most significantly China proposes economic cooperation should be carried out by littoral states 'and shall not be conducted in cooperation with companies from countries outside the region.'

The SDNT also included, however, a proposal by Vietnam to replace Section 2(c) in its entirety with twenty-seven points prescribing what states shall and shall not do. This list of 'do's and don'ts' includes: no construction on any artificial island, no militarisation of features, no blockade of vessels carrying provisions or personnel for rotation to existing installations, no declaration of an Air Defence Identification Zone, and no conduct of simulated attacks against the vessels and aircraft of other countries.

On 31 July, China's Foreign Minister Wang Yi revealed that ASEAN member states and China had concluded the first of three readings of the SDNT. According to Wang, this marked 'new, major progress.'

The original SDNT has been consolidated to reduce the overlapping proposals in Section 2(c). China withdrew its insistence that advance notification be given for military exercises between regional states and states outside the region and Vietnam's list of 'do's and don'ts' was dropped.

ASEAN's position has been that a timeline to conclude the negotiations on the SDNT should be mutually agreed. China has unilaterally announced a three-year time frame. This would coincide with Philippine President Duterte's term in office as well as the period in which the Philippines will be ASEAN's country co-ordinator for China. Also, during this three-year time frame the ASEAN Chair will pass from Thailand (the current Chair) to Vietnam (2020), Brunei (2021) and Cambodia (2022).

In any event, several contentious issues remain to be resolved before the SDNT can be finalized and adopted: (1) a definition of the geographic area to be covered by the Code of Conduct, (2) any dispute settlement mechanism, (3) the role of third parties and (4) the legal status of the final Code. On the latter point, China has thus far refused to countenance a legally binding Code of Conduct.

Discussion and analysis

One might hope that a way forward would be to seek agreement on the least contentious issues while postponing discussion of non-contentious issues. Questions of environmental protection and depleted fishing stocks might be thought to be low-hanging fruit with obvious scope for cooperation.

However, a key difficulty in making any progress is the nine-dash line: it makes any kind of cooperation on the issues foreseen in the Code of Conduct or other issues hard or impossible. China won't compromise its core claim, and its preferred approach to resolving disputes is bilateral discussions and joint development. Indeed China seeks to keep discussion of all contentious issues bilateral, as this gives them more leverage.

China is also prepared to use market access for leverage and has indicated that regional actors' interests in China will suffer if they actively oppose Chinese activities. It does not appear deterred at all by the views of international community. The threat of losing Chinese markets means, in practice,

the only claimant state willing to be assertive is China. There is also a general sense that US interests in the region are not such that the US is likely to come to the aid of an individual regional state in a dispute with China. It is also not clear how far the US would go to defend its own interests in freedom of navigation (both commercial and military). Finally, while there is pressure from China not to 'internationalise' the dispute and to keep 'outsiders' (i.e. western states) out of the region, being seen to invite international intervention is generally received poorly by other South East Asian countries also.

Further, it is hard to see a breakthrough in the immediate future on the ASEAN track. Compromise is difficult because of the significance of the issues involved for littoral states. Nationalist sentiment also makes compromise difficult. For all states involved, this is first and foremost about domestic politics. Each has multiple national constituencies which are dissatisfied with status quo. This is a two-edged sword. For example, the government in Vietnam is able to capitalise on nationalist sentiment at times, but must also work to keep it from boiling over.

A key question for the Code of Conduct, if concluded, will be its likely practical effectiveness. Practitioners in the discussion were less concerned about the risk of an unplanned incident escalating into armed conflict. History is replete with examples of unplanned encounters or incidents which have not lead to escalation. Recently, in defiance of maritime conventions and custom, a Chinese vessel left Philippines fishermen to fend for themselves when their vessel sunk following a collision.

Nonetheless, governments remain nervous about the risk of escalation from such incidents. The principal benefit of any Code of Conduct is likely to be that if channels of communication are established, and if step-by-step procedures are spelled out, and if these then become day-to-day practice, then the Code is likely to have de-escalatory and confidence building effects in practice irrespective of whether it is legally binding.

3. Legal argument and the 'three warfares'

International law and public diplomacy

There is a general sense that Australia's references to international law as part of public diplomacy on the South China Sea is suboptimal. By public diplomacy we mean communications by governments in the public sphere seeking to influence foreign governments, whether directly or indirectly, via either publics or the international community. Through public diplomacy governments typically aim to create good impression and to promote their own policy position. It is important therefore to consider the recipient state and how public diplomacy efforts are received. The West, in particular, is understood to have misread China before: while our public diplomacy might sound good to us, it likely doesn't to Chinese audiences. Australia is a third party to the South China Sea dispute, so China has spoken out against Australia involving itself at all. Contemporary communication media also considerably complicates such efforts.

Why refer to international law at all in public diplomacy? Historically, the US had led this practice and it's now become a core feature of diplomacy in the US-led international order. Simply put, though, in a pluralistic community of States international law has come to provide a common language for States to either justify their behavior or criticize others. The focus here is less on taking a case to arbitration and more on the rhetorical invocation of international law.

Using international law in this way has several features. States may refer to international law to enhance the legitimacy of their own actions or to delegitimise actions of another state or states. However, references to international law must make sense in legal terms. Done badly or unconvincingly, references to international law may serve to delegitimise one's own policy, or may upset the recipient state targeted by public diplomacy.

So, what constitutes an effective reference to international law in public diplomacy? Unsurprisingly, it is easier to draw on international law to support your position if the rules support your perspective. Recourse to international law in public diplomacy doesn't work well if there is an observable gap between a State's adherence to international law and its invocation of it. Thus, starkly political use of international law - as occurred in the 2003 invasion of Iraq - served to delegitimised US policy objectives (as the US appeared hypocritical).

The Cuban missile crisis, by contrast, is an example of more skillful reference to international law by the US. By seeking the support of the Organisation of American States the US was able to portray itself as multilateralist and rules-abiding, and avoid setting any precedents of unilateral action which the USSR could later invoke against it.

In the current case, China views Australia speaking up at all as interference in its internal affairs. The Australian position has largely been to say that Australia doesn't take sides on competing claims. Instead Australia has called on all parties to adhere to international law, has said the 2016 arbitral ruling is binding on all states, and has called on everyone to adhere to the rules-based international order.

Such references to international law have been too general to be useful. To use international law as leverage effectively we need to be more specific. For example, the arbitration ruling includes findings as regards the definition of islands that we may not particularly like (given our claim that Heard and McDonald Islands constitute islands capable of generating EEZs). Further, references to

resolving claims peacefully and in line with international law may sound naïve in light of developments over the last ten years.

More importantly, Australia has been critical of China without stating what we'd like China to do instead. The rules-based international order is generally interpreted as the current, US-led status quo. China can easily counter such references by saying, 'whose rules?' Indeed, there is a risk that routine reference to the rules-based international order dilutes the role of international law as something more than rules. If we refer to binding international law, we can at least point out that China participated in negotiating UNCLOS.

A real difficulty is that a tenet of international relations has become that legitimate participants in the international order should (or should be seen to, or claim to) abide by international law. Implying that we adhere to international law and China doesn't actually implies that we either desire to exclude China from the international order altogether or see it as an illegitimate actor. Many Chinese decision makers consider it to be the west that's been disregarding international law and they're the ones upholding it in important respects, e.g., upholding the WTO dispute resolution system or upholding traditional conceptions of State sovereignty against doctrines such as the 'responsibility to protect'.

Overall, Australia should review and update its references to international law in its public diplomacy on the South China Sea. In particular, it should more clearly articulate what it expects China to do rather than risk portraying it as an invariable rule-breaker.

The nine-dash line and legal argument as a tool of strategy

The problem with nine-dash line is that it cuts deeply into what UNCLOS promises other coastal states: exclusive rights of resource management over a 200 nm EEZ. Ironically, at the time of UNCLOS' negotiation, China was a major supporter of the EEZ concept: largely to position itself as a leader of the developing world and against the interests of the US and USSR as maritime superpowers.

China took a number of interesting positions during those negotiations. First, it argued that there was no fixed limit on the breadth of the territorial sea as a sovereign maritime zone (rather it should be determined by economic and security considerations). Second, warships should have no automatic right of innocent passage through territorial seas and straits. Third, China's own Chungchow Strait and vast Bohai Bay had a special status as 'internal waters'. (Notably, no such special claim was made in respect of the South China Sea.) Fourth, that maritime boundaries should be settled only by consultation and UNCLOS should make no provision for the judicial settlement of such disputes. Fifth, a continental state with sovereignty over an 'outlying archipelago' could draw straight baselines around it and use these to measure a territorial sea. The fate of the Chinese argument regarding outlying archipelagoes was noted in the executive summary and is discussed below.

The point to take away, is that Chinese claims for special historic rights or zones determined by security/economic necessity are not new; nor is an aversion to judicial dispute settlement. Thus, present arguments about special historical rights in the South China Sea have some precedent in Chinese legal thought but, given the positions taken at UNCLOS, are at best ahistorical and opportune. The same can be said, following the *Philippines v China* arbitration, for Chinese efforts to pivot and offer a new legal argument based on the rejected concept of EEZ entitlements for outlying

archipelagoes. This was the argument put by some 70 members of the scholarly Chinese Society of International Law (CSIL) in an extraordinary 500-page 'critical study' published in the *Chinese Journal of International Law* as a single journal article ('CSIL study').

The CSIL study goes to great lengths not only to attempt to advance the outlying archipelagoes argument but to discredit every single aspect of the *Philippines v China* arbitration tribunal's establishment, operation and decision – right down to how many times the pleadings were amended. Other than its dubious legal merits, the CSIL study was not independent scholarship in any ordinary sense. It was put together working in close collaboration with the Ministry of Foreign Affairs as noted in CSIL's own five-year workplan report. Indeed, it noted that CSIL had 'mobilized the academic community to cooperate with the overall deployment of diplomacy to carry out the juridical struggle' against the arbitral award. (The *CJIL* editor has denied the CSIL study lacked independence.)

The question is: why were such legal arguments being made at all? And why was the task taken so seriously? In part, parties do this to legitimate their own claims. The Chinese Communist Party (CCP), in particular, takes the battle of ideas seriously. It's three warfares doctrine encompasses a triad of non-kinetic methods of achieving China's national goals: public opinion warfare, psychological warfare, and legal warfare. South China Sea policy is partly about the CCP's legitimacy *internally* and its ability to govern. That is, the legality and rightness of its claims in the South China Sea, and its willingness to defend them, is part of its legitimating nationalist narrative internally. Thus, the Chinese government sees legal contestation of its rights in the South China Sea as criticizing its broader legitimacy and as attacking its legitimacy (and ability) to govern internally. Such criticism is not seen as debate, but as information warfare.

In any event while Chinese claims based on the nine-dash line are ahistorical and opportunistic, they are not necessarily insincere or completely invented. The arguments involved have some historical antecedents in Chinese thinking on these issues, which bolsters the legitimacy of these claims from the Chinese perspective.

Discussion and analysis

How do Chinese scholars and policy makers understand the law of the sea? On one view a fundamental problem is strategic culture. China is, as noted, historically a continental power which has only become interested in sea power since the 1990s. Thus policy makers still misunderstand key tenets of maritime power and approach maritime claims as if securing and defending territory. China made an historic claim to South China Sea based on general international law without truly understanding the international law of sea. Now it can't renege on the claim, so it needs to try to square its idiosyncratic territorial/ historical claim with international law. Nonetheless, China remains a party to UNCLOS, so its interest must remain somewhat aligned with UNCLOS principles.

Chinese scholars recognise this problem, and many scholars now regret that China supported UNCLOS. It is, however, false to claim that China was not actively involved in the UNCLOS negotiations. China chose which issues to prioritise and was actively involved in the establishment of EEZ regime which now conflicts with its nine-dash line claims. The simple fact is China supported UNCLOS negotiations but didn't anticipate how its interests would change over time. When it was not a great power, it sought to oppose practices such as great power surveillance operations carried out in other countries' EEZ. Now that China is a rising military power, it feels the need to project power everywhere – but the positions it has taken in the past on matters such as US FONOPs imposes constraints on Chinese practices or opens China to charges of hypocrisy. China is now

playing catch-up with international law and is trying to establish effective occupation of the South China Sea through artificial island building.

Chinese elites now regret not paying more attention to the international law of sea historically, but now is aiming to establish new facts on the ground in the South China Sea. There is some recognition that international law, not its historical claim, will determine the present day and future legitimacy of its claim. There is thus an emerging sentiment that modern China (both the Republic and People's Republic) engaged poorly with public international law in its early phases. China repeatedly asserted its maritime claims to island groups from the 1930s on. By the 1970s, Britain took the view that the French claims were extinct and Chinese claims were better than others. At that time, Philippines' claim was regarded as weak. This leads to the question: why didn't China assert its claims in 1974 during the UNCLOS negotiations? This is likely because the issues most on their mind at that time were matters such as keeping nuclear submarines out of Hainan Straits.

Nonetheless, Chinese conceptions of international law remain potentially quite different. The legalist philosophical tradition remains an always-present strand in Chinese legal thought: seeing law as a rigid set of rewards and punishments designed to maintain order and further the power of the ruler. Thus, the Chinese approach emphasises rule by law as opposed to an independent rule of law; the perception of law is as an instrument rather than an end. The often contradictory or indefensible claims made by China reflect this instrumental approach to law.

Although coming from low base of knowledge as to maritime power and the international law of sea, China is learning fast. What are the implications? It is conceivable that China will attempt to co-opt international law for its own interests. However, convening a fourth UN Conference of the Law of the Sea and renegotiating the law of the sea seems unlikely in foreseeable future. UNCLOS, the result of the third UN Conference, will likely remain primary instrument for now. Nonetheless, an alternative strategy is to attempt to introduce normative ambiguity into issues that were thought to be settled. This is the core of the Chinese strategy at present. It is not impossible that it will succeed, at least in part. As a simple point of fact, UNCLOS doesn't—it can't—cover all issues in international maritime law. There is thus some superficial plausibility in the argument that certain matters are unregulated by UNCLOS and there are normative gaps to fill with new rules. The challenge come when such arguments are made to wedge openings in UNCLOS where none was previously thought to exist.

The 21st century might become Sino-American maritime condominium: in such a future what role will China play? China will certainly have to learn to be flexible on some issues. Naval intelligence gathering is a key example. China has long criticised other countries for such activities in foreign EEZs but is now doing so itself. It cannot continue to have its cake and eat it too. China has never asked permission from another country or given prior notification of surveillance, with the possible exception of the Talisman Sabre exercise in 2019. Rather it has engaged in selective interpretation of relevant laws or proposed unconvincing distinctions. (For example, arguing that such activities are only prohibited if a coastal State has passed a relevant national law applicable in its EEZ, as China has.)

There was also some debate among the expert participants as to whether the 'international rules based order' discourse has been particularly effective in promoting Australian interests. For example, *only* Australia appears to have changed its behavior in response to the discussion following the *Philippines v China* arbitration (by changing its four decades-long approach to the Timor Sea). Australia has also seemed to prefer vague references to all parties abiding by international law in general rather than tackling specific issues.

This raises the question as to how effective is invoking international law as part of public diplomacy. The consensus was that case studies show weaker countries can sometimes hold their own against stronger countries through reference to international law. This approach hasn't worked, however, in the South China Sea.

International law can also be used to de-escalate disputes and tensions. By framing disputes in legal terms, public opinion on an issue can be defused and politically difficult decisions sold as mandated by international law. One could think of the Qatar/Bahrain dispute over various islands which was settled by the International Court of Justice (ICJ) in 2001, in which the ICJ ruling was important in 'selling' the outcome to disaffected nationalists in Bahrain. There is, however, only a minimal prospect of other countries taking their claims over the South China Sea to an arbitral tribunal, other than Vietnam which might be keeping the option open as a last resort.

4. Grey zone actors and resource disputes: coast guards, militias, and fishing vessels

Grey zone actors: the PRC's maritime militia

Maritime militias have existed in law and history for some time. A militia is simply a supplementary force raised from the civilian population to assist the regular armed forces. Prior examples include naval auxiliaries and privateers. But the PRC's use of maritime militias is novel because it is consciously used to generate legal uncertainty. Maritime militias should not be analogized to the use of armed private security contractors in the Indian Ocean. The legal status of the latter as private individuals without government sanction or authority is clear.

The hierarchy of Chinese maritime militia exists at three levels. First, purpose built steel-hulled vessels, which may look like fishing vessels but don't do much fishing. These vessels also have facilities for weapons and ammunition storage and sophisticated communication suites. The question arises as to their domestic status under Chinese law. They appear to be adjuncts to the coastguard operating under military or police discipline and therefore to be State-sponsored actors. Second, there are fishing vessels that appear to be under PLA or Chinese coast guard control and which are crewed by reservists or people who have recently been demobilized. Third, there are fishing vessels directed on a case-by-case basis to conduct activities the PLA or coast guard can't do. It is not clear whether there are in practice any significant distinction between the second and third of these categories.

Lawfare can be understood as the misuse of law to achieve military objectives. The legal status of maritime militia vessels can easily be made opaque or ambiguous – but status is important under international law. A fishing vessel is typically a private vessel and its conduct is not ordinarily considered to be that of its flag State, while a coast guard auxiliary vessel is a public vessel – a state agent – and its conduct is attributable to the State. If a vessel's conduct is attributable to a State then different rules apply, including to assess claims of exercises of law enforcement powers against (or by) such a vessel. However, if a vessel's status or conduct is ambiguous, the legal assessment of its conduct (or permissible scope of action against it) will also be ambiguous.

There is also the question of whether vessels can switch between statuses from day-to-day: fishing one day of the week as a private vessel, and being called into auxiliary service as a public vessel on another. Such questions complicate making an assessment of the status of a maritime militia vessel at any given time.

There is thus consciously manufactured legal ambiguity as to the status of maritime militia vessels and their rights and responsibilities. This has three outcomes. First, we are unsure in any incident who has acted and how to assess any use of force. This benefits perpetrators of uses of force, and is detrimental to responders to uses of force. Second, it creates an opportunity for seizing control of the narrative. That is, ambiguity allows a perpetrator to exploit institutional inefficiencies, given the inevitable time-lag in a bureaucracy in determining a response to an incident. This creates additional leverage for the perpetrator and allows them to get their story out first. Third, this creation of uncertainty over the definition and status of grey zone actors allows the undermining of other fundamental law of the sea concepts and categories elsewhere. That is, it creates room for other, less orthodox interpretations of the law of the sea. If hereto stable pillars of the rules-based order can be eroded in this way, whether other longstanding pillars? Rules concerning maritime espionage, human rights at sea, and the reserve domain of State powers could also be opened up or eroded.

High seas and polar fisheries

The idea that fishing vessels could be used as proxies to assert maritime claims is also nothing new. Fishing vessels and states' use of them have long been problematic. One could think of the UK-Iceland 'cod wars' of 1958-1961 and 1972-73, or the Spanish-Canadian fisheries jurisdiction dispute of the early 1990s.

The South China Sea is a particularly important fishery. For a relatively small area of ocean, it accounted in 2012 for 12% of the global fishing catch, worth over US\$21 billion. China now has the world's largest distant-water fishing fleet and heavily subsidizes its fishing industry especially through fuel subsidies. 3.7 million people in the region are dependent on fisheries, but catches in the South China Sea are down 75-90% on 1950s levels. Climate change and changing ocean temperatures will only exacerbate these problems. Overfishing ultimately poses serious threats to the marine environment and, increasingly, to national security through undermining food security. While the biggest problem is the collapse and destruction of fish stocks, it is not good for security to have unemployed fishermen. Maritime crime – particularly piracy or smuggling – can be attractive to those with boating skills who have lost traditional livelihoods, as has been seen in the Sulu-Celebes Sea or off Somalia.

Problems with regard to fishing in SCS include disputes over illegal fishing in foreign countries' EEZs, and incidents between rival coastguard or patrol boards (including 'patrol' vessels deployed by NGOs such as Sea Shepherd). The region has seen increasing Chinese coast guard activities and actions by intelligence vessels disguised as fishing vessels (so-called '[Sea Phantoms](#)').

Does fisheries law provide a potential avenue for cooperation, de-escalation and relieving pressure on fish stocks? Setting aside the nine-dash line there is a high seas area in the South China Sea, a 'donut hole', which could theoretically be brought under the management of a regional fisheries management organization (RFMO).

Regional fisheries management is an option, but not necessarily a good one. RFMOs to date haven't been especially effective and arguably not one has actually succeeded in conserving a fish stock. In any event China would be the main player in any RFMO: smaller South-East Asian states are unlikely to get desirable outcomes in RFMO negotiations with China. Issues in establishing such an RFMO include: will decision making be by consensus (arming each state with a veto); who will enforce fisheries measures and how (and against whom); how would quotas be allocated; and would Taiwan be allowed to join?

Dealing with subsidies might not of itself help curb Chinese overfishing and other fishing activities. China is clearly looking to expand the scope of its distant water fishing. China has been actively discussing the utilisation of marine resources in Antarctica and has taken to labelling itself as a ‘near-Arctic state’—why should China have a seat at the table in these discussions? Because when fish stocks in the South China Sea are fully depleted, China will start fishing elsewhere.

Discussion and analysis

Grey zone actors and UNCLOS

A central topic for discussion was whether non-compliance by one state can erode a critical pillar of UNCLOS. The conclusion was that this is possible: China’s size makes its actions disproportionately influential. In particular, China, unlike Russia, seeks to put forward alternative orthodoxies when it undermines international law. Russia merely undermines legality without proposing any alternative. In a sense, the Russian approach is *less* dangerous to international order: by playing the spoiler, its actions have no rule-making potential. China wishes to change the rules of the game.

Some of the experts present noted that a difficulty in disentangling these issues is that the Chinese state is monolithic and centrally directed but also diffuse and complex. It is also not an ‘ordinary’ state in the Westphalian sense. Given its one-party system there is no meaningful distinction between the government and the Chinese Communist Party (CCP). The risk, as highlighted by other participants, in such an analysis – or extending it too far – is that we arrive in a position where we say the CCP is not a legitimate actor and needs to be contained. At which point we are back to a Cold War approach and constructive engagement is made harder. How we frame the analysis has consequences.

It was observed that at present, as no State will back down from its position, present low-level conflict would appear to have no end. How then should we manage current and potential incidents and disputes? Regional cooperation models may be an option. This lead discussion to questions of regional fisheries management.

Fisheries and regional seas management

An obvious question is what could South China Sea claimants learn from cooperation among Arctic states? The conclusion, regrettably, was not very much: the situations are too different. Certainly, there exist in the Arctic examples of practical cooperation despite maritime boundary disputes: Norway and Russia, for example, agreed on fishing quotas pending a final delimitation. However, all Arctic states have agreed to resolve disputes through the UNCLOS dispute settlement mechanism. Further, there is no nine-dash line in the Arctic. Examples exist of fishery management regimes.

The ‘Arctic 5’ were able to agree on moratorium on fishing in a central portion of Arctic high seas until conservation and management measures put in place. Such an approach is likely not applicable in South China Sea: Arctic states cooperate to keep their EEZs clear from outsiders. South China Sea states would have to adopt different model altogether to maintain integrity of their EEZs (and exclude regional claimants).

Part of the Chinese strategy has been to flood SCS with fishing vessels (to establish ‘facts on the ground’). This has led to overcapacity in the fishing fleet, and may lead to incentives for some to sign up as maritime militia vessels. Overfishing and population growth pose the risk that militarily-trained civilians may turn to transnational criminal activity (especially smuggling, including people-

smuggling) activities in South China Sea. China is also the main source of drugs smuggled by sea in the region. PRC tolerance (or direct use of) of 'patriotic' criminals, such as triad gangs, adds another layer of risk.²

5. Looking forward: what is the outlook and how should middle-powers respond?

The challenge for middle powers

The most prominent geopolitical concerns and serious maritime disputes of our times originate in the South China Sea. The threat is different to previous, similar challenges. There is not war, but neither is there much peace. There is a potential for escalation but China will place responsibility for escalation on other powers. Even seeming setbacks may reinforce Chinese objectives.

We are faced with the rising ability of China to use the South China Sea to further its aerial denial and surveillance capabilities. Taking a decision to destroy the capabilities represented by its artificial island military installations would prove the greater challenge than destroying them per se.

What are middle powers doing? Not much, whether bigger or lesser. The lack of response from middle powers should concern us. Current multinational rhetoric underscores efforts to 'modify' Chinese behaviour but to little avail.

Even great power navies aren't doing much. US FONOPs do serve to erode Chinese PLA territorial claims and demonstrate US sea power. However, they haven't modified Chinese behaviour. In fact, Chinese behaviour is escalating, especially against smaller ASEAN states. The routinisation of FONOPs may also be a trap – if they're routine, do they achieve strategic objectives? If other navies stay beyond 12 nm from Chinese-occupied features this may only reinforce Chinese claims.

For its part, China seeks to drum up legal exceptions to justify its actions and gains by biding its time. This at least gives the appearance of respect for the law. We see this in its turn from the nine-dash line to the 'four sha' claim. The more time it has to establish facts on the ground, the greater the sense of inevitability regarding its dominance in the South China Sea. Its strategy here mirrors that elsewhere, for example in its occupation of Indian territory in the Himalayas. China is good at *uti possidetis* statecraft (that is, the statecraft of effective possession). China is also very good at stepping up the escalation ladder, and also occasionally stepping down.

Affected middle powers in the region need to take unambiguous positions about the South China Sea, and Chinese activity there – and preferably should do so collectively. Instead, middle powers are reluctant to even name China explicitly. Such deference is not helpful. In particular there needs to be a more consistent set of legal stances, and these in turn should be consistent with UNCLOS. Other States making EEZ claims which contradict UNCLOS only strengthens the Chinese position.

The Quad needs to function in lockstep as a 'squad' with diplomatic de-escalation efforts, and to support ASEAN as the pre-eminent organisation on this issue. Instead the overall approach has been to tread too gently in response to Chinese activity.

² E.g. Martin Purbrick (2019) 'Patriotic Chinese Triads and Secret Societies: From the Imperial Dynasties, to Nationalism, and Communism', *Asian Affairs*, 50:3, 305-322.

Middle powers need to up their game in SCS and focus on how China is seeking global pre-eminence. The focus should be on Chinese maritime expansion, seen in the wider context of its ambitions for territorial expansion and its move into the Arctic. Instead, actual geopolitical concerns are kept in the background. Much policymaking in this space aims for 'feel-good' outcomes (e.g., confidence-building, notions of an 'inclusive quad' that includes China). Pursuing such issues distracts from the main one: Chinese strategic expansion.

Chinese strategic control of the South China Sea: maritime trade implications for Australia

We are now entering the second period in which Australia and its allies have experienced loss of uncontested dominance and control of the South China Sea. Western assumptions that the Chinese Communist Party (CCP) would permit further economic (and political) liberalisation have been erroneous. Indeed, it is possible that the trajectory of CCP at present is towards deeper totalitarian control. China's use of hybrid warfare in the Indo-Pacific has been effective for over 25 years and options for dispute settlement are limited in dealing with a totalitarian state.

There are important lessons in historical approaches to maritime strategic burden sharing. The British Empire responded to Japanese expansion in the South China Sea with its Singapore strategy. However, in 1930 British strategic assumptions about the South China Sea collapsed during the Manchurian crisis.

Chinese base-building in 2015 marked the collapse of our (western) strategic assumptions. The simple fact is we've lost control of the South China Sea. The focus now needs to be wider: including protecting the Indian Ocean. To borrow a phrase from the Australian Strategic Policy Institute, this is not necessarily a cold war; but it may be a 'hot peace'.

There are parallels between Imperial Japanese expansion and current Chinese expansion. Indeed, China requires similar level of expansion to Imperial Japan in order to achieve strategic objectives.

What are the risks and options for Australia? Forty percent of our export trade transits the South China Sea: including approximately one third of all exports, and half of all imports. Loss of access to the South China Sea would have severe impacts, including a 25-33% reduction in our living standards (similar to that experienced during the World Wars).

Any active conflict in the South China Sea would force ships onto longer routes, driving up freight rates. It would require a national war risk insurance scheme in order for Australia to survive economically. Securing Australian shipping would also require naval control and guidance of merchant shipping involving voluntarily reporting, re-routing to avoid the South China Sea, and potentially convoy - but all such options necessarily result in loss of carrying capacity (for example, a loss of 10-15% in the event of convoying shipping). Nonetheless, the likely losses to the Chinese merchant fleet in any conflict would likely leave enough vessels in service to continue the maritime trade in resources from Australia to other Asian coastal states. Indeed, in terms of conflict avoidance (or mitigation) Australia's substantial exports of primary resources to China should provide Australia with strategic leverage, at least over the mid-term.

Hot war, cold war and Australian sea supply

The Australian government is once again sending assets to the Strait of Hormuz as conflict is spilling over into the maritime domain. Piracy remains a threat to commercial shipping lanes, including

those on which Australia relies for key strategic resources. Added to this, some great powers like Russia and China are increasingly relying on hybrid warfare or grey zone operations, that fall somewhere on the scale between war and peace.

Australia's strategic thinkers are focussing on the latter. Discussions on the emerging strategic environment, on Chinese operations in the South China Sea, potential accommodation or operational responses, and the logistics required to support operations to our north have dominated the debate. However strategic assessment of critical trade and resources upon which Australia relies that flows through the area, or sea supply, has received less attention.

Australia's economic functioning relies on maritime trade and increasingly this represents a strategic vulnerability. Further, 99% of communications reaching Australia pass through undersea fibre optic cables. Less and less civilian shipping used by Australia is Australian-owned or managed. The UN Convention on the Law of the Sea doesn't address some of the maritime trade issues we're facing at present.

Australia responses to threats to maritime trade in the past have been mix of ad hoc responses and protection measures. In both world wars, shortage of merchant shipping or air and naval assets prevented Australia from protecting its own interests without Allied support. In any 'hot' conflict that encompasses South China Sea, middle powers will lose some of their sea supply and maritime trade, as major powers assume control of merchant shipping capacity and make decisions about which lines of supply to protect. The exception will be to the extent such middle powers are supplying a global priority commodity.

A new strategic spectrum of capabilities and types of operations has emerged. China has been using grey zone actors and hybrid warfare to project maritime power. The West has failed to respond effectively, drawing largely on experiences from the Cold War (which are not necessarily relevant).

Australia involvement in offensive operations related to maritime trade have been limited to cooperation with allies. In this space commercial actors are largely focussed on the provision and availability of war risk insurance. Australia last practiced larger-scale trade protection in 1990s, amid crises in Mid-East maritime areas. We need more native expertise in protection of maritime trade. At present we face a shortfall of operational experience and lack an appreciation of the strategic outlook.

Australia's strategic defence framework fails to capture spectrum of risks currently emerging. The 2016 Defence White Paper referred to 'unimpeded trade' that would be supported by the international shipping industry. But how durable is this order, especially with its reliance in practice on unaccountable 'flags of convenience'? Looking ahead, the maritime order in the South China Sea is more likely to be disrupted by great power conflict rather than asymmetric threats, and 60% of Australian import and export trade (combined) passes through South China Sea. US-China rivalry has the potential to create even more contested space in which Australia trade will have to operate.

We cannot take for granted the continuation of the existing rules-based order in the maritime space. Australia needs naval power to protect supply routes independent of the support of traditional allies such as the US. Australia needs to seek out new allies based on self-interest as well as historical or cultural ties. The US unlikely to have naval resources in the short-term to protect maritime trade or project military assets in South China Sea and it doesn't have the same immediate interests as Australia in the South China Sea.

A strategic reassessment is likely required. What, then, are the options and priorities? Australia could, if there is a dire strategic need, arm merchant vessels. This is cost and time efficient as force multiplier, but would need to be supported by efforts to promote the development of re-purposable merchant vessels and to counter likely cyber threats. Indeed, cyber blocking capabilities will need to be part of any 'hot conflict' port protection strategy. In such a scenario greater understanding of merchant vessel vulnerabilities and invulnerabilities needed. There may also be a role for marine autonomous vessels (MAVs) in trade protection. Australia must also consider provision of own national scheme of war risk insurance (other countries are already doing this). A further option for trade protection could be to license modern equivalent of privateers. The option of private armed escort vessels for merchant traffic has been explored in theatres such as the waters off Somalia, but thus far onboard privately contracted armed security personnel have usually been considered more cost-effective.

Regardless, there is a need to forward brief the Australia public to expect increase in defence spending.

Can environmental management provide a basis for cooperation in the South China Sea?

One option for constructive engagement and confidence building which is frequently discussed in relation to the South China Sea is environmental cooperation. How likely is this in practice?

At present, there is a constellation of national and local tourism companies operating in the Paracels and the expansion of Chinese tourism into the Spratlys is likely in future. Tour packages to the Paracels are inexpensive, and Woody Island is being promoted as the 'Chinese Maldives'. The Chinese government is promoting domestic tourism, so the trend is likely to continue. Further, tourists from 59 countries can enter Hainan (which administers China's claimed territory in the Paracels and Spratleys) without a visa. Such tourism assists China in creating facts on the ground and establishing 'actual use' as part of its justification for owning South China Sea islands. The implications are wide-reaching in socioeconomic and environmental terms.

Chinese island building activities clearly raise environmental concerns including the destruction of coral reefs, and the illegal poaching of giant clams. There has also been some domestic outcry within China regarding the poor environmental practices of some tourists to such fragile environments.

There is a need for China to work with other South East Asian coastal states on environmental cooperation and management. There is some precedent for environmental cooperation in South China Sea, including a multi-year UN Environment Program (UNEP) project in 2002-2009 involving scientific and technical exchanges. There has, however, been nothing comparable since. Long term environmental cooperation requires issues to be politicised effectively in order to engage and mobilise stakeholders. There are almost tautological reasons for inconsistent environmental cooperation in South China Sea: while scientific and technical cooperation is seen as de-escalatory, for such cooperation to occur present levels of tension must decrease. In an already tense environment, effective politicisation creates risks to the underlying rationale for having these projects in the first place.

Nonetheless, the UNEP South China Sea project in the early 2000s was successful: why? Initial interpretations of the project's success highlighted that states involved weren't afraid to politicise the issue. Subsequent analysis, however, showed that the project succeeded because of de-politicisation—separating science from politics. UNEP involvement as a neutral international actor

was also key. But since the 2016 arbitral tribunal ruling in *Philippines v China*, China has developed a strong mistrust of international organisations. Nonetheless, the UNEP experience suggests that scientific diplomacy can assist with dispute resolution. That said, UNEP limited itself to coastal areas within territorial jurisdiction and so was uncontroversial. But if such activities enter the South China Sea, they are more contentious and there is less prospect for cooperation. This is because, under UNCLOS, who gets to control the conduct of marine scientific research in an Exclusive Economic Zone is a question of sovereign rights. Further, asserting that an area is open to the exercise of the 'freedom of scientific research' would be to assert an area was part of the high seas beyond national jurisdiction, effectively denying a maritime EEZ claim in much the manner of a FONOP in respect of claimed territorial seas.

Marine resources in South China Sea being depleted at worrying rate, with impacts for China and other countries whose economies rely on marine resources for trade, food, etc. It is sometimes suggested that the Antarctic Treaty System might provide insights for future approaches to environmental cooperation. Since the 1980s, Australia has drawn in Chinese scientists to survey the Antarctic, including changes to ice caps. Those scientific relationships have persisted, resulting in industry and people-to-people links between both countries.

Cooperation on environmental issues in the South China Sea is possible: it's happened before. What is unclear whether it is scalable and sustainable under current conditions. Local developments and concerns about environmental degradation within China might also facilitate regional environmental protection efforts.

Discussion and analysis

Strategic outlook

A number of participants raised the role of India. Should India be considered a middle power or a 'reluctant great power'? Won't dynamics such as the Indo-Pacific, the Quad and India's economic potential of propel India into great power status? Given that, what implications for South China Sea with Modi remaining in power?

The phrase 'reluctant great power' was considered relevant. India's economic growth doesn't reflect economic disparities within India; and India has other domestic problems to address before projecting power globally. India has always been interested in the Russian Far East as source of energy supplies. India is thus more concerned over the potential for Chinese expansion into Far East and a new 'Great Game'. It is perhaps only a matter of time before Beijing dusts off its treaties with Russia and seeks renegotiation. Nonetheless, India currently depends on the South China Sea trade route for energy supplies.

Discussion turned also to historical parallels. Are we facing a collapse of the existing rules based international order comparable to that of the 1930s? If the US loses its current position as preeminent global power, there is no obvious successor. So today is different in many ways to the 1930s. Further, much of the rhetoric regarding international law at present ignores what it's been able to achieve in practice. While it cannot forcibly restrain the most powerful, it provides a benchmark for judging the behaviour of key actors and a framework for cooperation. Failures of international order and international law in the 1930s included failures to appreciate aggression, setting various actors up for a Thucydides trap. There is a greater ability now to track where countries are projecting power.

Nonetheless, we should be sensitive to the local historical context. British navy reports of the 1930s document serious proposals to lease the Spratly or Taiping islands as air bases. The strategic importance of Spratlys was recognised then. Further, we should recall the example of 1974 and Chinese activities in respect of the Paracels where it intervened when the US left, seeking to claim them before South Vietnam could do so. This shows that China not only plays the long game but will act decisively when and if needed.

The immediate context should also mitigate concerns about the risk of a 'hot conflict'. States such as Vietnam and Malaysia are unlikely to seek escalation while courting Chinese inbound investment. Nonetheless, pathways to broader cooperation must be found.

The prospects for environmental cooperation were revisited but the conclusions were pessimistic. China recognises fragile environmental status of South China Sea but continues with massive destruction of natural resources in the area. There is evidence of escalation in terms of extractive or destructive activities, reflecting a desire for territorial control. Scientific diplomacy can and has been co-opted by Chinese.

A central concern for Australia in South China Sea is freedom of navigation. China, however, has no more interest in conflict in South China Sea than any other power—it depends on South China Sea for maritime trade. Much of the Australian trade passing through the South China Sea is trade *with* China. Nonetheless, the bottom line implication is that Australia needs to be less economically dependent on China.

The role of law

Australian rhetoric on international law is ineffective because it lacks specificity. Rather than a generalised invocation of the 'rules based order' Australia (and Australian analysts) should be more precise about the legal regimes we're discussing. For example, the law of the sea is peacetime regime. It is not necessarily equipped to deal with a hot peace (let alone hot conflict). We need to be able to articulate the *specific* rules with which we expect China to comply, otherwise we risk simply portraying China as a lawless actor and painting it into a corner. Our approach should be to state our position clearly, then develop a coordinated strategy with allies and friends to demonstrate that China should comply.

Further, there needs to be push-back against certain Chinese narratives which are being pursued with unity of focus and as part of a longer game. These include the idea that 'UNCLOS is a product of the west' which excluded the participation of China and other South East Asian States. Obviously, States from the Group of 77 were instrumental in pursuing such objectives as the development in law of the exclusive economic zone and the archipelagic States regime. Another, is that all facets of the dispute can be resolved between China and ASEAN States and any tension is being created by interloping outsiders. We should emphasise that UNCLOS was, in many ways, a developing world construct; and reinforce that the negotiations were concluded under the chairmanship of Singapore. An important and often missing narrative is why does China, as a rising power, not have more sensitivity to its exercises of power upon or against developing countries?

The effort than China is putting into lawfare demonstrates that it cares very much about international law. Properly used, international law may provide a path to cooperation and increased mutual trust. Arguments based in international law, and UNCLOS, remain an important part of diplomacy. International law needs to be seen as a mechanism for cooperation and pursuing peace through law.

Workshop participants

The UNSW Canberra Maritime Security Research Group is grateful for the participation of the following academics in the workshop. This report, however, is the sole responsibility of the chair and nothing in it should be attributed to any individual.

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