Delhi Policy Group

Advancing India's Rise as a Leading Power

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US Raises Stakes in the South China Sea

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Cover Photographs:

US Secretary of State Mike Pompeo speaking at the State Department in Washington, D.C., July 15, 2020. Source: Flickr/ US Department of State

The Permanent Court of Arbitration announcing its award in the South China Sea Arbitration case of The Republic of the Philippines vs. The People's Republic of China on July 12, 2016. Source: Permanent Court of Arbitration

The Nimitz Carrier Strike Force comprising the USS Nimitz and USS Ronald Reagan Carrier Strike Groups conducting dual carrier operations in the South China Sea in July, 2020. Source: CNN

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US Raises Stakes in the South China Sea

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Pompeo Re-defines US Policy on the SCS

The statement[1] by Secretary of State Michael Pompeo on July 13, 2020 re-defining the US position on the South China Sea (SCS) has significantly changed the regional outlook on this vital waterway, which has increasingly been regarded by China as its "blue water territory" based on obscure notions of historic rights which have no basis in international law.

For the first time, the US has dwelt not only on the importance of its Freedom of Navigation (FON) rights in the global commons or territorial waters as defined by UNCLOS, which is widely accepted as the Constitution of the Seas, but has also voiced support for regional nations in the face of China's relentless onslaught to arrogate to itself both the resources and the territorial expanse of the SCS.

US Secretary of State Mike Pompeo speaking at the State Department in Washington, D.C., July 15, 2020. Source: Flickr/ US Department of State

[1] https://www.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/

Formally discarding the hitherto neutral posture and underlying concerns about antagonising China that have circumscribed US policy, Pompeo affirmed: "Beijing's claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them"[2]. Identifying US objectives in the SCS as preserving peace and stability, upholding the freedom of the seas in a manner consistent with international law, maintaining the unimpeded flow of commerce and opposing any attempt to use coercion or force to settle disputes, Pompeo further stated that these widely shared interests have come under an unprecedented threat from the People's Republic of China (PRC), which has used intimidation to undermine the sovereign rights of SCS coastal states, bully them out of offshore resources, assert unilateral dominion and replace international law with a "might is right" approach.

The Permanent Court of Arbitration announcing its award in the South China Sea Arbitration case of The Republic of the Philippines vs. The People's Republic of China on July 12, 2016. Source: Permanent Court of Arbitration

Pompeo's statement also observes that China has produced no coherent legal basis for its nine-dash line claim in the SCS, which was rejected by the award of the Permanent Court of Arbitration (PCA) on July 12, 2016. It firmly aligns the US position with the PCA award and rejects the PRC's claims arising from reefs and features lying within the Philippines' EEZ and Continental Shelf, as also the

[2] Ibid

features/EEZ the PRC disputes with Vietnam, Brunei, Malaysia and Indonesia. It affirms that the US stands with its South East Asian allies and partners in protecting their sovereign rights to offshore resources, and with the international community in defence of the freedom of the seas and respect for sovereignty.

This authoritative articulation of US policy is the strongest indicator yet of US support to several South East Asian nations which have until now been browbeaten by China's coercive power, and appears designed to revive[3] their faith in the US as a reliable resident power and provider of regional security, stability and order. In doing so, the US has also plugged a gaping hole in its Indo-Pacific strategy which remains a work in progress.

China's Riposte

Not surprisingly, the Chinese Embassy in Washington D.C. retorted the very next day[4], accusing the US of disregarding the efforts of China and the ASEAN countries to maintain peace and stability in the SCS, deliberately distorting the facts and international law including UNCLOS, and attempting to sow discord between China and other littoral nations. The Chinese riposte asserts that while firmly safeguarding its territorial sovereignty, maritime rights and interests, China is committed to resolving disputes in consultation with the countries directly involved, managing differences through "rules and mechanisms", and achieving "win-win" results through mutually beneficial cooperation. It points out that the situation in the SCS had remained peaceful and stable and that the countries concerned have maintained dialogue and made visible progress towards conclusion of a binding Code of Conduct (COC) in the SCS. It also observes that the US is not directly involved with the SCS disputes and is citing UNCLOS without itself ratifying the convention. It concludes by advising the US to honour its commitment of not taking sides on the issue of territorial sovereignty and respecting regional efforts to maintain a peaceful and stable SCS.

US Strategic Messaging

The two statements highlight the differing narratives of the US and China regarding the state of play in the SCS. These differences broadly relate to China's "territorial sovereignty and maritime rights and interests"; maintaining

[3] Confidence in the US as a provider of regional security had sunk to dismal levels, as seen from the ISEAS – Yusof Izhak Institute's "The State of South East Asia Survey Report 2020", published January 16, 2020.

[4] http://www.china-embassy.org/eng/zmgxss/t1797515.htm

regional peace and stability through dialogue, "rules and mechanisms"; resort to fait accompli situations, coercion and force to achieve unilateral objectives; and observance of the rule of international law, including UNCLOS.

Through protracted, non-transparent negotiations on a COC with the ten ASEAN nations, China has sought to gain the upper hand by undermining ASEAN cohesion, excluding international stakeholders, and holding out the promise of some access by littoral states to SCS resources if they submit to the primacy of China's power and interests.

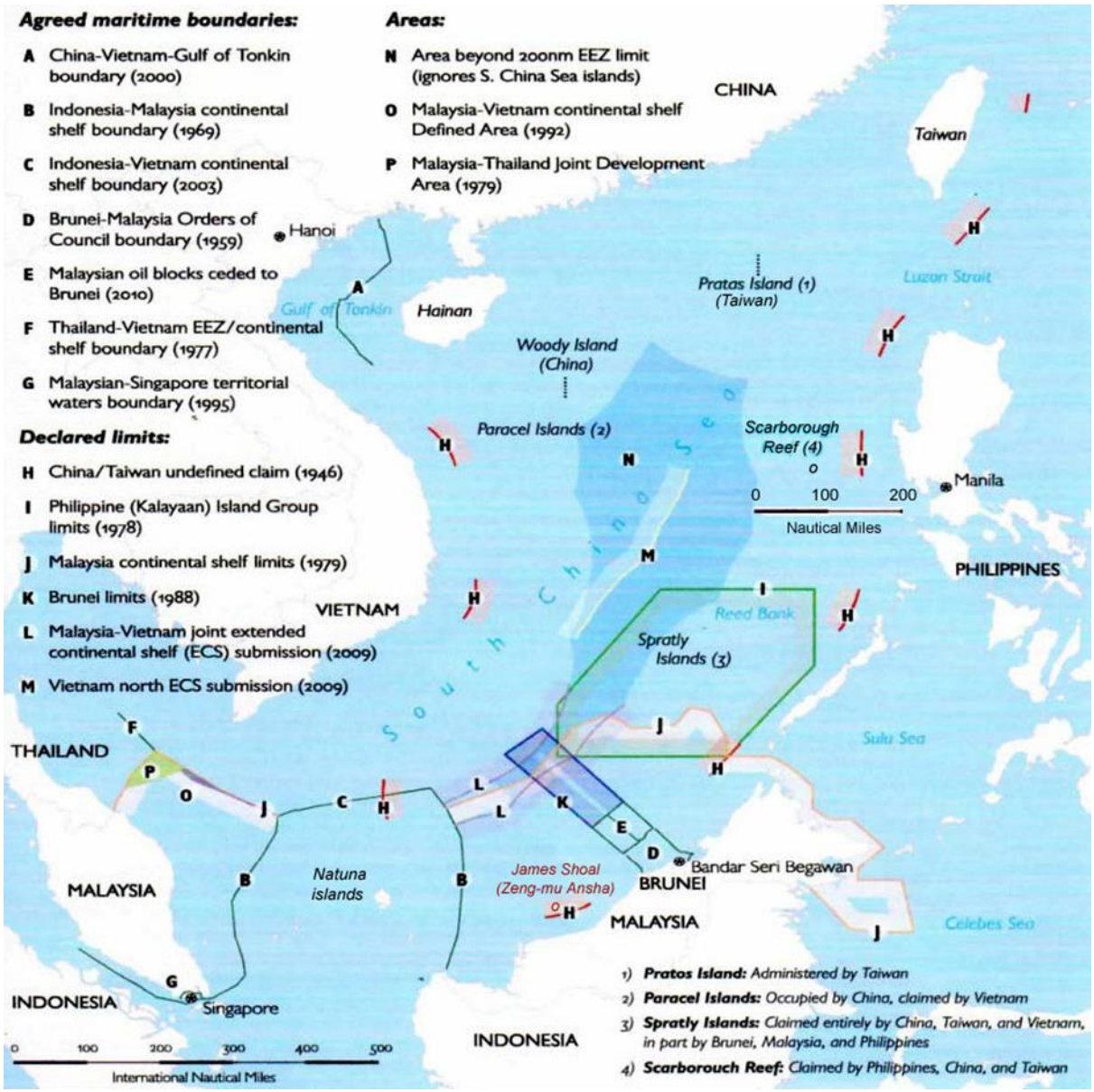
The strategic message which the US statement on the SCS projects has direct implications for the sovereign interests of littoral nations, but also reverberates against China's territorial assertions and bullying across the broader Indo-Pacific maritime. Coming as it does immediately after a show of force and extensive naval exercises conducted in the SCS by two US Navy aircraft carrier strike groups[5], the US statement sends a clear signal of deterrent intent to China and regional states alike.

The Nimitz Carrier Strike Force comprising the USS Nimitz and USS Ronald Reagan Carrier Strike Groups conducting dual carrier operations in the South China Sea in July, 2020. Source: CNN

[5] Time Magazine, July 07, 2020, https://time.com/5863590/aircraft-carriers-ronald-reagan-nimitz-south-china-sea/

China's Claims and the Provisions of UNCLOS

Sovereignty, including over expanses of blue water and their resources, is an important component of national interest. Chinese scholars began including the SCS as a "core interest" of China from around 2010[6]. The key issue is whether this sovereignty is accepted or contested, and if the latter, whether the dispute is settled in accordance with international law, or by coercive threats and use of force. But before proceeding further, it is necessary to understand the nature of the SCS dispute itself and the legal position governing it.



South China Sea claims and agreements. Source: US Department of Defense

[6] Edward Wong, "Security Law Suggests a Broadening of Core Interests", New York Times, July 2, 2015, https://www.nytimes.com/2015/07/03/world/asia/security-law-suggests-a-broadening-of-chinas-core-interests.html

The "historical" origin of the nine-dash line, defining China's expansive claims in the SCS, dates back to 1948[7], when it first appeared on a Chinese map. China was then under the control of the Kuomintang Nationalist government. The map originally featured 11 dashes, two of which (in the Gulf of Tonkin) were removed in 1953, by when mainland China had come under Communist rule. China has consistently failed to spell out the exact nature of its claims within the nine-dash line, leaving scope for ambiguity and shifting goalposts.

On May 7, 2009, the PRC sent separate Notes Verbale[8] to the UN Secretary-General in response to Malaysia and Vietnam's joint submission the preceding day to the Commission on the Limits of the Continental Shelf. These stated that China had "indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. The above position is consistently held by the Chinese government, and is widely known by the international community". They prompted immediate objections from Vietnam and Malaysia, and subsequent rebuttals from Indonesia and the Philippines as well.

The objection from the Philippines eventually led to its filing of proceedings with the Permanent Court of Arbitration at The Hague in 2013. China refused to take part. In its award dated July 12, 2016, the PCA unanimously adjudicated[9]:

- The provisions of Article 9 of Annex VII to UNCLOS provide that "Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law". The Tribunal had determined that it had jurisdiction; that the claim was well founded; and had accordingly continued with the proceedings.

- The 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea, the Treaty of Amity and Cooperation in Southeast Asia and other treaties and joint statements did not preclude recourse to compulsory dispute settlement procedures under Section 2 of Part XV of UNCLOS.

[7] Contents of this section are sourced from the award by the PCA on July 12, 2016, https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf

[8] Ibid

[9] Ibid

- China effectively had no rights to an EEZ arising from the claimed islands, reefs and low tide elevations (for a detailed list of these features, see the PCA award[10]).

- China had breached its obligations under Articles 56, 58 (3), 123, 192, 194 (1), 194 (5), 197, 206, 279, 296 and 300 of UNCLOS (and thus acted in contravention of international law).

Article 11 of Annex VII to UNCLOS[11] further provides: "The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to the appellate procedure. It shall be complied with by the parties to the dispute". China reacted predictably by describing the PCA award as a "piece of trash paper" and refused to comply with it.

China's perceived territorial rights and maritime interests, as also its claim to living and non-living resources in the SCS, are thus not compatible with international law, including UNCLOS, but are based exclusively on its own perceptions, unilateral assertions and manufactured history.

China's claims to resources in the SCS have led to an absurd situation in which an energy-starved Philippines is left with no choice but to buy from China gas extracted from its own EEZ by China; coercive pressure is brought to bear on Vietnam and Malaysia to prevent them from exploring hydrocarbon resources in their lawful maritime zones; and littoral nations are prevented from exploiting fishery resources in their EEZs. Meanwhile, China not only arrogates to itself these resources citing historical rights, but also imposes its domestic law in international waters.

The obvious implication is that China believes it is bound only by its own domestic law, which it can change at will. It does not accept the jurisdiction of international dispute resolution mechanisms it has expressly committed to honour by ratifying UNCLOS. Its bilateral and multilateral agreements and treaties are only the means to an end and can be repudiated at will.

This outlook is also apparent in the ongoing Chinese military incursions along the Line of Actual Control with India in Ladakh, where China has wilfully breached the provisions of the Border Peace and Tranquillity Agreement of 1993 and several subsequent border management agreements with India, endangering regional peace and stability.

[10] Ibid

[11] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, P 190

The challenge to regional peace and stability in the SCS thus arises primarily from China's expansive and unilateral claims and their imposition in contravention of international law. China's actions impact other claimants and stakeholders under two different provisions of UNCLOS. While aspects related to national jurisdiction, freedom of navigation and international users of the seas are contained in Parts II and VII, those pertaining to resource rights of littoral states in the SCS are contained in Parts V and VI. China's aggressive and coercive focus has been mainly in the areas covered by Parts V and VI, where its asymmetric military and economic power enable it to escalate issues far beyond the ability of other regional states to respond. It is in this precise context that the then Chinese Foreign Minister Yang Jiechi made his infamous statement at the 17th ASEAN Regional Forum held in Hanoi on July 23, 2010: "China is a big country and you are small countries, and that is just a fact"[12].

Since the legal position was unambiguously determined by the PCA to be against China, it provided considerable leverage to ASEAN claimants to moderate China's assertions. However, they remained hesitant and divided, with the Philippines in particular showing insufficient purpose and resolve to uphold its own sovereign interests. This state of inaction and reticence on the part of ASEAN has allowed China to take continued recourse to salami-slicing expansion and intimidation to attain its ends in extending administrative control over much of the SCS, backed by military power.

Over the past decade, growing economic dependence on China and its carefully crafted influence operations have largely over-ridden concerns in ASEAN about Chinese domination, effectively turning "ASEAN centrality" into China's centrality in controlling regional affairs. Short term economic and connectivity gains from the BRI apart, in the longer term China's much touted "win-win cooperation" is actually a "no-win" prospect for ASEAN nations, as the benefits ultimately come at the price of their sovereignty.

Code of Conduct Negotiations

Dialogue to maintain peace and stability through "rules and mechanisms" between China and ASEAN on the SCS began with the December 16, 1997 Joint Statement[13] of the Meeting of the Heads of State/Government of ASEAN and the President of the PRC, in which the parties undertook to resolve their

[12] Ian Storey, "China's Missteps in South East Asia: Less Charm, More Offensive", December 17. 2010, https://jamestown.org/program/chinas-missteps-in-southeast-asia-less-charm-more-offensive/

[13] https://asean.org/?static_post=joint-statement-of-the-meeting-of-heads-of-stategovernment-of-the-member-states-of-asean-and-the-president-of-the-people-s-republic-of-china-kuala-lumpur-malaysia-16-december-1997

disputes in the South China Sea in accordance with international law including UNCLOS, without the use of force. The need for mutually agreed rules and mechanisms to govern national action eventually resulted in the Declaration on the Conduct of Parties in the South China Sea[14] (DOC) of 2002, committing regional states to "refrain from inhabiting presently uninhabited islands" and "ensuring just and human treatment of all persons who are in danger or in distress".

China's subsequent actions in converting submerged features into islands, militarising these features and islands, unilateral enforcement of its domestic law in the South China Sea, imposing a fishing ban from May-August each year, and deliberate sinking of fishing vessels of other countries indicate just how ineffective the DOC has actually been.

The search for a more "binding" Code of Conduct (COC) continues, with China seeking incorporation of provisions that would give it de facto veto power over South East Asian nations on conducting military exercises with extra-regional powers (thereby depriving them of the ability to externally balance against China's coercion) as well as over the involvement of extra-regional nations in prospecting for hydrocarbon resources in the South China Sea.

China has thus pursued its well-recognised strategy of interminable negotiation and expansive demands to prevent the conclusion of a meaningful COC, except on terms dictated by it. Besides, it is now also evident that China accepts being bound by its international commitments only so long as it suits China, and that these commitments are routinely dishonoured, with accompanying resort to propaganda and "law-fare" to hide transgressions.

Non-ratification of UNCLOS by the US

Finger pointing against the US for not being a party to the SCS disputes and for not having ratified UNCLOS, a treaty the US played a leading role in negotiating and drafting, is also part of China's deliberate obfuscation. We hold no brief for the US's non-ratification of UNCLOS. However, to set the record straight, US inability to ratify UNCLOS despite repeated attempts by successive administrations stems primarily from the Senate's objections to Part XI of UNCLOS, which deals with seabed mining. Ratification was first blocked by Senator Jesse Helms, the Chair of the Senate Foreign Relations Committee

[14] https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2

from 1993-2003, by refusing to place it on the Committee's hearings calendar[15]. Subsequently, presidential candidate Joseph Biden, in his capacity as the Chair of the Committee, led the charge for ratification in 2007, but failed to secure the requisite two-thirds majority[16]. Ironically, the US itself stands to lose substantially from not ratifying the treaty, as it cannot file claims to an extended continental shelf in the fast warming Arctic.

Senate Foreign Relations Committee Chair Joe Biden, January 10, 2007.
Source: Vox/ Getty Images

Although the US has not ratified UNCLOS, successive administrations have remained committed to following all its provisions except those relating to Part XI. China, which has ratified the convention, routinely flouts its treaty obligations in their territorial jurisdiction, resource exploitation and freedom of navigation dimensions.

Conclusion

Pompeo's forceful articulation of US policy on China's unrelenting power play in the SCS, giving equal weight to its own FON rights as well as the territorial and resource rights of littoral countries, provides a much needed shot in the

[15] https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1049&context=law_globalstudies

[16] Ibid

arm for ASEAN nations long intimidated by China's asymmetric power advantage. It also comes at an opportune time.

At the 36th ASEAN Summit chaired by Vietnam on June 26, 2020, ASEAN unequivocally affirmed that "UNCLOS is the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests" in the South China Sea[17]. The reference to the ASEAN Outlook in the Indo-Pacific (AOIP) in the Chair's statement indicates the regional grouping's desire to reclaim some strategic space and reaffirm its relevance in shaping the regional order. There are also indications that ASEAN-China talks on a China-dictated COC have slowed.

ASEAN Leaders at the 36th ASEAN Virtual Summit on June 26, 2020.
Source: ASEAN

Indonesia has recently written to the UN to say that it is China's nine-dash line in the South China Sea that is a scrap of paper, not the 2016 award of the PCA; it has rejected[18] Beijing's offer of bilateral talks over Indonesia's sovereign rights in Natuna Besar, signalling its preference for ASEAN-led negotiations.

Malaysia and Vietnam have disregarded China's objections in filing their claims to an extended continental shelf in the SCS, resisting strong Chinese

[17] https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf

[18] https://www.benarnews.org/english/news/indonesian/no-negotiation-06052020155450.html

pressure. Vietnam has instructed its fishermen to disregard the seasonal Chinese ban on fishing in international waters. Philippines has held in abeyance its earlier decision to pull out of the Visiting Forces Agreement with the US. Singapore, heavily dependent on China for its economic prosperity, is balancing calls for accommodating China's rise with appeals to the US to maintain the freedom of the maritime commons in the SCS.

Coming on the heels of the US Permanent Representative at the UN formally rejecting China's assertion of its South China Sea resource claims, Secretary Pompeo's statement signals a more robust US posture in the region, better aligned with the US's still under-resourced Indo-Pacific strategy. Regional nations, from Japan to India to Australia, are also stepping up their strategic partnerships and defence agreements. The Quad remains an active forum for security coordination and an issue-based Quad Plus arrangement is emerging.

A pushback against China's playbook of deception, coercion and aggression is slowly taking shape in the Indo-Pacific. With the evolving trend towards a more balanced, national capacity based and people-centric globalisation, there is growing regional recognition that an expansionist and predatory authoritarian power cannot be trusted to helm a so-called "shared community of common future of mankind".

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