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No Maritime Security Without Exclusive Economic Zones (EEZs)

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The South China Sea has suffered from a lack of maritime security for many decades, due mainly to rival sovereignty claims and military occupation of the Paracels and Spratlys, fishery disputes, oil exploration, and pressures from a nationalist public opinion. Diminishing fish stocks have led to more aggressive fishing both farther out at sea and near other countries’ coasts. Illegal fishing methods have been used. China has imposed fishing bans in disputed areas. Environmental risk has increased with the enormous growth in sea based transportation. Piracy has plagued some areas. For more than a hundred years, navies have sought to balance each others’ power projecting capacity in the area, and power has shifted between various naval powers. Blown up reports on enormous possible value of resources in the South China Sea have led to widespread popular misunderstandings. People often imagine that the South China Sea is full of islands when the truth is that it consists almost uniquely of water. While the area covered by the Paracels and the Spratlys most of their land features are just reefs, shoals and tiny islets that barely deserve to be called islands. In the 1920s there were reports that these islands had enough guano to produce fertilizer for all of China’s agricultural needs over many decades. Since the 1950s there have been huge expectations for oil reservoirs, based on the rich deposits off the coast of Brunei and East Malaysia. Much of this oil has now been taken out. There can be little doubt that it belonged to Brunei and Malaysia. No one knows if similar finds can be made in the unexplored parts of the South China Sea.

What would it take to ensure maritime security in this region? The normal answer is that the disputes over delimitation of maritime zones and sovereignty to islands are too complex to be resolved, at least in the foreseeable future. Any solution can therefore be only temporary, and must consist in three kinds of measures: naval balancing, establishment of a legally binding code-of-conduct to prevent aggressive behavior, and various kinds of joint development in disputes zones. The idea is that these measures may preserve status quo, while we wait for

1 Quote Ralph Emmers, Jacob Bercovitch and Sam Bateman.
mutual cooperation and understanding to emerge. Some commentators even add to this that borders are less important anyway in the post nationalist era.

My view is different. I think none of the three proposed measures will work unless the interested countries also take small, but steady steps in the direction of conflict resolution. And conflict resolution in this context means delimitation of maritime zones of national jurisdiction. I think it is fully possible to move in that direction with an aim to get an overall agreement at some point in the future – or a set of agreements. And I’m convinced that this movements towards conflict resolution must build closely on the provisions in the law of the sea. Rather than discouraging politicians and government officials from constantly seeking to move forward in implementing international law I think scholars should be creative in looking for opportunities. I see the delimitation of Exclusive Economic Zones (EEZs) and of any part of the continental shelf that might go beyond 200 nautical miles as the only realistic way to obtain lasting maritime security. And what I see as most urgent is that all the countries around the South China Sea make known their precise EEZ and continental shelf claims. The countries around the central part of the South China Sea (China, Vietnam, Malaysia, Brunei and the Philippines) have all signed and ratified the United Nations Convention on the Law of the Sea (LOS Convention). This obviously means that they are legally bound to implement it. China has taken exception from the provisions for international arbitration and adjudication, thus making clear that it will not let anyone else decide for it. It will implement international law on its own, and negotiate with bilaterally others when there are conflicting claims. This does not of course mean that China has exempted itself from the obligation to abide by the Convention. The parties to the Convention are fully obliged to implement it. Indeed those countries who have not ratified it are also bound by most of its provisions since these are already part of international customary law. A condition for the implementation of the Convention’s many provisions for maritime zone delimitation is that coastal states make known their precise EEZ and continental shelf claims.

Why does not naval balancing create maritime security?

In history there have been a series of shifts in maritime power, but neither balance nor hegemony have tended to remove sources of tension in the South China Sea. Navies have not necessarily shared the interest of turtle catchers, birds nest collectors, fishermen, fosfat producers and oil companies. Fishing and oil exploration are essential drivers behind the tension we have seen in the South China Sea. Navies, at least if they are strong enough, are also not so interested in the question that has been a fixation for explorers, politicians and foreign ministries for the last century or so, namely the possession of the tiny Spratlys, which on older maps were appropriately called “Dangerous Grounds.” What navies are interested in is mainly their own strength, operational capacity, and security. Thus port facilities, such as at Cam Ranh Bay,

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2 The only South China Sea countries who are not party to the Convention are Cambodia and Thailand.
Sanya, Changi or Subic Bay have been of great importance. I have looked at the role of the Spratlys and Paracels in 20th century naval history. While they have repeatedly been used for national posturing, they have never been considered to have much strategic value. They were disregarded by planners during World War 2, although they may have played a certain role in the preparations for the Japanese invasion of the Philippines. The US Navy probably used them for shooting exercises after it had taken back the Philippines. There was some talk about utilizing them to practice submarine cat and mouse plays during the Cold War. And then they have been used to collect intelligence, notably on weather conditions. But in the age of satellites even this is no longer of much importance. To establish a military presence on these islets means to make oneself militarily vulnerable, assume the cost of keeping up logistics and become what may properly be called a “sitting duck.” A determined adversary could destroy any installation in the Spratlys in no time at all.

For the navies of countries depending on trade the main concern is the so-called freedom of navigation, meaning the security of sea lanes. From a naval perspective this includes the freedom to conduct exercises and gather intelligence on the precise features of the seabed. Thus the great negotiating powers have made sure that seismic exploration of the kind that is prohibited for commercial purposes in another country’s EEZ does not violate the Law of the Sea if it is done for a military purpose. If Impeccable had been civilian, its activities would have been in obvious conflict with the law of the sea. Navies want of course to be free to undertake their activities as close as possible to the coasts of other countries, without having to ask anyone’s permission.

Historical shifts in strength among the various national navies, with some periods of condominium and some of hegemony have never brought maritime security. European navies rivalled each other in the colonial period, and to some extent protected the fishing and other interests of the colonized populations. The Taiwanese established a presence in the Paracels and Spratlys in the period when they could expect protection from the navy of Japan, and returned to the Spratlys soon after World War 2 under the flag of the Republic of China. Just like the British navy before it, the dominant US Navy has not been in the least interested in the Spratlys or the Paracels. From a sailor’s perspective, they are best avoided.

What does the Chinese Navy want? Most probably the same as other navies. Boost its capabilities, become sufficiently strong to project power as far out from the coast as possible. Convince China’s political leaders that it needs better budgets. It may promise to protect sea lanes, oil explorers and fishing interests. But has it benefitted from the construction of a kind of base on Mischief Reef, which is on the continental shelf of the Philippines? Does it want to take over the islets occupied by the Philippines, Malaysia and Vietnam? Not if it thinks rationally. For they would be a costly source of naval vulnerability, not strength.

The role of navies is ambiguous. On the one hand they thrive on insecurity because this boosts their budgets. On the other they need maritime security in order to be able to build strength. At any rate I see little evidence in naval history that naval balancing has produced maritime security. Navies hardly contribute to the kind of security needed to impose fishing bans or explore for oil and gas. If the Chinese navy should become all powerful in the South China Sea, it would still not be able to protect Chinese exploitation of oil in areas that the neighboring countries see as theirs. Oil operations considered as illegal would be subject to hostile reactions also from countries with inferior military strength. It would be difficult to obtain international loans the drilling for oil, and the protection costs would be huge. Secure exploration for oil and gas can only be made when the question of national jurisdiction has been resolved.

Why is a code-of-conduct unlikely to have any lasting effect?

Let me emphasize that ASEAN and China’s 2002 Declaration on the Conduct of Parties in the South China Sea did have a positive effect. It was not followed up by confidence building measures, but the signatories did show enough restraint to make the 2000s a much calmer decade in the South China Sea than the 1990s. As late as last year, Jacob Bercovitch and Mikio Oishi published a book on International Conflict in the Asia-Pacific where they claimed: “It seems, at least for the time being, that the dragon has been tamed effectively in the SCS. ... China has transformed itself into a good neighbour of the ASEAN states in managing disputes in the SCS.” And this was true. The Declaration itself and the process that led to it produced a better mutual understanding than previously, and it contributed to calming the waters for seven years. As of now, however, its restraining effect can no longer really be felt. Even earlier, there were quite a few incidents that should not have happened if the Declaration had been fully respected. But they were played down by the countries involved. They were managed without much acrimony. This is what has changed. It has been astounding to see the speed with which China could throw away the soft power it had managed to build in the region. As Ernest Bower said in his “Antidote” circular last week: “If it were not for the People’s Liberation Army (PLA) and the PLA-Navy (PLAN) - we should perhaps add the marine surveillance, fishery authorities and coastguard -, and their seeming desire to push China’s sovereign interests in Southeast Asia immediately, China’s pitch to its neighbors might be overwhelmingly compelling.” And let me add that since it is clearly in China’s national interest to be overwhelmingly compelling, its recent actions at sea have worked against any rational definition of China’s long term national interest.

Will it help to make a legally binding agreement? Yes, certainly. Again a process of confidence building will be needed, and if it succeeds it will create an atmosphere under which incidents

may again be managed diplomatically. A legally binding agreement will also raise the stakes, put more pressure on governments to prevent their nationals from undertaking aggressive action, and make it possible to go after violent perpetrators with demands for compensation. Yet I doubt that even a legally binding code-of-conduct will have lasting effect since it does not remove the drivers of conflict. When there is not enough fish on their own fishing banks, fishermen will try to fish elsewhere even at the risk of conflict with the patrol vessels of other countries. As long as national zones of jurisdiction have not been established, both the fishermen and the patrolling captains think they are in their right. Vietnamese media have recently got a new hero, a fisherman who had his boat and equipment confiscated by China three times, served time in a Chinese jail, and is now raising money to buy yet another boat.

As oil prices are soring, there will also be mounting pressures to undertake oil exploration, so were are likely to see more incidents of the kind we have seen lately, with the cable of a ship undertaking seismic exploration on behalf of Vietnam being cut by Chinese marine surveillance vessels.

Attempts to establish a legally binding code-of-conduct should in my view be combined with attempts to establish more favorable conditions for initiating a process of maritime delimitation. If a legally binding code of conduct is pursued not just to maintain status quo but to help the implementation of the law of the sea, then it could have a lasting effect. It would then be important to bring naval officers, fishermen’s organizations and oil executives in as active participants in the establishment of the code-of-conduct so they can build confidence and get a direct stake in the outcome.

**Why may joint development rather worsen than improve security?**

It is a good idea to develop joint scientific marine research, environmental protection, preparedness for search and rescue operations, and monitoring of fish stocks. Indeed this is an obligation for all parties to the LOS Convention, specified in article 123 on “semi-enclosed” seas. However, only under very special circumstances is it a good idea to establish joint exploration for oil and gas. These circumstances are not present in the South China Sea.

One kind of circumstance that may make joint development of oil and gas an acceptable solution is when two states have made a sustained diplomatic attempt to arrive at an agreement on maritime delimitation, but have failed to agree on a small part of the area it was meant to cover. This would be a clearly defined area where they know each other’s claims perfectly well. Then they may set up a bilateral or even trilateral development scheme, with detailed provisions for how to divide any revenue from the production of oil and gas. This is the kind of joint development that exists between Vietnam, Thailand and Malaysia.
A similar kind of circumstance existed in a bigger way between Indonesia and Australia in the so-called Timor Gap. And this was lucky indeed for Timor-Leste once it became an independent state. Because Indonesia was in the vanguard of maritime delimitation, it got a bad deal for itself with Australia. If Indonesia had waited, it could have benefitted from the trend towards the median line principle and got a more favorable agreement. This was obvious at the time when Indonesia and Australia negotiated about the area between Australia and East Timor. Thus Indonesia was unwilling to simply prolong the unfavorable border it had agreed to for the rest of its territory. For Australia it was difficult to accept a less favorable border with East Timor than with the rest of Indonesia. Hence the Timor Gap Treaty was established with a complex legal arrangement for revenue sharing in a zone that received its own judicial system, independent of any government. This is what Timor Leste inherited when it became independent.

China and Japan have also attempted to establish a joint development zone. It has not been successful. Too much is at stake, and the two countries have not been through a process of trying to negotiate maritime delimitation in good faith. China and Japan have discovered that negotiating a joint development scheme may be even more complicated than to agree on a border.

The worst kind of joint development scheme is the one that was initiated between China and the Philippines in 2004 and widened to become a trilateral agreement with Vietnam in the following year. It provided for joint seismic exploration in areas that are almost certainly part of the Philippines’ continental shelf. It is not surprising that once the Philippines realized the risks of this agreement, they backtracked, so it was allowed to lapse in 2008.

China’s fixation on joint development as the most promising way out of the South China Sea imbroglio goes back to a statement made by Deng Xiaoping in which he made the normal mistake of conflating the disputed islands in the South China Sea with what was going to be developed economically and thus proposed joint development for the islands. Since it is not the islands as such that may contain oil, but reservoirs under the seabed, this provided for the kind of mistake that remains so common today.

Joint development of oil and gas is likely to be a dead end in the South China Sea unless there are first serious negotiations leading to the establishment of enclaves around small islands or other small zones where the claims of two or more nations may have roughly equal chance of prevailing in a court of law. Then a joint development scheme may come as a handy second-best solution.

One risk if countries engage in an ill considered joint development scheme is that oil is actually found. This would immediately raise the stakes, and could make a dispute even more contentious. Another problem is that a joint development zone requires a rather complex legal agreement between the parties. Professor Gao Jianjun of China University of Political Sciences and Law in Beijing has looked at the failed attempts to agree on a Sino-Japanese joint
development zone in the East China Sea. He finds that: “...joint development is by no means an easier challenge to tackle than delimitation.” This concerns an area where there are just two claimants. In a semi-enclosed sea like the South China Sea, with its many surrounding states, it will be even more difficult to agree on which areas are legitimately disputed among whom bilaterally, trilaterally, or multilaterally, and how revenue should be divided in each case. Why should this be easier than to simply delimit the borders?

What does it take to move towards maritime delimitation?

I have been happy to discover that there is now considerable progress in the region in terms of applying the law of the sea. The joint Malaysian-Vietnamese submission of the calculation of the outer limit of their continental shelf set in motion a process of protests and replies to protests that has actually done much to clarify where the countries stand in terms of how to apply the law of the sea to the circumstances of the South China. If Vietnam and Malaysia had considered any of the Spratlys as capable of generating an EEZ and continental shelf of its own, then there would have been no need for them to submit a calculation of the outer limit of their continental shelf claim from their coast. The EEZ of the Spratlys would then have covered the area outside of the Vietnamese and Malaysian 200 nm EEZs. So the submission meant by implication that none of the Spratlys, of which Vietnam occupies more than any other state, can generate more than 12 nm territorial waters. Brunei has later expressed the same opinion, and the Philippines seems now to also move towards this opinion, although it adopted a new law as late as 2009 with a rather dubious claim to include a substantial part of the Spratlys, under the name Kalaya’an in a special “regime of islands” under Philippines jurisdiction. Hopefully, the Philippines will also submit its own estimation of the outer limit of its continental shelf. The result may therefore be that all of the ASEAN countries unite behind the position that those of the Spratly islets that are above water at high tide can constitute only small territorial water enclaves of a little over 24 nm diameter each. This will make it possible to shelve disputes over sovereignty to these enclaves while negotiating maritime delimitation of the waters and seabed around and between them.

The exchange of notes has also made it necessary for China to clarify its claims. Although China maintains its ambiguity, I interpret the Chinese protests to the United Nations Commission on the Continental Shelf to mean that China is on its way to recognizing that the only reasonable way to interpret the u-shaped line is as a claim to all islands within it. Then China has taken the opposite position of the ASEAN countries in that it thinks that at least some of the Spratlys and Paracels do have a right to an EEZ and continental shelf of their own. This could be bad news. China and ASEAN have adopted opposite viewpoints on a highly significant question. China’s insistence that some of the Spratls can have EEZs of their own could be an ominous sign that

5 Professor Gao rightly points out that joint development requires more sincerity or trust among the parties than delimitation. Gao Jianjun, “Joint Development in the East China Sea,” 39, 41, 75.
China intends at some point to take possession of these islands, which today are occupied by Vietnam, the Philippines, Malaysia, and Taiwan. China does not today occupy any of the Spratly Islands, although it has established its presence on some low tide elevations and reefs. Could the ASEAN countries turn this new situation into an advantage? Could Vietnam, the Philippines, Brunei and Malaysia, since they now all agree that the Spratlys cannot have more than 12 nm territorial waters, simply agree on creating small territorial enclaves around these islands, shelve their disputes to them, and then get on with delimiting their maritime zones in the southern part of the South China Sea. They could negotiate on the basis of an expectation that China would also at some point agree that the Spratlys are too small to have an EEZ or continental shelf of their own, or they could ask the Court in Hamburg to decide this matter. As far as I understand the practice when it comes to recognizing small features as islands with a right to an EEZ varies quite a lot, so there is room for interpretation.

When there is room for interpretation, it could matter that the only equitable division of the resources in the South China Sea among the surrounding countries would be one where China gets most of the northern half while Vietnam, Malaysia, Brunei and Philippines divide the southern half between them. This would be the result if the Spratlys are seen as too small to have an EEZ or continental shelf while the Paracels are considered to be big enough, and to belong to China. If the four ASEAN countries could agree on maritime delimitation among themselves, then Vietnam and the Philippines could approach China afterwards with a favorable offer (such as recognition of the Paracels as being under Chinese sovereignty, and of Macclesfield Bank as belonging to the Chinese continental shelf). Both Vietnam and the Philippines might also offer to give concessions to Chinese oil companies on their continental shelf, with revenues sharing of revenues. All of this in return for China’s acceptance of the agreements made between the ASEAN countries for the southern part of the South China Sea.

The content of the most realistic bargain to come out of the South China Sea disputes in the end is relatively easy to see. China must yield to the ASEAN view that none of the Spratlys can generate an EEZ and continental shelf of their own. Hence the southern part of the South China Sea will be subject to maritime delimitation among Malaysia, Brunei, the Philippines and Vietnam. In return Vietnam must yield its sovereignty claim to the Paracels and probably also accept that some of the Paracel Islands can have a right to an EEZ and continental shelf.

I hear the objections: “No Chinese leader can ever agree to giving up Nansha (the Spratlys) and expect to remain in power!” “No Vietnamese leader can ever give up Hoang Sa (the Paracels), and keep his office.” Well, I’m not sure about that. Good leadership sometimes consists in making the necessary concessions to get a good bargain. What I’ve just described would be a good bargain for Vietnam. It would get recognition of its right to the resources of a huge continental shelf in the western part of the South China Sea, where there may be good prospects of finding oil. And it would never get back any part of the Paracels anyway. China also has much to win from an agreement that ensures good relations with its neighbors, and which would allow its oil companies to take part in the exploration of oil not just on the Chinese continental shelf.
but on that of the neighboring states as well. The Tonkin Gulf treaty has already established a precedent for allowing the Chinese to develop resources on a temporary basis (in that case fish) also on the Vietnamese side of the border.

It is in China’s national interest to make an agreement allowing oil exploration to take place. What is most important for China is the oil itself, not the ownership to it or the revenue from its production. China has money, but would like to enhance its energy security by getting oil from fields in its vicinity.

It is in China’s national interest to reassure its neighbors so they see less need for protection from outside powers.

Let us hope that China’s next leaders will see more clearly and act more rationally than China has done in the last two years.