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Viribus Mari Victoria? Power and Law in the South China Sea
Peter Dutton

What is the role of international law in managing the disputes in the South China Sea? This question is really two-fold. The first part is what role, objectively speaking, *can* law play to manage the disputes in the South China Sea. The second aspect of the question is what role, subjectively speaking, are the parties to the disputes *willing to allow* law to play in managing those same disputes? Additionally, it is important to observe that there are really three fundamentally different types of disputes in the South China Sea—sovereignty disputes, resource boundary disputes, and disputes over the degree of state control over offshore waters--and the objective and subjective roles of law are different for each.[i] In order to simplify the task of addressing these issues, I shall limit my remarks to the cases of China and the Philippines and primarily to the issue of the role of UNCLOS as an important source of stability amidst the complexities of the South China Sea disputes.

What role *can* law play?

The most significant strength of international law—especially international treaty law—is its ability to establish norms of expected behavior among the community of sovereign states. This normative power of international law should not be underestimated for its ability to drive and shape the behavior of states toward stabilizing, predictable behavior. Maritime disputes in particular have benefited from the normative power of the United Nations Convention on the Law of the Sea (UNCLOS). One important normative aspect of UNCLOS was its establishment of a limit of a fully sovereign territorial sea to 12-nautical miles and creation of a 200-nautical mile exclusive economic zone. Prior to international negotiation of a final text in 1982, international claims reflected a hodgepodge of approaches. Indeed, as late as 1990, prior to the date in 1996 when UNCLOS came into force, thirteen states still claimed a 200 nautical mile territorial sea. By 2008, the normative power of UNCLOS reduced this number to seven. As of today six of these remaining seven States are party to UNCLOS, which through Article 3 explicitly limits the territorial sea to 12-nautical miles. Thus, on a global basis the number of states remaining beyond the normative reach of UNCLOS and continuing to claim a 200-nautical mile, fully sovereign territorial sea appears in fact to be only one—Peru.

In East Asia, in many ways there is a similar pattern of close conformity to the norms established in UNCLOS. China and Vietnam represent two countries that have not yet fully adopted its norms. In Vietnam's case, its baselines remain grossly excessive. In China's case, it too maintains numerous excessive, non-normative baseline claims, an ambiguous claim of historic or other rights within the 9-dashed line that has no basis under UNCLOS, and it remains a leaders among a small group of coastal states with non-normative perspectives on foreign military activities in the exclusive economic zone. Recent public coverage of Chinese naval activities in the exclusive economic zones of Japan and the United States suggest that perhaps this is one more way in which Chinese perspectives on international law will join the normative tide. However, even with the remaining deficiencies, both China and Vietnam are party to UNCLOS, have fully incorporated many of its other provisions into their domestic laws, and take an active part in the organizations established by this convention to further develop international law of the sea.

At what point does the normative power of the law break down? Vietnam and China's partial normative conformity through which they have attempted to expand their coastal control appear to be based on the belief that some aspects of current international law do not serve their vital interests. For China, is this beginning to change as the Chinese sense of weakness diminishes? Chinese naval operations and intelligence gathering near Guam, Hawaii, and Japan suggest that this may be so. For Vietnam, will its tension with much larger China drive it toward full normative compliance in order to garner increased international support? Or will it continue to seek to protect its vital interests by remaining outside the norms? Either way, there appears to be a clear correlation between a state's adherence to international norms and its sense of its place in the relevant international power dynamics.

The Philippines is an excellent example of a country that made the decision to embrace full normative conformity with the provisions and requirements of UNCLOS as a way to enhance its power status in relation to its maritime claims. In doing so, the country used international law to enhance and expand its ability to protect and defend its vital national interests. Prior to 2008, the Philippines labored under a centuries-old colonial articulation of its maritime sovereignty that bore no resemblance to current international law, but which was enshrined in its constitution and was therefore very politically difficult to change. Nonetheless, by spring 2009, the Philippine government found the political will to bring every aspect of its domestic legislation into full conformity with UNCLOS, throwing off centuries-old, non-normative claims based on the vestiges of history. In doing so, since many of its maritime claims conflict with those of Vietnam and China, the Philippines is leading it stronger neighbors by example.

Thus, objectively, international law has the power to bring the behavior of all states into alignment, some more and some less, in ways that contribute greatly to global stability. And it has done so in East Asia through the mechanism of UNCLOS. Subjectively, however, states appear to continue to choose to deviate from legal norms when they perceive that those norms do not sufficiently protect their vital interests and when they have the power to shield themselves sufficiently from the consequences of non-compliance. Thus, *there is an inextricable link between power and law*. Very strong states have an incentive to conform to legal norms because the norms are largely of their own making and perpetuation of them serves their interests. Relatively weak states also have an incentive to conform to legal norms as a way of cooperating with the system and maximizing benefits from it. However, it appear to be the middling states and rising states that have much less incentive to be fully cooperative with the law. They can be expected to comply with the law where the law serves their vital interests and to use their power to deviate from the law where their vital interests will be better protected by doing so. Thus, law *can* play, that is, it is *available* to play, a substantial role in nudging countries into ever-greater conformity with international norms, but can only do so where states perceive that a vital interest will either be advanced or at least not hindered by compliance.

What role are regional states *willing to allow* law to play?

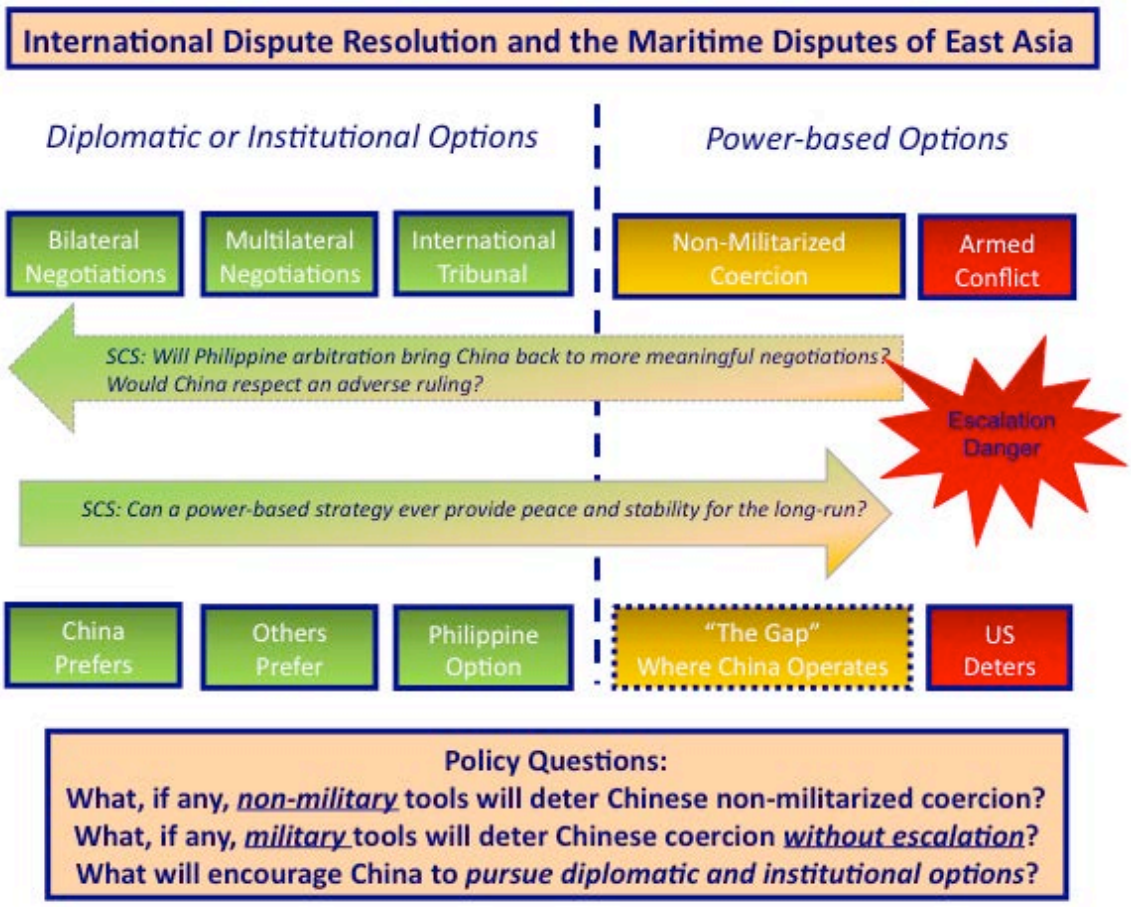
China.[ii] In the decades during which the Chinese government under the leadership of the Chinese Communist Party was developing its perspectives on international law, China was a middling

power with significant security concerns directed at the maritime domain and the areas of friction between it and the United States as the dominant global power. Not surprisingly, in an effort to reap the benefits of compliance, China accepted as much of the international law rules and norms as it could without compromising what it believed to be its vital interests. Similarly, as it emerged as a rising great power, China has also cooperated as much as possible without compromising its vital interests. Thus, as was noted above, in many ways China has acceded to the international legal framework for the maritime domain. But it has stopped short of full implementation of international law and norms that it believes favor the dominant global power while disadvantaging China's perceived vital interests on its maritime periphery. These interests relate to China's sovereignty disputes, resource boundary disputes, and security concerns and are seen in Beijing as vital interests related to Chinese security and the stability of the role of the Chinese Communist Party.

Prior to 1970, the CCP gave scant attention to its maritime interests, focusing instead on Mao's revolutionary agenda. Since awakening to its maritime interests in about 1970, China has consistently pursued peripheral maritime interests through power-based options, rather than through law. This can be attributed to the perception that its peripheral maritime interests were vital to its national security interests, that the developing framework of international law of the sea better served American and Soviet interests than it did China's. Although much weaker that either the United States or the Soviet Union, China had sufficient power to opt out of the dominant paradigm without undue costs. Thus, rather than using international law to pursue its claims, China has often pursued power-based approaches.

Specifically, during the period of 1970-1995, China primarily used military power to favorably enhance its maritime position—especially in the Paracels in 1974, Fiery Cross Reef in 1988, and at Mischief Reef in 1995. From approximately 1995 to 2008, China's "charm offensive" period, it used its rapidly growing economic and political power to attempt to create a favorable regional order within which it might readily realize its maritime interests. When this proved unsuccessful, beginning in about 2008 China shifted its approach to begin to apply a full range of political, economic, civilian maritime power, and indirect military power to achieve its aims. At no time in the last six decades can it be said that China's preferred approach to achieving its peripheral maritime aims has been through international law.

The below diagram lays out the framework of five basic approaches to international dispute resolution. The spectrum begins with three diplomatic or institutional options. The first of these is direct, *bilateral negotiations* between the disputing parties. The second is *multilateral negotiations*, either through an appropriate institution, such as ASEAN or the UN, or undertaken on an ad hoc basis among the various disputing parties. The third is to submit the dispute to arbitration or litigation through an appropriate *international legal institution*. The fourth and fifth approaches are power based—*non-militarized coercion* and *armed conflict*.



Of these five approaches, China's stated preference is bilateral negotiations to resolve the conflict, but these negotiations have gone nowhere over the past two decades because China demands more than its negotiating partners are willing to give up. China has participated in multilateral negotiations in the past—the period between 1995 and 2008 in particular—and this led to some successes, including the Declaration on the Conduct of Parties in the South China Sea. When ASEAN was unified against China, as it was in the aftermath of the 1995 Mischief Reef Incident, this pressure gave China incentive to work productively with ASEAN, but by 2008 the Chinese had concluded that only they were negotiating in good faith and that the other disputing parties were taking advantage of Chinese restraint to seize control of valuable hydrocarbon resources. The Chinese thereafter actively sought to divide ASEAN to forestall any meaningful collective pressure from that direction. Likewise, the Chinese have so far refused to submit to international arbitration or litigation because, although there is no doubt that the Chinese sincerely believe their claims are just and appropriate, they know that international law does not support many of their assertions, especially their more expansive claims—such as jurisdiction over the waters of the South China Sea based on the 9-dashed line. Finally, China has been deterred over the past few decades from using armed conflict to resolve the disputes—an approach it had used successfully in 1974 in the Paracel Islands and in 1988 at Fiery Cross Reef. Thus, since 2008 China's strategic emphasis has settled into the gap between armed conflict—from which it has been deterred—and institutional approaches, which it found

ineffective to advance its interests. In the gap between these strategies lies the power-based approach of non-militarized coercion.

A good example of how China employs non-militarized coercion to consolidate its near seas claims can be seen in the 2012 Scarborough Reef Incident, the interactions between the Chinese and Philippine vessels in recent weeks in the vicinity of Second Thomas Shoal, and in the on-going saga between China and Japan over the Senkaku/Diaoyu Islands in the East China Sea. These incidents demonstrate some of the key attributes of China's comprehensive coercive strategy for advancing its interests within the 9-dash line. First, and perhaps most obvious, is China's tremendous investment and *expansion of its various civilian maritime agencies*. As China's white-hulled capacity grew, so did China's now continuous presence in the disputed waters. These vessels outnumber even the collective capacity of other disputants and provide an intimidating presence and de facto control over much of the disputed water space.

The second attribute is *integration of the enormous civilian maritime capacity* China has developed over the past two decades in a new sort of people's war. China's fishing fleet reportedly receives financial incentives and logistical support to operate in the southern waters of the South China Sea and can help flood a hot spot in support of government action in a way that overwhelms the law enforcement capacity of China's rivals—especially in the South China Sea. Third, the Chinese also *leverage superior economic power* through targeted commercial engagement by state-owned enterprises, infrastructure projects, and official gifts, grants, and favorable loans. These can be extended or withheld to affect national policy—an example of which can be seen in the stoppage of rare earth shipments to Japan during the 2010 crisis and the cancellation of banana imports from the Philippines in 2012. Fourth, China has developed *domestic laws and institutions* to rationalize and manage the spaces it is increasingly controlling. These laws serve to organize and direct the efforts of China's considerable domestic agencies, but they also serve to raise the stakes for their opponents. As China incorporates more closely islands and waters in the South China Sea, it simultaneously deters action against it by treating these gains as new triggers for action in national self-defense.

Likewise, Beijing applies *public and psychological pressure* on its neighbors by stirring up Chinese nationalist fervor surrounding the disputes and also through media campaigns, such as its very well publicized deployment in early 2012 of a deep-water drilling capacity. Fifth, although its role remains indirect, the PLA still has an important component of this strategy. Just as they were during the Scarborough Reef Incident, PLA Navy vessels are never far from the site of any dispute and these *Chinese naval forces serve as a deterrent* reminder that China could manage any escalatory action its opponents might be tempted to try. This combination of economic leverage, civilian maritime power, and military deterrence power has enabled a Chinese strategy in which there are *little or no consequences for the employment of escalation*, short of militarized armed conflict.

Only one aspect of China's strategy can be said to involve international law. China uses the language of the law to justify its claims and its right to use power to pursue them. Regrettably, so far, China has chose not to formally conform its claims to relevant international law or to use international legal mechanisms to help resolve its maritime disputes with neighboring states.

Thus, current operationalization of China's strategy includes the use of power and even low-levels of force, but not international law or its institutional mechanisms.

The Philippines. For the past several years, China's coercive strategy for consolidating its hold over the islands and water space within the 9-dash line has left other claimants grappling to find effective ways to respond. On January 22, 2013, however, the Philippines shifted the nature of the dispute and shook up decades of stagnation in negotiations and discussions with China by initiating an international arbitration process under the United Nations Convention on the Law of the Sea (UNCLOS).[iii] The Philippines, as a relatively weaker state closely allied with the United States to protect its security interests, has, predictably, been much more supportive of international law and international legal mechanisms to try to resolve maritime disputes in its favor. As discussed above, this led the Philippine government to update its domestic law to bring its claims into conformity with international law.

So far, China continues to reject participation in the arbitral process initiated by the Philippines, even though arbitration will continue without them. The process, therefore, presents China with several challenges. First, China's continuing failure to reach a negotiated settlement with any of its neighbors has exposed China to the risk of international litigation of the issues. If the Philippines is successful, other states may well join in the process or initiate arbitration of their own. Thus, one impact of the arbitration is that Beijing has, at least temporarily, *lost the strategic initiative* it so painstakingly developed through the combined strategy of diplomatic stalling and non-militarized coercion at sea. Second, if the arbitration goes forward Beijing will be at a serious disadvantage because it is doubtful that several Chinese assertions about their South China Sea rights will survive the scrutiny of international law. Thus, another impact is that *Beijing could lose even the mere fig leaf of legal credibility* for some of its important maritime claims. Thus, a very important outcome of this case could be that China is faced with the embarrassment of the formal international rejection of its claims and a clear reinforcement of the rules and norms concerning rights and obligations at sea that UNCLOS establishes. How China would react to being so clearly set on the wrong side of widely accepted international norms remains to be seen.

Continued failure by China to participate in the process or, worse, a decision to ignore unfavorable results, would be a signal from Beijing that no amount of international disapproval will sway it. Thus, since there is a relation between power and international laws and norms, a third impact could be to encourage others in the region and beyond to enhance coercive capacity and *engage in accelerated balancing activities* in order to reinforce their claim strength and their overall security in the face of a more powerful China.

How do states change the calculus of interests to bring outsiders into the international circle of states perceiving that the rules and norms of international law should be followed? Certainly, military power, especially naval power, can be a powerful reinforcing mechanism for political efforts to bring others into compliance with international law in the maritime domain. Naval power can supplement political efforts to reinforce international rights at sea through such efforts as freedom of navigation operations. It can also signal support for compliant states and it can demonstrate resolve to protect the normative international legal order. In these ways, a dominant

state or a group of collectively strong states can use power to set limits on normative deviations from international law.

In turn, however, there are limits on the ability to use military power to drive normative acceptance. As discussed above, it is much more difficult to employ naval power to alter the calculus of middling and rising powers that perceive a threat to their vital national interests. With such states, others face a choice. Do they, like the Philippines, fully align with the dominant normative legal order to draw support for their maritime interests while protecting their national security under the umbrella of a military alliance? Having no real military power of their own, they run the risk that their opponent will use its surplus power to improve its situation, as China did to the Philippines at Mischief Reef in 1995 and at Scarborough Reef in 2012 and seems intent on doing at Second Thomas Shoal in 2013. Even when closely allied, dominant powers and small powers do not always perceive their interests as fully in alignment. Or, like Vietnam, do they accept the majority of the norms and reject those that might increase their vulnerability to their stronger disputing partner, while supplementing their national strength with a diverse set of international relationships and friendships? This seems to have shielded the Vietnamese from Chinese military pressure, at least since the Fiery Cross Reef Incident in 1988, but it has required the Vietnamese to exercise significant restraint in the face of Chinese coercive acts against Vietnamese survey and fishing vessels. In either case, by resisting the pressure of the rising and powerful opposing claimant, the danger of military escalation remains.

There is also a role for the application of collective political power by other states. Demonstrations of international approval for those states whose policies support and reinforce the norms and disapproval for the rising state's destabilizing policies that deviate from or undermine the norms can affect each state's calculus. The Philippine arbitration, for instance, is fundamentally a political act. Other states can and should express public support for the Philippine approach to dispute resolution. The combined power of supportive political will and use of international legal institutions may provide a strong gravitational pull in the direction of stability through normative compliance. One of the best outcomes in such cases is for this gravitational pull to result in more meaningful bilateral negotiations than were previously possible. Thus, perhaps the single biggest impact of the Philippine arbitration is that it *incentivizes China to re-open the avenue of bilateral negotiations* on terms that are more realistically acceptable to the Philippines. By extension the same may be true for the other states with which China has maritime disputes, especially if the international community openly is openly and publicly supportive of use of diplomatic and institutional measures and disapproving of power-based dispute resolution actions.

What Should Be the U.S. Role in Reinforcing International Law?

To date, the United States has carved out two roles for itself in supporting peaceful resolution of East Asian maritime disputes. First and most importantly, American alliances, security partnerships, and security guarantees, in combination with the maintenance of strong American military power resident in East Asia, have so far taken military conflict—the fifth approach discussed in the framework above--off the table as a method of dispute resolution. Since 1988, Beijing has not used military force to improve its position in the East and South China Seas.

Second, the US does use its persuasive power to reinforce international law norms and its diplomatic power to encourage the disputing parties to resolve their conflicts through peaceful means—that is, the first three approaches discussed in the framework above. The US has so far played a very limited role in affecting Beijing's calculations about the fourth framework option, that of pursuing a non-military coercive strategy. American tools in the region are almost entirely military, meant for prevention or winning of war. We have no similar regional "white hulls" and to use the US Navy to counter action by China's civilian law enforcement vessels would be escalatory. Nonetheless, there are ample measures the United States can take to support regional stability and to enhance compliance with the framework of international law that promotes national and regional security.

First, the US must maintain deterrent military power in East Asia. The single most important role for the United States in East Asia is to keep conflict as a means of dispute resolution off the table. If American deterrent power begins to erode, both schools would agree that should to be reversed with concrete, visible steps. No other measure will ensure that framework option five—armed conflict--remains off the dispute resolution table. This is the single biggest contribution America, and America alone, can make. If we do nothing else, we must focus on continuing to achieve this.

Second, allow regional states to expend scarce resources on counter-coercion capabilities. By focusing on military deterrence, the United States allows regional states to allocate more of their defense resources on developing coast guard and other non-military capabilities necessary to withstand Chinese coercive pressure at sea. Additionally, to the extent that others are able to play a supporting role, they should consider providing financial support to regional states having to deal with Chinese pressure for building white hull capacity to resist Chinese power. Potential such partners could include Australia, New Zealand, India, NATO, and the European Union, among others. These are logical partners inasmuch as they rely heavily on the stability of maritime trade routes through the East and South China Seas.

Third, leverage the gravitational power of international norms. The United States should continue to bring its diplomatic power to bear to persuade and encourage parties to pursue diplomatic or institutional measures. Continued American leadership in this regard may also give encouragement to other states inclined to voice similar expectations. American persuasive power would also be strengthened by a reassertion of the American leadership role over the development of international law of the sea. Since UNCLOS is the basis of modern international law of the sea, the U.S. should ratify the Convention in order to more effectively exercise, maintain, and perpetuate its leadership and to strengthen the normative framework that UNCLOS provides.

Fourth, remain neutral about sovereignty, but not about drawing boundaries at sea. The American policy of neutrality on the outcome of sovereignty disputes—that is disputes over the ownership of islands, rocks, and reefs--is a good one, as long as the dispute is resolved without the use of force. Our refusal to be drawn into conflict with a rising power over a piece of territory that is relatively trivial is an important aspect of regional and global stability. On the other hand, the United States has a strong interest in seeing the provisions of UNCLOS strengthened, since they provide the only near-universal framework that decreases resource and

security disputes in the maritime domain. As such, the American policy should be to consistently reinforce UNCLOS as the basis for resource boundaries in the South China Sea. The United States Department of State should issue a public, official statement that challenges any right for China to use the 9-dashed as a basis for maritime boundary making. China must not be allowed to use its view of history or its coercive power or any other basis to alter the existing rule set that has provided global stability in what otherwise might have been a very contentious domain. International law must be the only basis for all states to make resource claims in the South China Sea. The United States, indeed all countries, have a vital interest in the strength of the methods of UNCLOS for allocating coastal state rights to resource zones. Not history, not power, but international law must be the standard.

In the end, there may be nothing that can persuade China to abandon its power-based strategies for consolidating its control over the islands and other territorial features in the South China Sea. If so, China will have to pay the price for its policies and that price may be that they command sand bars but not friends. However, as this dynamic unfolds over the coming months, years, and perhaps decades, the role of international law in the South China Sea will be to serve as the steady counterweight to raw power. China may find that whatever incremental victories sea power provides, the Chinese people may ultimately lose more than they gain.

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[i] Peter A. Dutton, "Three Disputes and Three Objectives: China and the South China Sea," *Naval War College Review*, Autumn 2011, Vol. 64, No. 4.

[ii] Peter A. Dutton, Testimony before the U.S.-China Economic and Security Review Committee Hearing on China's Maritime Disputes in the East and South China Seas, April 4, 2013, available at www.uscc.gov.

[iii] Peter A. Dutton, "The Sino-Philippine Maritime Row: International Arbitration and the South China Sea," *East and South China Seas Bulletin #10*, Center for a New American Security, March 15, 2013.