

CONFLICT IN THE SOUTH CHINA SEA

May 6-7, 2016, Yale University

ABSTRACTS

PANEL 1

“A History of Histories: China’s Claim in the South China Sea as Discourse”

Chris P.C. Chung (University of Toronto, Ontario, Canada)

I will discuss my research findings on the historical formation, usage, and meanings of China’s U-Shaped line claim in the South China Sea dispute. However, I will broadly and theoretically frame the discussion in terms of discourse. The islands dispute in China is fundamentally such an issue. China’s government and large segments of its populace wholeheartedly believe the islands are intrinsic territory. Yet, this historical narrative itself has a rich discursive history. This needs to be examined in order to fully grasp the substantial role it plays in China’s nationalism, political self-identity, and definitions of political interests and priorities.

As I will highlight, these characterizations of history and identity are multiple, dynamic, and simultaneously inform and contest each other, even as various actors construe them as “inherent” or having existed “since time immemorial.” Changing conceptions of geography, history, sovereignty, and borders; the many interpretations of the U-shaped line; the evolution of maritime international law; how various segments of Chinese society manipulate existing historical narratives beyond original intentions to create new ones that affect state actions and rhetoric — these and more problematize any monolithicized and static characterization of how China views the islands.

My coverage of the history of the U-shaped line in particular draws on ROC national archival files that remain virtually unused by scholars on the dispute. I argue that the line served as an “islands attribution” boundary until at least 1974. It claimed only the islands, features, and any adjacent waters consistent with

contemporary conceptions of international maritime law. Since 1974, the PRC has maintained official ambiguity as to what specific waters and rights it claims within the U-shaped line.

“Maps, Myths and the Making of China’s Maritime Geobody”

Bill Hayton (Asia Programme, Chatham House)

This paper argues that China’s ‘historic claim’ to the South China Sea only emerged after 1933 in response to the annexation by France of several of the Spratly Islands. Developing the work of Robert Culp and William Callahan, it will situate the claim within efforts by Chinese intellectual and state elites to construct a national ‘geobody’ in the first decades of the 20th Century. The French annexation prompted an angry, though contradictory, response among Chinese state officials, journalists and educationalists. This coincided with the first formal effort by the Republic of China to define the country’s territory through its ‘Land and Water Maps Inspection Committee.’ This effort was not a process of documenting a pre-existing and self-evident claim but of imagining, constructing and asserting it through the mobilization of archive documents. The legacy of this claim-making shapes the geopolitics of the South China Sea today.

“Evidence for Vietnamese Sovereignty over Hoang Sa (Paracels) and Truong Sa (Spratlys): An Evaluation of Historical Documents and Ancient Maps from China and the West”

Tran Duc Anh Son (Visiting Fellow, Yale University; Danang Institute for Socio-Economic Development)

During recent visits to the United States (July 2015), the United Kingdom (October 2015), and Singapore (November 2015), Xi Jinping, President of the People’s Republic of China, announced that “China has had a long history of sovereignty over the South China Sea [called the Eastern Sea, or Bien Dong, by Vietnam] and its archipelagoes.” However, his delegation was unable to provide any historical or legal evidence to support this claim. In this paper, I show that many historical documents and ancient maps, including those issued by China, neighboring countries, and by Western travelers in the region, completely undermine China’s claims to sovereignty over the Eastern Sea and its archipelagoes. In this review, I present evidence from a broad range of different Western historical and legal documents and maps published around the 16th-19th centuries, as well as Chinese maps published around the 19th- 20th centuries. The evidence in these sources verifies and affirms that the Hoang Sa (Paracels) and Truong Sa (Spratlys) have always been exploited by the Vietnamese, have been considered part of Vietnam, and that Vietnam has exercised its sovereignty in the area. Based on the historical evidence presented in these documents and ancient maps, I assert that Mr. Xi Jinping’s claims about China’s sovereignty over the East Sea and its archipelagoes are unfounded, and can be clearly refuted by the historical record.

“Power Politics In Asia’s Most Troubled Water: The Disputes In The South China Sea (SCS) And A Helpful Lesson From Europe’s Past”

Enrico Fels (University of Bonn, Germany)

Despite its impressive development, a wealthier and militarily more powerful China has not automatically turned the regional tides in its favour. While an aggregated power analysis shows (via a novel composite index on aggregated power (CIAP)) that the distribution of relevant material (and immaterial) capabilities in Asia-Pacific has certainly changed in favour of Beijing since the end of the Cold War, the Chinese leadership has largely failed to win the allegiance of regional middle powers – an important indicator for China’s lack of regional relational power.

In contrast, the United States – despite having lost most of its relative lead in aggregated power since 1992 particularly vis-à-vis China – has successfully improved its regional stance thanks to Beijing’s assertiveness in the SCS and the People’s Republic’s weak relational power.

Washington has managed to keep the allegiance of multiple regional middle powers, allowing it to remain the region’s leading actor and putting it into a position to actively promote a liberal regional order for binding a rising China. Amidst these power dynamics, the disputes in the SCS present a telling example not only for the continuing reign of realist power politics, but also outline one of China’s core strategic dilemmas: rising means, but a continuing shortage of relevant partners for advancing own aims.

Still, Asia-Pacific’s shifting aggregated power structure and Washington’s effective regional policies do not provide a way out of the region’s looming Thucydides Trap nor make them up for the lack of a viable regional security community. Instead, the SCS disputes have developed into a political powder keg, with current international law appearing to be (so far) unable to tackle Chinese great power politics and the dynamics they trigger in the SCS (might vs. right). By drawing on the historic example of the Spitsbergen Treaty, the paper outlines a possible conflict management solution to the SCS disputes based on a largely neglected part of Europe’s diplomatic history. The paper argues that applying the ‘Spitsbergen Approach’ to the SCS would allow claimant and non-claimant states to defuse the tense situation, limit the likelihood of a ‘Chinese Monroe Doctrine’ for the SCS and instead start a joint and less conflict-ridden usage of Asia’s most troubled water and its great riches.

PANEL 2

“Why China Wants the South China Sea for Itself Alone”

General **Daniel Schaeffer** (Asia think-tank 21, France)

As everybody knows, since 1947 the Chinese ambitions in the SCS are based on the 9/10 dashed line which roughly encompasses 80% of that sea, including waters, archipelagos and all other kinds of features scattered all over that water body. According to different Chinese documents such as the two verbal notes addressed on the 7th of May 2009 to the UN General Secretary, such as the vertical map published on the 26th of June 2014 through which China intends to feature its national territory and its borders, it appears more and more clear that this huge marine area, called the “buffalo tongue” by the South - East Asian riparian states, is considered by China as a territorial sea. Therefore China, in order to exert its full power over it, arbitrarily applies to this area the rules applying to territorial seas as normally determined according to the UNCLOS rules, UNCLOS to which China is a full signatory. Hence, contrarily to what a lot of different observers are spreading all over the world, the main reasons of the Chinese claims are not based on the existence of hydrocarbons in the subsoil, neither on that of the sea living resources, nor for the safety and the security of the international navigation. If all these factors enter into account in the disputes between China and the bordering states they however do not constitute the main reasons of these disputes. These are only stakes.

The main reason is strategic. Because the utmost problem for China, which feels not only contained but threatened by the United states, is to be able to have its noisy Jin-class SSBNs securely exit their Sanya home-port with two operational possibilities: diving in the depths of the South China Sea; or escape this semi-enclosed sea through the Bashi strait in order to enter the Pacific ocean, and farther come as close as possible of western CONUS coast and put the biggest towns at firing range of the Julang 2 nuclear missiles. This is the only valid reason for which China wants to empty the South China Sea of any foreign navy: escape the foreign tracking of its boats.

“South China Sea: The Strategic Implications of China’s Artificial Islands”

Carlyle A. Thayer (University of New South Wales, Australia)

Analysts have identified four main drivers behind China’s policy of constructing artificial islands in the South China Sea: nationalism, fisheries, hydrocarbons and geo-strategic imperatives. This paper argues that geo-strategic imperatives are the most important. China seeks to counter the Obama Administration’s policy of rebalancing towards the Asia-Pacific by developing sufficient military power to dominate the first island chain running south from Japan, Okinawa, Taiwan, and the Philippines. China seeks to dominate the South China Sea to protect its sea lines of communications and to secure its southern flank against intervention by the U.S. Navy and Air

Force. China's artificial islands in the Spratly archipelago will serve as forward operating bases for Chinese fisheries and hydrocarbon industries as well as maritime law enforcement agencies. More importantly, the infrastructure on these artificial islands will support a growing military presence in the future. China is engaging in "new colonialism" by constructing upwards from submerged reefs in order to assert control of the adjacent waters and resources. In contrast, in old colonialism stated occupied land territory to exert control over the population and natural resources. China is poised to take "decisive and provocative" action, reportedly at Scarborough Shoal in response to the finding of the Permanent Court of Arbitration's Arbitral Tribunal.

This paper argues that present U.S. Freedom of Navigation Operational Patrols are unlikely to dissuade China from exerting control over the South China Sea. In summary, China is slowly and deliberately excising the maritime heart out of Southeast Asia and by gradually militarizing its artificial islands it will alter altering the regional naval balance of power in coming decades.

"Vietnam's Geopolitical Position and Crisis Resolution in the South China Sea"

Ngo Vinh Long (Maine University)

Because of its geopolitical position Vietnam has perhaps been most vulnerable to China's activities not only in the South China Sea but also in many other areas. This talk will summarize some of these areas to show how Vietnam has been squeezed by China like a tube of toothpaste and why, as a result, Vietnamese authorities have been quite circumspect in their reactions to China's ever increasing assertive behaviors in the South China Sea.

However, this paper will argue that precisely because of Vietnam's proximities to China—and particularly because of the fact that it has the longest coast line along the South China Sea as well as extensive claims (historical and territorial) in the Paracels and the Spratlys—Vietnam could perhaps play proactive and constructive roles in promoting peaceful resolutions to the current crisis. To this end, the paper will forward a number of suggestions for discussion at the conference as well as for consideration by policy makers in Vietnam and elsewhere.

"The Geopolitical Quandaries in the South China Sea: Implications for the Philippines, China and the US"

Aileen S.P. Baviera (University of the Philippines)

Chinese assertiveness and US rebalance are both driven by geopolitical interests: U.S. military preponderance vs. China's demand for strategic space; access to and control over trade and energy supply routes; and the desire for influence over the shaping of regional order and security architecture. The Philippines, on the other hand, seeks access to resources, security against external threat, and a rules-based order to guarantee both.

All three parties now face quandaries in the management of relations and how to promote their respective interests. The United States needs to defend its primacy with less resources at hand. It has to balance between sustaining the credibility of its system of alliances and at the same time avoid unwanted entanglements. Moreover, China is not just an emerging peer competitor but on certain important issues a valued partner as well. China has its own quandaries. It is clearly a dissatisfied power but one that is not ready, capability-wise, to confront the US. The Xi Jinping government's ambitious vision – the “China dream” will have to be attained amidst economic slowdown as well as rising distrust of China's intentions among its immediate neighbors. Currently, China's neighborhood policy, particularly with reference to the South China Sea, is full of contradictions. On the other hand, the Philippines is caught in a bind on whether to be guided by principlism or pragmatism in its approach towards China's more muscular behavior in the South China Sea. It has to rely on a military alliance with the US, whose credibility is doubted in key policy circles. The Philippines has staked its claim to marine resources at apparent great political cost, knowing full well that the solutions may be beyond reach without making even more compromises. For the Philippines, the brewing rivalry between major powers threatens to overlay its other goals and concerns, raising questions about whether its core interests will ultimately be served.

“Shamefare’: A New United States Strategy for the South China Sea”

Harry Kazianis (National Security Policy, Potomac Foundation)

Washington, along with its allies and partners in the South China Sea region--and indeed, all of the Indo-Pacific area--face a rising China seemingly determined to change the status quo in its favor. America and like-minded nations throughout the region must devise a non-kinetic, asymmetric approach to deter Chinese actions and ensure that if Beijing continues on with aggressively altering the status quo it will pay a very high cost for its actions.

PANEL 3

“Post-Arbitration Implication In The South China Sea: The Role Of UNCLOS”

Nong Hong (Institute for China-America Studies)

This presentation starts by providing a legal analysis of China's territorial and maritime claims in the South China Sea based on general international law, including the 1982 United Nations Convention on the Law of the Sea. It also explores China's approach to international law and state practice of international dispute settlement, which lays down a foundation for the further analysis on why China takes the approach of no participation and no acceptance of the South

China Sea Arbitration case. This presentation carefully articulates why China has its legal rationale to question on the jurisdiction and admissibility of the arbitration tribunal. The post-arbitration implication in the South China Sea, politically, strategically and legally, will also be discussed in this presentation.

“A Roadmap for a Rules-Based Order in the South China Sea”

Patrick Cronin (Asia-Pacific Security Policy, Potomac Foundation)

The presentation will describe some of the critical sources of instability and uncertainty that are leading to heightened tensions in the South China Sea. It will discuss the impact of the current arbitration case on the overall stability of the region and interstate relations. It will look ahead to impending challenges to order in the South China Sea. It will then discuss the basic legal and diplomatic approaches necessary for establishing a shared, inclusive, rules-based regional order. It will focus on the policy of the United States and the responsibilities of other regional powers in ensuring a stable and prosperous order. It will look at the value of creating a transparency regime as well as the need to foster support for international law and regional norms.

“Vietnam’s Lawfare For Claiming Territorial Sovereignty And Maritime Rights In The South China Sea”

Tai Van Ta (Harvard Law School, Harvard University)

Even the Military in Vietnam sought legal advice.

I. Identification of Vietnam’s Interest in Territorial Sovereignty Rights and Maritime Rights.

A. Vietnam’s interests in territorial sovereignty rights on many (not all) land features in the Paracels and Spratleys are solidly based on the customary/traditional classical rule of international law of the last 4 centuries on acquisition of sovereignty over land, as applied to clear historical facts. Our arguments that the 1958 diplomatic note of Prime Minister Pham Van Dong did not cede those land features to China were used by the Vietnam Mission at the United Nations. There were continuing assertions of territorial sovereignty through the periods of the two Vietnams and the Socialist Republic of Vietnam; no prescription of rights.

B. Vietnam’s sovereign rights (or entitlements) in the maritime zones of the Exclusive Economic Zone and Continental Shelf: fishery, seabed resources, environmental and navigation (this, in cooperation with other nations, for freedom of navigation), under the rules of the UN Convention of the Law of the Sea.

II. Actual and Potential Violations or Threats to Vietnam’s Rights and Legal-Institutional Methods of Mechanisms for Defending those Rights and Dispute Settlement.

A. China's actual and potential violations of, or threats to Vietnam and other countries' territorial and maritime rights: seizure by force of land features in Paracels in 1956, 1974 and Spratleys in 1988; the U-shaped line; the placing of the oil rig in Vietnam's continental shelf in 2014 (then withdrawal) and again in 2016; the build-up of artificial islands from submerged rocks the attempted militarization, in Spratleys (China has no right of self-defense here, under UN Charter).

B. Vietnam's responses, together with other nations'; diplomatic protests; negotiation-, bilateral and multilateral; joint ventures (?); litigation, difficult but advisable in situations that are ripe for cause of action: Vietnam could have a good law case during the oil rig crisis of 2014 or can use the same counts for the potential lawsuits in future attempts by China; The ICJ and the UNCLOS tribunals; support for freedom of navigation operations of the US and other countries; United Nations forum: report to the Security Council, the General Assembly and the Secretary General.

"China's Maritime Militia and International Maritime Law"

James Kraska (U.S. Naval War College)

China operates a massive network of fishing vessels and commercial trawlers that operate in conjunction with its law enforcement to change the status quo in the South China Sea. This asymmetric approach avoids overt militarization of the disputes, while rendering a decisive operational advantage to China. China's maritime militia conduct operations that are inconsistent with the peacetime international law of the sea, including flag state duties under the 1982 United Nations Convention on the Law of the Sea and the International Regulations for Preventing Collisions at Sea 1972. The militia are also poised to serve as an irregular naval force multiplier during armed conflict, which circumvents the law of naval warfare and erases the longstanding distinction between warships and civilian vessels. China's maritime militia poses political, operational and legal challenges to its neighbors, and this presentation focuses on how the militia is an effective element of Chinese "lawfare."

"Dispute Settlement in the South China Sea: from joint FONOPs to joint proceedings?"

Jeremy Lagelee (Georgetown University Law Center)

This paper explores the opportunities for South China Sea claimants to utilize procedural rules to bring claims or participate in related arbitration(s) beyond a bilateral framework. The claims brought by the Philippines to a PCA administered arbitration panel highlight some of the opportunities and shortcomings of state-to-state dispute resolution under UNCLOS Annex VII. Notes Verbales and amicus curiae briefs by non-disputing parties illustrate the potential for participation by other SCS claimants. The current consensus building effort by the U.S. is resulting in an increasing level of cooperation and joint military operations. This multi-party

approach could equally translate to the field of dispute settlement. Strategic litigation and innovative strategies may provide a more successful avenue of addressing competing claims and enticing the PRC to participate in dispute resolution proceedings. For example, investor-state arbitration could provide an avenue to step up the pressure on relevant stakeholders. Building on the upcoming PCA decision in *The Republic of Philippines v. The People's Republic of China* case, increasing the number of claims and parties to such disputes could provide impetus for renewed negotiations. The paper will first explore the potential for arbitration as a means of resolving the SCS disputes in light of the PCA arbitration and concurrent stalemate in establishing a binding Code of Conduct. It will then set out procedural rules available to parties in order to bring the disputes from a bilateral to a multi-party framework. The paper will finally argue that the shift from joint military action to joint legal action is a logical and viable step in ensuring the peaceful settlement of disputes in the SCS.