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# Policy Options for Australia to Support Stabilisation and Resolution of Maritime Disputes in the South China Sea

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## Abstract

This paper examines the various policy options that Australia could pursue to reduce tensions and work towards stabilisation and ultimate resolution of the ongoing disputes in the South China Sea. It argues that the South China Sea is a region of considerable importance to Australia's national interests, and that Australia's future wellbeing is clearly interlinked to resolving the disputes, or at least reducing tension to ensure longstanding stability.

The paper notes that because Australia lacks a direct stake in the disputes—and that China is particularly sensitive to any outside interference—any Australian policy needs to be carefully evaluated with regard to whether it could gain traction with China. It concludes that Australian policy must include proactive and honest engagement with all claimant nations, even where that is resented, and that Australia—while retaining a degree of independence from US policy—needs to strongly support the dispute resolution mechanisms of international law, as well as the rules relating to freedom of navigation.

# Policy Options for Australia to Support Stabilisation and Resolution of Maritime Disputes in the South China Sea

## Introduction

The South China Sea, despite being some 2500 kilometres northwest of Australia, plays a significant role in Australia's national interests. As a maritime trading nation, 90 per cent of Australia's merchandise trade moves by sea, of which approximately two-thirds transits the South China Sea. Nine of Australia's top ten trading partners are in the Indo-Pacific region, making the area the 'centre of gravity of Australia's economic and strategic interests'.<sup>1</sup> This importance is clearly articulated by the Australian Government, which considers that the security of the region is best served by a rules-based global order.<sup>2</sup>

The South China Sea contains a major sea line of communication (SLOC) through Southeast Asia, and is where six nations have overlapping and competing sovereignty claims on numerous islands, reefs and rocks, and the territorial seas and economic zones that are associated with the land features. Unfortunately, the South China Sea is an area beset by tension between those nations, and also between China and the US over strategic maritime issues. The risk of breakdown of order and subsequent conflict is assessed by several strategic commentators to be high.<sup>3</sup> Given the deep Australian interests in the region, there is concern regarding the impact of heightened instability or a regional conflict on Australian maritime trade to the region and, subsequently, on Australia's economic prosperity.

Despite its close interest in ensuring continued peace and stability in the South China Sea, Australia has been extremely careful in its policies and official government discourse towards the disputes and the nations involved. This is due to Australian Government recognition that it has no direct stake in the South China Sea, and reticence to offend China, which regularly criticises nations—including Australia—which comment on the disputes without having a direct stake in the sovereignty issues. Some scholars believe that this is a highly risk-averse and timid approach that does not serve the broader cause well.<sup>4</sup>

A recent relatively-innocuous statement by Australian Prime Minister Malcolm Turnbull that China's actions in the disputed sea had 'pushed the envelope' and had been counterproductive to its own interests produced an official—and standard—Chinese response, advising Australia to 'stay committed to not taking sides on issues concerning disputes over sovereignty'.<sup>5</sup> However, Australian policy may be turning. Defence Secretary Dennis Richardson has openly stated that Chinese land reclamation policy for military purposes would be of concern.<sup>6</sup> The ongoing Chinese land reclamation policy in the Spratly Islands has caused Australian officials to reconsider policy options in response to continuing Chinese assertiveness.<sup>7</sup> The challenge for Australia is to determine what course of policy action would produce the best outcome in reducing regional tensions within the South China Sea and working towards resolution of the disputes.

This paper will analyse various policy options that Australia could pursue to reduce tensions and work towards stabilisation and ultimate resolution of the South China Sea disputes. Lacking a direct stake in the disputes—and noting China's objection to such interference—any Australian policy needs to be carefully evaluated with regard to whether it could gain traction with China in order to achieve a beneficial outcome. After analysing these options, the paper will recommend a set of policies that Australia could realistically adopt, noting that there is an inherent assumption that Australia should not disengage from the issue but instead adopt proactive policies, reflective of its belief in a global rules-based order.

The paper will consider what approach might best encourage a legal resolution of the disputes, and also a range of confidence-building measures that could be implemented to improve relationships and reduce tensions. A number of these have been proposed previously and either failed or not proceeded, so will be analysed to consider what Australia can value-add in reinvigorating such proposals. Joint development and shared resource options will be analysed

to determine how Australia might successfully advocate for the competing nations to defuse tensions through this mechanism. Finally, the paper will consider whether Australia should more closely align its South China Sea policies with the US, or take a divergent approach.

## Part 1: Overview of the South China Sea disputes

The South China Sea extends from the shores of Taiwan and China in the north, laps the coastlines of The Philippines, Brunei and (East) Malaysia to the east, Indonesia to the south, and abuts Malaysia and Vietnam to the west. Within its approximately three million square kilometre expanse are a number of groups of land features, which range in size and classification from islands to barely-visible outcrops of rocks and reefs, and also submerged banks and shoals. These features include the Pratas, Paracel, Spratly and Natuna Islands, Scarborough Shoal and Macclesfield Bank.<sup>8</sup> Central to the dispute is China's expansive claim to most of the South China Sea, commonly referred to as its 'nine-dashed line' claim (the boundaries of which are indicated by the red dash line at Figure 1).



**Figure 1: Map of the South China Sea, showing the various exclusive economic zone boundaries and overlapping claims<sup>9</sup>**

China's claim is contentious for reasons that will be discussed shortly. In essence, its claim is based on 'historical discovery' and control of the area dating back several centuries. This is disputed by several Southeast Asian countries bordering the South China Sea, which claim some

of the same land features and sea territory as either sovereign territory or as part of their exclusive economic zone (EEZ) under contemporary international law and the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>10</sup> Taiwan makes the same claim as China, a position rejected by China as it considers Taiwan to be one of its provinces, rather than an independent country. The overlapping claims, sometimes with multiple claimants, are the basis of the present-day disputes, with China, Taiwan, The Philippines, Vietnam, Malaysia and Brunei the protagonists.

## The basis of the claims

Economic and geostrategic advantages are significant factors driving China's interest in asserting sovereignty over features in the South China Sea, with recognition by senior Chinese officials that 'whoever controls the Spratlys will reap huge economic and military benefits'.<sup>11</sup> Commentators identify three other core factors in China's claim: the perceived theft of China's resources by foreign nations; a perceived conspiracy against China by the US; and a desire by Beijing to be seen to be standing up to foreign challenges.<sup>12</sup>

At the heart of the dispute is a clash between China and other nations over the validity of historical claims versus contemporary international law, which requires continuous effective administration of an area to underpin sovereignty. China claims sovereignty based on historical grounds, arguing that Chinese explorers reached as far as the Spratly Islands between 206 BCE and 220 AD, and claimed the area for China.<sup>13</sup>

In 1980, China provided what it contended was historical and cultural evidence of control of the area dating from the Song dynasty (10<sup>th</sup> to 13<sup>th</sup> century).<sup>14</sup> It has also argued that official Chinese maps published in 1914, which included the claimed maritime boundaries, were the basis for an official map published by the nationalist Republic of China Government in 1947, which included an 'eleven-dashed line' maritime area claim.<sup>15</sup> Following the communist Chinese victory in the civil war, Premier Zhou Enlai in 1951 publicly asserted sovereignty by the People's Republic of China over the South China Sea islands.<sup>16</sup>

China argues that since it has administered the islands continuously throughout history, and that because its imperial sovereignty predates Western international law principles (and particularly the 1982 UNCLOS), it should be recognised as the valid *ab initio* claimant, that is valid 'from the beginning'.<sup>17</sup> When China ratified UNCLOS in 1996, it would normally have been compelled to surrender historical maritime claims for those congruent with the convention. However, Chinese caveats on its ratification made clear that China was not surrendering its historical claim, reinforcing China's view that its claim pre-dates the provisions of UNCLOS.<sup>18</sup>

However, there are several ambiguities and concerns with the Chinese position. First, Chinese maps over the years have depicted the dashed lines inconsistently, with some geographical differences between the versions. Second, the fact that the lines are discontinuous and have no coordinates provides for substantial ambiguity as to the exact delineation of the claim. Third, and particularly in the view of the US, China has incorrectly applied UNCLOS provisions relating to archipelagic baselines and historic bays, an anomaly compounded by China's rejection of the validity of UNCLOS in relation to its broader claim.<sup>19</sup>

Additionally, many of the land features in the South China Sea are submerged at high tide, and any claims to maritime zones based on such features—even if structures have subsequently been built on them—are invalid in terms of UNCLOS. China has never attempted to distinguish between features as 'islands' or 'rocks', the latter of which cannot claim a continental shelf or EEZ under UNCLOS definitions and provisions.<sup>20</sup> Finally, there is no basis under UNCLOS or contemporary international law to claim a vast ocean space, such as encompassed by China's nine-dashed line claim.<sup>21</sup>

Vietnam's contradictory claims create the greatest overlap with China's claims and, since the two countries have twice fought battles over the disputed islands, theirs is a significant rivalry.<sup>22</sup> In 1947, both the colonial power, France, and the predecessor of the Vietnamese government, the Viet Minh, protested the veracity of the 1947 Republic of China's claim of sovereignty over the

South China Sea islands.<sup>23</sup> After the Vietnam War, the government of a unified Vietnam claimed sovereignty over the entire Paracel and Spratly Island groups on an historical basis different to that argued by China.<sup>24</sup>

Vietnam argues that its own dynasties administered the Paracel Islands from the early 17<sup>th</sup> century.<sup>25</sup> Numerous Vietnamese geographical and resource survey records show ongoing official Vietnamese interaction with the Spratly Islands, supporting Vietnam's contention that it has exercised continuous sovereignty over several centuries.<sup>26</sup> Also, in the 1920s, the colonial power France stationed troops on both sets of islands, effectively on behalf of Vietnam.

Vietnam dismisses China's historical claims as relying on unofficial sources and including vague or incomplete references to names and locations that in combination do not demonstrate continuous and effective control over the Paracel and Spratly Islands.<sup>27</sup> Yuwa Wei provides some support for this view, admitting 'an era of relaxation in control of these offshore territories occurred between the sixteenth century and middle of the nineteenth century'.<sup>28</sup> However, the Chinese Government rejects the Vietnamese position, and argues that Vietnam previously acknowledged Chinese sovereignty over the areas through official public statements in 1956 and 1958.<sup>29</sup>

The Philippines' claim to sovereignty of the Spratly Islands only began in 1956, based on what was originally a private claim of discovery. Its position was strengthened by the passage of domestic laws defining the country's archipelagic baseline in line with the provisions of UNCLOS. Primarily, The Philippines claims those features that exist within its 200 nautical mile EEZ and continental shelf.<sup>30</sup>

Malaysia claims features in the southern Spratly Islands, based on the continental shelf off Sabah and Sarawak in East Malaysia. Brunei claims just two submerged Spratly Islands' features, a reef and a bank, based on extending its EEZ into the southern portion of the South China Sea.<sup>31</sup> However, some have argued that the respective claims of Malaysia and Brunei, which are based on extending their continental shelf beyond the standard EEZ, are not justifiable within the provisions of UNCLOS.<sup>32</sup>

## Dispute over resources

At its most basic level, the dispute in the South China Sea is about competition for resources. The primary focus is on energy resources, with surveys in 1969 and the 1970s indicating considerable reserves of oil and natural gas in the area. The oil shocks of 1973-74, coinciding with UNCLOS-related agreements that sanctioned the concept of a 200 nautical mile EEZ, resulted in increased awareness by regional states of the economic benefits potentially deriving from maritime sovereignty within the South China Sea.<sup>33</sup>

Modern demand for energy resources has further increased, and will continue to rise in future. China is already the world's largest oil importer, with its consumption forecast to double by 2030.<sup>34</sup> A 2012 Chinese assessment of South China Sea energy resources estimated reserves at 125 billion barrels of oil and 500 trillion cubic feet of natural gas.<sup>35</sup> The oil reserves would equate to 80 per cent of Saudi Arabia's oil reserves, and hence are a significant economic lure for China.<sup>36</sup> Vietnam, Malaysia and Brunei all have substantial investment in offshore oil exploration and production to meet their own needs. With Asian domestic oil production forecast to plateau or decline in future, new energy sources are of great importance to the continued economic wellbeing of regional states.<sup>37</sup>

A central Chinese concern, deriving from their assertion of sovereignty over most of the area, is that other nations are not entitled to the resources and are also diminishing them at such a rapid rate they could be exhausted within 20 years.<sup>38</sup> This has prompted aggressive action in the disputed areas by Chinese maritime authorities. For example, in 2011, a Chinese marine surveillance ship cut cables on two Vietnamese oil exploration ships in claimed Vietnamese waters.<sup>39</sup> In May 2014, China set up an oil rig southwest of the Paracel islands, within the standard Vietnamese EEZ. This caused a tense confrontation between Chinese and Vietnamese maritime forces, monitored by naval forces from each country, with the use of water cannons and

ramming tactics. This type of behaviour evokes considerable criticism and suspicion of long-term Chinese intent by Southeast Asian countries, and encourages them to seek US support.<sup>40</sup>

Another focus of resource competition is fish. Both China and Vietnam consider the South China Sea their traditional fishing ground. It is one of the richest in the world, with fish caught in the South China Sea accounting for around ten per cent of the annual global catch.<sup>41</sup> Similarly, Filipino fishermen ply their trade in the waters to the west of The Philippines' islands of Luzon and Palawan, out to their 200 mile EEZ limit, increasingly coming into dispute with Chinese fishermen and maritime authorities, particularly near Scarborough Shoal and Reed Bank.<sup>42</sup>

Increasing catch rates from the whole area have seen overfishing and a decline in available fish stocks, in line with UN warnings that global fishing numbers are in jeopardy.<sup>43</sup> It has become increasingly difficult for Chinese fishermen to obtain sufficient catch close to the mainland, so fishing grounds farther offshore have become more important.<sup>44</sup> In turn, Chinese authorities are becoming more aggressive towards what they consider illegal fishing of their resources. They cite statistics of illegal fishing (in their view) by Vietnamese fishermen in the Paracels as increasing from 21 cases in 2001 to more than 900 in 2007; they also highlight hundreds of examples of 'foreign countries "attacking, robbing, detaining and killing" Chinese fishermen'.<sup>45</sup>

In response, China has imposed unilateral fishing bans in the South China Sea, choosing months corresponding to the main Vietnamese fishing season. In enforcing the ban, Chinese maritime authority vessels have harassed Vietnamese fishing vessels by driving them off, detaining crews, seizing catches and sinking a fishing boat.<sup>46</sup> The problem of illegal fishing is not just between China and other nations; however, the scale of effort and severity of enforcement by Chinese maritime authorities is significantly greater than any other nation's effort.<sup>47</sup>

### Strategic mistrust between China and the US

Tensions flowing from the regional disputes cause first- and second-order levels of friction, exacerbating mistrust between China and the US over each other's policies towards the South China Sea. China's land reclamation program in the disputed 'nine-dashed line' area adds to tensions beyond sovereignty disputes between neighbouring countries. In creating over 800 hectares of artificial islands in just over a year, with plans to build military installations on those features, and repeatedly challenging military patrol aircraft from the US and The Philippines intruding into self-described military security zones, China has substantially challenged its neighbours, the US and international rules.<sup>48</sup>

Mark Thompson notes expectations that China will install air-defence radars, then air defence missiles and later probably fighter aircraft on some artificial islands.<sup>49</sup> At the first-order level, US military assessments identify China's tactics as the use of 'low-intensity coercion to advance its maritime jurisdiction over disputed areas ... [using] a progression of small, incremental steps to increase its effective control over disputed territories and avoid escalation to military conflict'.<sup>50</sup> In return, China rebukes the US over its 'biased reports' and attempts to drive a wedge between China and Southeast Asian nations.<sup>51</sup>

The second-order level friction stems from subsequent US policy on the issue of freedom of navigation, which in turn brings about allegations by China of US containment of China's rising power. The SLOCs through the South China Sea are the second busiest in the world, carrying raw materials and manufactured goods to and from the Asian economic powerhouses of China, Japan, Taiwan and South Korea, which in turn underpin global economic prosperity.<sup>52</sup> More than half of the global merchant fleet uses the SLOC, carrying one-third of global oil by sea and half the global natural gas; so any conflict would disrupt global trade, forcing ships to be rerouted at significant additional cost and time.<sup>53</sup>

Concern over the possibility of Chinese domination, or instigation of conflict, in the South China Sea led to then-US Secretary of State Hillary Clinton's 2010 declaration of the 'national interest [of the US] in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea'.<sup>54</sup> Additionally, President Obama instituted a policy of



the US 'rebalancing' to the Pacific, explained by Clinton as a 'strategic turn to the region that fits logically into our overall global effort to secure and sustain America's global leadership'.<sup>55</sup>

However, China regards the US rebalance as a strategy to contain China's rise in the world. It therefore resents the US presence, and resents what it sees as attempts by Southeast Asian countries to bring the US into the disputes.<sup>56</sup> China considers that its EEZ holds the same status as a territorial sea, and objects to foreign military vessels and aircraft conducting transits or surveillance missions. This is at odds with the interpretation of UNCLOS by most signatory countries and the US which, although not a signatory, accords with most elements as customary international practice.<sup>57</sup>

This difference in view has caused a number of near-miss incidents between Chinese and US vessels and aircraft in recent years, which creates its own risk of escalation into an unintended armed clash in the South China Sea.<sup>58</sup> However, since it would be between two major powers, the impact would be much more disruptive to regional and global economies than if between Asian countries.

## Part 2: Support for Legal Resolution

Formal legal resolution of both sovereignty claims and maritime zones would be the ideal outcome but is unlikely to occur in the near term without additional pressure or inducement on several countries to willingly pursue this course of action. This part of the paper will review the impediments to legal resolution, and consider what policies Australia could pursue to resolve them. The two separate, though interlinked legal issues that underpin the South China Sea disputes relate to the sovereignty of land features, and the determination and delimitation of associated maritime zones.

### Sovereignty

The pre-eminent legal issue regarding the sovereignty of the hundreds of islands, atolls, reefs, rocks and shoals is not one that can be easily solved. UNCLOS is not the mechanism to address this, with no provisions pertaining to resolution of sovereignty disputes.<sup>59</sup> The most likely available recourse would be to seek an International Court of Justice ruling (outside of UNCLOS), with each side being provided the opportunity to present their case of historical administration or opposing evidence. However, this would require the consent of all the countries involved, which is extremely unlikely to occur.

While many countries are wary of submitting disputes for third party determination, China in particular rejects this as a method.<sup>60</sup> For example, China protested Vietnamese and Malaysian submissions to the UN Commission on the Limits of the Continental Shelf on the grounds that it was illegal in view of China's claim to the majority of the South China Sea. As the Commission was unable to rule on matters without the agreement of all affected parties, the issue remains unheard and unresolved.<sup>61</sup> Nevertheless, the fault does not lie with China alone, as most of the competing countries use international law selectively to support their own position and attack rival claims.<sup>62</sup> China has repeatedly called for bilateral negotiations to resolve matters, which some would argue enables China to pursue a strategy of 'treat[ing] each case differently, and defeat[ing] each one separately'.<sup>63</sup>

An Australian role in dispute resolution would primarily be to continue advocating the use of international law for peaceful resolution. This is essentially the current Australian Government policy, so the only new aspect would be more direct and proactive discussion with claimant countries, particularly China, to submit their sovereignty claims to the International Court of Justice. While China would likely resent such 'interference' from a non-claimant country, continual engagement in advocating acceptance of the norms of international law may eventually lead to an acceptance of such norms. However, it would be important for such discussions to be held behind closed doors during formal discussions, and not argued through the media, which would be immediately and soundly rejected.

## Delimitation of maritime boundaries

UNCLOS provides guidelines for determining maritime zones associated with land features, specifying that in the case of overlapping EEZs and continental shelves, each nation's boundary should be delimited by agreement between the nations on an equitable basis.<sup>64</sup> It is notable that the placement of China's dashes in its nine-dashed line is generally closer to the coastline of the mainland country than it is to the nearest Chinese-claimed island. Additionally, several of the dashes are closer to opposing countries' coastlines in the 2009 version of the map than the 1947 map.<sup>65</sup>

It seems probable, therefore, that China's claims would not be upheld in any arbitration, which China likely knows.<sup>66</sup> China has a history of inconsistent standards in dealing with similar maritime disputes with its neighbours. For example, China rejected a 50-50 delimitation with Japan in the East China Sea in favour of a continental shelf approach, which would increase its claimed area by 30,000 square kilometres but accepted a 50-50 approach in its dispute with Russia and Vietnam (in the Gulf of Tonkin).<sup>67</sup>

Australia should have legal experts carefully examine previous such agreements, and seek to determine if any similar principles or motivation could be brought to bear in the current disputes. It should also seek to engage China on the ambiguities in its 'nine-dashed line' claim, encouraging it to formally lodge its claim for arbitration. Australia's role should be limited to an advocacy role supporting peaceful resolution using international law. Bilateral discussions with China also need to point out the seeming inconsistencies in China's position, regardless of the likely backlash that any such discussion would generate.

## Dispute resolution

UNCLOS also provides dispute-resolution mechanisms for delimitation disagreements. If no resolution is able to be achieved within the Convention's guidelines, an independent judicial ruling can be obtained through one of four options, namely two standing tribunals, the International Tribunal for the Law of the Sea and the International Court of Justice, or two arbitral tribunals constituted under either Annex VII or Annex VIII of UNCLOS.<sup>68</sup>

In considering the disproportionate effect of China's nine-dashed line on neighbouring countries' maritime zones, it is worth noting that in recent cases where such tribunals have adjudicated, they placed more weight on the principle of equitable outcome than a strict adherence to a particular method.<sup>69</sup> In 2013, The Philippines filed a claim for resolution under UNCLOS's Annex VII tribunal against China's claims in the South China Sea, with its submission contending that the Chinese 'nine-dashed line' claim far exceeds the entitlements for coastal countries under UNCLOS provisions.

Flowing from this, The Philippines claims that China's occupation of certain maritime features is illegal and that China's activities interfere with its rights in its own EEZ, as well illegally exploiting resources in The Philippines' EEZ.<sup>70</sup> China formally rejects the arbitration on several grounds. First, China contends that UNCLOS has no relevance in the determination of underlying sovereignty of land features. Second, China contends that The Philippines' claim contains serious errors and falsehoods. Third, China had previously declared its rejection of arbitration as a method of maritime delimitation. Additionally, China contends that The Philippines' resort to arbitration breaches the 2002 agreement between China and ASEAN—of which The Philippines is a member—to resolve disputes through friendly consultations.<sup>71</sup>

However, China's rejection does not stop the case from proceeding. Mark Rosen notes that notwithstanding China's objections, The Philippines' approach is 'clever pleading ... [that could] resolve the status of a number of ambiguous and troubling features of the South China Sea and the status of the Nine-Dash Line (sic) claim'.<sup>72</sup> In late October 2015, the arbitral court announced its first decision, finding it had the appropriate jurisdiction to hear the case; it also held that The Philippines was within its rights to file its case and that China's argument that its agreement with ASEAN precluded such legal action was invalid.<sup>73</sup> Predictably, China immediately rejected the

findings of the court and reiterated its stance of ‘neither accepting nor participating in the international arbitration’.<sup>74</sup>

Australia’s reaction to, and support for, rulings in *The Philippines’* case will be important for consistent advocacy of legal resolution. Australia will need to accept and impartially support all legal determinations from the court. Following the court’s initial ruling, Australia should reiterate its call for the disputants to accept the court’s judgment. Moreover, even though such Australian policy would likely encounter Chinese hostility, it needs to be reiterated and clearly explained to Chinese officials.

One of the sensitivities is that an ‘Asian approach should not make people lose face’.<sup>75</sup> This gets to the heart of the difficulty in setting an appropriate Australian policy response, given China’s entrenched opposition to legal resolution, in deciding what approach would be likely to gain traction with, and not alienate, China. Similarly, Australia would need to be in close dialogue with *The Philippines* and US to support balanced and complementary policies across the three nations.

It is also quite possible that future rulings might contain a mixture of favourable, unfavourable and ‘no jurisdiction’ findings. This would provide the most challenging environment for policy creation, as each nation would likely accept findings favourable to it and reject unfavourable findings, with any ‘no jurisdiction’ finding simply perpetuating the current ambiguity. As well, Leszek Buszynski and Chris Roberts suggest that China ‘may not challenge the corpus of existing law, but may call for a special exception for the South China Sea’.<sup>76</sup>

Irrespective of the outcome, Australia should continue to engage diplomatically on this issue with all relevant countries. A number of countries have agreed to delimit boundaries around the region—Indonesia with Malaysia and Vietnam, Vietnam with Thailand in the Gulf of Thailand and with China in the Gulf of Tonkin—so further encouragement towards bilateral resolution would remain a reasonable baseline strategy.<sup>77</sup>

### Classification of features

Another element of the disputes that could be subject to legal process is the classification of features as islands, rocks, low-tide elevations or submerged features. Comprehensive classification of all features would provide a sound basis for application of UNCLOS provisions regarding entitled maritime zones. Under Article 121 of UNCLOS, a feature classified as a rock does not attract a territorial sea or EEZ. Similarly, a feature that is classified as a low-tide elevation—land that is surrounded by water but submerged at high tide—cannot have a territorial sea or EEZ of its own.

In recent arbitration cases, even features accepted as islands have only been awarded a 12 nautical mile territorial sea but no EEZ, to avoid distortion of natural continental boundaries and to comply with the principle of equity.<sup>78</sup> Therefore, a formal survey and classification of all features within the South China Sea would provide the capacity for a court to make determinations of appropriate maritime zones, if future arbitration is sought.<sup>79</sup>

Even without resort to legal action, a reduction in the current level of ambiguity could cause countries to consider more reasonable courses of action. It is likely that China, and possibly other nations, would object to such an endeavour if they believed the outcome might be disadvantageous to their own claims. However, previous official statements on this issue indicate that Vietnam, Malaysia and *The Philippines* all consider the disputed islands incapable of sustaining habitation, so they might be convinced to support such an action.<sup>80</sup> A joint approach by two or more of these claimant countries to an UNCLOS tribunal—even if other nations objected—in order to achieve formal categorisation (without specifically seeking delimitation) throughout the whole of the South China Sea would be a positive step.

Australian advocacy and support for such an approach would be a valuable policy contribution. The approach could commence on a bilateral basis to individual countries, to quietly seek initial backing, although seeking broader support through ASEAN and the ASEAN Regional Forum should be the longer-term goal. It would need to be accepted that Chinese opposition is likely,

and ongoing dialogue with China regarding acceptance of current international law mechanisms would be required.

Overall, an Australian role in any legal resolution is extremely limited due to Australia's lack of direct involvement, and would largely be limited to an advocacy role. However, adding a strong voice to the rest of the international community would be important in persuading countries to clarify ambiguous issues and follow international law and normal standards of behaviour.

**Summary of recommendations for Australian policy in support of legal resolution:**

- continue to publicly and privately advocate for peaceful resolution using international law;
- support the initial international tribunal ruling on the jurisdiction of the court and legitimacy of the case of The Philippines in relation to China's 'nine-dashed line' claim, as well as continuing to support future rulings;
- advocate that countries clarify their claims regarding the South China Sea and seek judicial resolution of sovereignty claims in the South China Sea;
- encourage countries to continue to seek bilateral delimitation of maritime boundaries and, where unable to resolve matters, to seek UNCLOS arbitration of delimitation; and
- advocate for a comprehensive catalogue of land features in the South China Sea, based on an UNCLOS tribunal ruling on their classification under Article 121(3).

### Part 3: Support for Confidence-Building Measures

Given that there seems little likelihood of legal resolution of the disputes in the short- to medium-term, the development of confidence-building measures has been, and will remain, a focus of efforts to reduce tension in the South China Sea. Such measures consist of both direct and indirect activities aimed at building communication, transparency and confidence between nations.<sup>81</sup> In the South China Sea, such confidence-building measures need to extend beyond military entities to other national organisations, including coast guard and maritime authorities, which typically are the major participants in asserting and defending maritime claims.

The position of the US is the other major factor, given the military incidents between its vessels and aircraft and those of China over several years, which led to Hillary Clinton's 2010 statement regarding the US' interest in the peace and stability of the region. Of significant note is the differing view between China and Western nations on the role of confidence-building measures. China believes that strategic trust is required before maritime diplomacy can advance, while Western nations tend to consider that confidence-building measures are useful where there is no trust.<sup>82</sup>

Australia's role, therefore, would need to be carefully managed in developing and advocating confidence-building measures, given it has no direct stake in the disputed region, by acting primarily as a broker for other nations in working towards bilateral and multilateral measures. At the most basic level, Australia could encourage routine engagement and cooperation between

the military and other authorities of regional states, both through multilateral forums and its own bilateral endeavours. While it is impossible to force nations to commit to activities such as goodwill ship and aircraft visits and international exercises, encouragement to do so could assist in generating an understanding of operational approaches and predictability of reaction, and would allow military personnel to see other nations' forces in a more personal perspective.<sup>83</sup>

As an example, in 2012 the US invited China to participate for the first time at its RIMPAC exercise in Hawaii. Given that this was at the height of Sino-Japanese tension over disputed maritime territory, it was a way of building confidence between the participant navies, which included China, the US and Japan.<sup>84</sup> Australia could help by setting a good example with its own exercise schedule. It has done so in a small way to date, with a minor Australia-US-China trilateral exercise held in September 2015 in northern Australia, and a multilateral maritime exercise between China, Malaysia, US and Australia in late 2015 in the Strait of Malacca.<sup>85</sup> More such multinational engagement would be advantageous in furthering inter-military goodwill and understanding.

### Environmental and resource management organisations

There is also a range of other existing confidence-building programs, and organisations providing regional interaction, that should continue to be supported and, if possible, expanded for greater benefit. One such regional approach, operating within the UN Environmental Program is the East Asian Seas Regional Seas Program.<sup>86</sup> Beginning in 1977, it was expanded in 1994 to include all of the South China Sea disputant states, except for Taiwan and Brunei, as well as Australia. Similarly, the Partnership in Environmental Management for the Seas of East Asia is a forum which includes the South China Sea as a subregion, with similar state membership, other than Taiwan and Brunei.<sup>87</sup>

These are forums in which Australia has direct access to China and other relevant states, and where discussion of maritime matters is a basic premise. However, the criticism of these programs is that they tend to have a single-sector focus, are not well supported, and do not discuss controversial topics.<sup>88</sup> China would undoubtedly object to broadening discussion towards the legality of its 'nine-dashed line' stance—and that would not be the goal. Rather, it would be to undertake broad multilateral engagement and cooperation in managing other aspects of the marine environment and coastal areas such that good working relationships between maritime authorities become the norm.

### Code of conduct

The development of a code of conduct in the South China Sea is a long-desired goal of the ASEAN nations bordering the South China Sea, supported by indirectly-affected nations including the US and Australia. The push for such an agreement began in 1992, in response to a provocative Chinese law asserting sovereignty over the South China Sea, when ASEAN adopted a Declaration on the South China Sea, urging nations to seek solutions through peaceful means, and to agree areas of cooperation without compromising sovereignty claims. When asked to agree to the declaration, China refused. Subsequently, when The Philippines discovered China's occupation of Mischief Reef within the Filipino-claimed EEZ in 1995, ASEAN took up mediation without success.<sup>89</sup>

However, during the 1996 ASEAN Regional Forum, China agreed with the ASEAN nations to seek peaceful solutions within international law. Between 1995 and 2002, meetings between ASEAN and China assisted in developing a Declaration on the Conduct of Parties in the South China Sea, which was adopted by the ASEAN countries and China in 2002. The declaration is a non-binding agreement by claimant countries to maintain the *status quo* in the region, and reiterates a commitment to the principles espoused in existing international agreements. It resolves that countries 'would avoid undertaking activities that had the potential to complicate or escalate disputes and affect the peace and stability in the South China Sea'.<sup>90</sup>

Further progress on cooperative measures occurred in 2003 with agreement on an ASEAN-China Joint Declaration on a Strategic Partnership for Peace and Prosperity, followed by China becoming one of the first non-ASEAN nations to join the Treaty of Amity and Cooperation in Southeast Asia. This unprecedented level of harmony likely assisted the resolution of a three-year agreement in 2005 for joint maritime exploration in areas of the South China Sea by the national oil corporations of China, Vietnam and The Philippines.<sup>91</sup>

However, the 2002 declaration was meant to be a stepping stone to a more stringent, binding code of conduct in the South China Sea, which has never been achieved. ASEAN nations' self-interest and differing national views on China's behaviour and intentions hampered efforts in the early 2010s to achieve a united, strong ASEAN position.<sup>92</sup> China essentially ignores the provisions of the declaration by its actions in conducting military activities and fisheries enforcement against vessels of other nations in South China Sea waters.<sup>93</sup> However, the Chinese government accuses Vietnam and The Philippines of repeatedly violating the declaration's self-restraint clause by taking provocative unilateral actions, with those two nations making the same counter-accusation in return.<sup>94</sup>

Realistically, as Tommy Koh has pointed out, 'none of the six claimant nations in the South China Sea have adhered to the declaration on the code of conduct'.<sup>95</sup> Therefore, despite vague agreement by China at the ASEAN summit in 2011 to the introduction of a Declaration on the Conduct of the Parties, no substantial progress has yet occurred.<sup>96</sup> Although ASEAN member states agreed in mid-2012 on a set of proposed elements as the basis for a code of conduct, China reversed its acquiescence in July 2012 when the Chinese Foreign Ministry announced that talks could only begin 'when conditions are ripe'.<sup>97</sup> Furthermore, Ian Storey suggests that ASEAN's proposed mechanisms for dispute resolution for violations and interpretations of the code are likely unworkable or inappropriate.<sup>98</sup>

Additionally, China considers that the code of conduct will only apply to waters outside of the disputed areas, which it considers are Chinese territorial waters.<sup>99</sup> This would entirely negate the point of a code of conduct, so countries including Australia should press China to accept a wider application. The long timeframe required to progress from initial proposal to the eventual Declaration on the Conduct of the Parties suggests that progress towards a code of conduct is likely to take significant time, and therefore continued advocacy is worthwhile.

The difficulty for Australia is similar to that for the US—there is resentment by some countries at outside involvement that is regarded as interference. Moreover, it is not just China that regards the topic as none of the business of external parties. Indonesia is also cautious about external involvement, particularly wanting the US to allow ASEAN room to do its work, while providing influence in support.<sup>100</sup> As well, China remains reticent with regard to ASEAN having any role in managing the disputes, stating that 'China's consistent stance is that the South China Sea issue is not an issue between China and ASEAN'.<sup>101</sup>

Notwithstanding such objections, Australia needs to continue to constructively engage with China, ASEAN and individual countries through various methods and forums to promote a code of conduct, providing influence and support, and particularly promoting discussion of options in areas of disagreement. In particular, it would be worthwhile to engage with those ASEAN countries not actively involved in the South China Sea disputes, which see little benefit for them in potentially angering China by pursuing dialogue on a controversial issue. Self-interest driving intransigence or disinterest creates ASEAN discord, which undermines attempts to persuade China to come to the negotiating table. However, Buszynski and Roberts point out that given previous Chinese failure to accede to the provisions of the Declaration on the Conduct of the Parties, a code of conduct may just be a chimera that fails to regulate behaviour once finally achieved.<sup>102</sup>

### **Maritime agreements to prevent escalation of incidents**

Of value at a lower level than a code of conduct would be agreements that set rules and guidelines for the behaviour of ships and aircraft when encountering each other. The model for such agreements could be the Cold War-era Incidents at Sea Agreement. Such an agreement

would provide agreed behaviour to increase predictability and thus reduce the risk of collisions, as well as lessening the risk of accidental weapons release.

The agreement between the US and the Soviet Union provided for provision of a short warning period prior to military activity on the high seas, and the agreement for use of caution when operating near ships and aircraft of the other party.<sup>103</sup> Ideally, such an agreement would be expanded to include naval, coast guard and maritime authority forces, and would include all South China Sea nations as well as those of nations external to the dispute but operating in the area, such as US, Australia and Japan. It would also include the establishment of hotlines between naval and coast guard commands from the applicable countries.<sup>104</sup>

A similar approach comes from the Western Pacific Naval Symposium's Code for Unalerted Encounters at Sea, which was agreed in 2014 by over 20 nations, including the US, Australia and all countries involved in the South China Sea disputes except Taiwan. This non-binding document provides guidance on tactical manoeuvring and communications at sea involving both vessels and aircraft, with a view to avoiding collisions and near-collisions.<sup>105</sup> Australia has been actively involved, with the draft originally promulgated by the Australian Chief of Navy in 1999.<sup>106</sup>

Similar to a code of conduct, and given its voluntary status, China may choose not to follow a code for unalerted encounters within the disputed territory it regards as Chinese waters. However, such an agreement would provide some hope of regulating behaviour. Its application is currently limited to navies but should be extended to coast guard and other maritime authorities.<sup>107</sup> An Australian role could be to develop this approach further—extending its coverage to other authorities, developing protocols for aircraft, and expanding the range of behaviour that is regulated—to provide optimal assurance against incidents in the disputed areas.

**Summary of recommendations for Australian policy relating to confidence-building measures:**

- participate in and encourage Southeast Asian countries to undertake bilateral and multilateral exercises between disputing countries to enhance goodwill;
- continue and refine the use of regional organisations, including the UN Environmental Program's East Asian Seas and the Partnership in Environmental Management for the Seas of East Asia, for broad confidence-building engagement with major South China Sea maritime entities;
- continue to engage constructively with China and ASEAN through multiple mechanisms to promote adoption of a code of conduct, and in areas of disagreement promote the discussion of options;
- engage with ASEAN countries not actively involved in the dispute to promote ASEAN solidarity on the need for a code of conduct; and
- continue to develop a Code for Unalerted Encounters-type methodology, including by extending its applicability to coast guard and other maritime authorities, as well as developing protocols for aircraft to achieve optimal guidance in preventing and de-escalating maritime incidents.

## Part 4: Shared Resources through Joint Development

An approach of setting aside the issue of sovereignty to allow joint development within the disputed areas has the potential to reduce tension and enable mutual benefit for the participating nations. However, there have been previous attempts at this in the South China Sea, which have failed as national self-interest has remained an overriding factor. At the core of a viable proposal would be for claimant nations to set aside but not renounce their territorial and maritime claims to enable resources from the area to be shared for mutual benefit.<sup>108</sup>

The previous failures occurred primarily because China demanded other claimants recognise its sovereignty over disputed areas, which other nations refused to do, and include China as a partner in every project. As the other nations see no merit in China's sovereignty claims, they largely consider a joint partnership with China as unnecessarily impinging on their national resources.<sup>109</sup> Joint development or shared resource options could exist for both hydrocarbons and fish stocks but would likely require different approaches to each.

### Fishing resources

Fisheries management in the South China Sea should be of vital interest to all the claimant countries. Fish export quantities from the area have risen to exceed the calculated sustainable level, decreasing remaining stocks—assessed as halving between 1960 and 2000—and threatening sustainability.<sup>110</sup> Fishing boats are becoming more numerous, more powerful and fishing further away from shore, with increased catch sizes. China implements unilateral bans that it also enforces on other nations' fishermen where it can. However, overfishing of the area remains a concern.

Clashes between rival nations' fishermen and maritime enforcement authorities are one of the basic reasons for tension in the area.<sup>111</sup> There are obligations on countries and existing agreements or organisations to work together on fisheries management, however, these are not working due to lack of widespread commitment towards a common good. For example, among the claimant states only Indonesia is a party to the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, with China and The Philippines not yet ratifying it.

The 2004 Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean does have China, Vietnam, The Philippines and Taiwan as participants but disagreements over boundaries limits its effectiveness. A regional plan to combat illegal fishing has broader agreement but crucially lacks China's involvement.<sup>112</sup> As fish are migratory across invisible sovereign borders, it is clearly in the best interests of all countries to regulate cooperatively to prevent overfishing of the entire area.

Australia is party to one of the aforementioned agreements but some members of ASEAN are within all major agreements. Australia should become more proactive through multilateral forums, such as the ASEAN Regional Forum and the East Asia Summit, in championing the cause of transnational agreements on fisheries protection. As a priority, Australia should influence countries whose fishermen operate in the South China Sea to agree and ratify the various agreements, and to synchronise activities that better manage fishing resources.

### Hydrocarbon resources

Attempts at joint development of hydrocarbon resources have a similarly-chequered history. Indonesian diplomat Hasjim Djalal was at the forefront of previous efforts to initiate joint development of hydrocarbons in the South China Sea from the late 1980s.<sup>113</sup> Djalal saw the requirement for a solution that did not involve outsiders, and that informal mechanisms were the best approach to developing potentially acceptable courses of action. He coordinated a series of workshops on South China Sea issues over a quarter of a century, and achieved some gains in opening the subject up for discussion. However, none of his efforts has achieved a concrete outcome.



Despite ostensible support by China—with Premier Li Peng broaching joint development in 1990—in practice China objects to many proposals, such as in 1998 opposing ‘an Indonesian suggestion to study hydrocarbons, a Thai plan to study fish stocks and even a plan to create a regional database on geoscience’.<sup>114</sup> Recently Djatal noted that while China seemed ‘willing to cooperate on technical, scientific and environmental issues ... it’s less enthusiastic about developing cooperation on resource distribution issues’.<sup>115</sup> This highlights some of the difficulties for Australia in developing realistic policy that would progress joint development.

Moreover, China is not the only obstruction, with other nations demonstrating reluctance to relinquish their perceived sovereign rights.<sup>116</sup> The most recent attempt at joint development in the disputed area, beginning in 2005, was the trilateral Joint Marine Seismic Undertaking between the state oil companies of China, Vietnam and The Philippines. Its aim was pre-exploration oil surveys in the Spratly Islands. The venture began as a bilateral China-Philippines activity, and expanded following Vietnamese protests that the proposed exploration site impinged on its claimed territory. A basic stipulation of the three-year agreement was that it did not undermine any government position held by each nation.

The core problem that caused the agreement to fail was that 80 per cent of the survey area was within the Philippines claim zone. While the incumbent government supported the agreement, from the Filipino people’s perspective the agreement not only weakened their nation’s claim to the area but also breached the constitutional requirement for 60 per cent of any joint venture to be apportioned to The Philippines. The Philippines Government allowed the agreement to expire in 2008 without achieving any tangible benefits, with Filipinos perceiving the enterprise as having compromised their national integrity and security.<sup>117</sup>

Nevertheless, there have been successful agreements pertaining to the joint development of seabed energy resources. These include the 1979/1990 Malaysia-Thailand Agreement, the 1992 Malaysia-Viet Nam Arrangement and the 2009 Brunei-Malaysia Arrangement over shared resources. The benefit of some of these agreements was ‘the opportunity to sidestep seemingly intractable disputes over ocean space and proceed with the development or management of potentially valuable resources’.<sup>118</sup> However, history would suggest that joint development is more difficult to achieve where the overlapping area has inadequate legal grounds.<sup>119</sup>

In the South China Sea, where there are multiple claimants in some areas, joint resource development becomes highly problematic. China refuses to back down on its view of indisputable sovereignty within the ‘nine-dashed line’, and other countries vehemently refuse to compromise their own EEZ. As The Philippines did with the Joint Marine Seismic Undertaking, other countries perceive their resources being exploited by China. Conversely, China will not back down on its claims as it believes that other countries have stolen its resources for far too long.

The desire to maintain good relationships between states can be a rationale for entering cooperative agreements, such as the example of Vietnam seeking entry to ASEAN as a prompt for the 1992 Malaysia-Viet Nam Arrangement to be signed.<sup>120</sup> Currently, China has an economic initiative supported by President Xi Jinping, the ‘One Belt One Road’ plan, which could be jeopardised by disruptions in the South China Sea. Therefore, the time may be ripe for countries to extract moderation in Chinese behaviour that could advance the prospects of joint development.<sup>121</sup> It is difficult, though, to see a specific role for Australia in this case, other than general encouragement of all countries to achieve a cooperative outcome.

### Cooperative maritime regime

A different proposal regarding sharing of resources is that of a cooperative maritime regime, as championed by Mark Valencia. This envisages progress from consultation to harmonisation of national policies, and requires the creation of a development or management authority that would control exploration and joint development activities, manage a common fund for joint hydrocarbon development, and distribute the profits achieved.<sup>122</sup> It is suggested that, at least initially, a smaller area of joint collaboration would allow for trust-building—such as limiting it to just the Spratly Islands precinct.<sup>123</sup> Indeed, the process would be easier where only two countries are in dispute, which is possible in some areas of the South China Sea.<sup>124</sup>

The critical factor remains, though, the atmosphere of political trust that would be required to enable such a ground-breaking commitment. Given the inability of Hasjim Djalal to gain traction on joint development after many years, it is unlikely that Australian advocacy of such an approach would be successful in the short term. Nevertheless, Australia could discuss joint development with the claimant countries through the various forums, such as the ASEAN Regional Forum and the East Asian Summit, seeking to determine the barriers to agreement and working to overcome those as a long-term approach to stabilisation of the disputes.

**Recommendations related to Australian policy on shared resources and joint management:**

- proactively influence wider ratification of agreements and membership of organisations related to fisheries management, and seek to better synchronise efforts towards sustainability of fish resources; and
- encourage nations to seek joint development of hydrocarbon resources through setting aside sovereignty claims temporarily, and discussing barriers to joint development through multilateral forums such as the ASEAN Regional Forum and the East Asian Summit.

## Part 5 – Policy Alignment with the US

The US posits that the health of the global economy is built on the Asian economy, which requires unencumbered maritime trading routes. Hence its concern at Chinese intentions in the disputed areas, particularly any potential impediment to freedom of navigation, which is a large factor in its South China Sea policies. In turn, a fundamental driver of China’s resentment at such policies is its experience during the ‘century of humiliation’, between 1840 and 1945, when external powers violated its sovereignty by controlling large swathes of China.

China’s sense of vulnerability, particularly in the maritime domain, derives from that loss of sovereignty, which came about largely due to superior Western naval technology.<sup>125</sup> The ‘century of humiliation’ has become a key element of the Chinese Communist Party’s narrative as China’s ruler, its preoccupation with territorial integrity and sovereignty, and its umbrage at the behaviour of Western powers towards it, particularly in relation to the South China Sea.<sup>126</sup> Australia, like the US and other major nations that trade into East Asia, has a vested interest in freedom of navigation and the stability of the region.<sup>127</sup> This collides with the Chinese Communist Party’s narrative, and provides a fundamental foreign policy dilemma for Australia.

### Current Australian policy

Australia’s policy to date has largely been simply to urge all nations to abide by international rules and norms in the South China Sea, and not to irritate China. However, there are differing views of this policy. Some commentators have been critical of what they see as a soft, inoffensive approach, which on one hand loudly proclaims non-interference in the disputes to avoid offending China, while on the other keeps ASEAN countries on side by supporting a code of conduct.<sup>128</sup> Others are critical of reports that Australia might change policy and synchronise its freedom of navigation policy with the US by flying its own maritime patrol aircraft near Chinese artificial islands.

Sam Bateman believes that such operations would serve only to provoke the Chinese unnecessarily and make the situation worse.<sup>129</sup> Benjamin Herscovitch believes that becoming deeply embroiled in the disputes will poorly serve both Australia’s national interests and those of

its Southeast Asian friends. He argues that China is unlikely to harm itself economically by blocking merchant shipping through the South China Sea.<sup>130</sup> Critics of the US freedom of navigation policy point to exaggeration of the threat to civilian ships being used to disguise US concern over a perceived threat to its military access to the region.<sup>131</sup>

This support for non-confrontational policy is generally underpinned by a view that China will eclipse the US, both economically and militarily, as the prime regional power in the not-too-distant future. Hugh White holds such a view of the 'great power transition' but further argues that 'Australia should launch a diplomatic campaign to persuade China and America to work together to build a "Concert of Asia"'.<sup>132</sup> While valid opinions, they are open to debate. For example, White argues that China's actions are not illegal, and that it has made no effort to press or enforce its claims.<sup>133</sup>

As previously discussed, it is clear that China's 'nine-dashed line' area does not accord with modern international law, and there other aspects of its claims that exceed UNCLOS conventions. Furthermore, China has used strong language and mildly aggressive action to enforce its claims. It is arguable that the existing moderate policy of '[i]nternational criticism has done nothing to temper Chinese behaviour'.<sup>134</sup> Alan Dupont points out that '[a]lthough not illegal, China's land reclamation has been carried out with scant regard for international norms, regional sensitivities and the competing claims of other ... states'.<sup>135</sup> Accordingly, the consequence of inaction now may be long-term damage to regional stability and international law and norms.

## US policy

The preceding discussion also identifies that the strategic disagreement between China and the US is at a higher level than just concerning reefs, reclaimed land and resources. While regional countries may see 'the US 7<sup>th</sup> Fleet [as] the only guarantor of security' in the region, China sees the US pursuing an aggressive policy of encirclement and containment—reflective of the 'century of humiliation'.<sup>136</sup> Some Chinese commentators have warned that a confrontational approach from the US will simply harden China's assertive behaviour.<sup>137</sup> Accordingly, while the US and Australia want to prevent the Chinese from militarising the South China Sea, confrontational actions may increase China's determination to do so.

However, a previous General Secretary of the Chinese Communist Party, Jiang Zemin, believed that the desired Chinese policy towards external countries should be to 'struggle without breaking'.<sup>138</sup> China's recent behaviour, particularly its island creation efforts, has pushed the limits of acceptable behaviour short of provoking military action, before backing off to diplomatically smooth over the issues created. Over time, China believes that the 'attendant diplomatic pain will ease as the balance of power continues to shift in China's favour ... gradually turning more hard-line ... [and that] other countries will get used to the change and accommodate it'.<sup>139</sup>

If so, it may be that the US military presence is the only force that acts as a handbrake on the suspected Chinese long-term strategic goal of regional power dominance. However, this approach risks turning the South China Sea into a source of great power competition.<sup>140</sup> Notwithstanding, John Garnaut points out that in the East China Sea, China similarly deployed a mixture of military and diplomatic pressure to challenge Japan's position on the Senkaku/Diaoyu Islands but has achieved little to date except a remilitarised Japan and a strengthened US-Japan alliance.<sup>141</sup> Therefore, perhaps a tough stance in the South China Sea might similarly cause China to moderate its behaviour. In this case, Australia needs to consider the issues of short-term tension versus long-term stability in considering a policy of whether it accommodates the Chinese approach or aligns more closely with US policy.

## A third option?

In pondering Australia's options, it is worth exploring whether there is a viable third course of action, somewhere between being mute on the disputes and standing in lockstep with the US. Euan Graham recommends finding a middle course of action that allows Australia to

‘demonstrate an independently defined Australian concern to uphold the basic principle of access to the commons, but it does not have to parrot the US approach’.<sup>142</sup>

In regards the broader strategic struggle for power in the region, Scott Dewar does not agree that a radical change of approach in the Asian region, such as suggested by Hugh White, is required—and, in fact, would poorly serve Australia’s long-term interests.<sup>143</sup> He believes that China would feel emboldened and, far from accepting a ‘concert of powers’, could increase regional tension. Instead, he recommends avoiding making choices that do not need to be made, while continuing to support the US alliance. One approach he suggests is using existing ties with Malaysia, Singapore and Japan to develop a shared approach to regional issues.

Australia is part of the Five Power Defence Arrangement (FPDA), which includes both Malaysia and Singapore. Both these countries have direct links to the South China Sea, and Malaysia has overlapping claims—but avoids dispute—with China. However, it is difficult to see how the FPDA could be used to directly influence the maritime disputes, as this would bring in more external countries, which China and the ASEAN nations dislike. Also, it would be better not to invoke a formal treaty that could be too confrontational to China.

Similarly, Japan has its own maritime disputes with China and, while Australia certainly has aligned interests with Japan, it is difficult to identify practical collaborative measures that would not inflame the situation further. White notes that China believes the best way to weaken US power in Asia is to undermine regional nations’ confidence in it, leading to much of China’s confrontational approach to the US.<sup>144</sup> Perhaps the only middle ground would be for Australia publicly and privately to support US actions in support of international laws but not conduct freedom of navigation patrols itself, as that would remove any claim to an independent view.

Therefore, there is no clear option for Australia in relation to alignment with or divergence from US policy that has a clearly-assessed likelihood of reducing tension and supporting regional stability in both the short and long term. The US conduct of patrols near occupied islands in accordance with UNCLOS provisions will continue to inflame tensions with China in the short term. But it just may dampen China’s longer-term strategic aims of regional domination as it seeks stability to execute its ‘One Belt, One Road’ strategy.

Were the US to abandon such patrols, there would likely be no restraint on Chinese behaviour. So it seems prudent that Australia should support the US policy, both publicly and privately. If Australia was to conduct similar patrols—either independently of or in concert with the US—it would provide a clear message to China on Australia’s position regarding the application of international law. However, not participating directly with the US would provide a more nuanced position—in effect saying that rather than simply supporting an ally, Australia supports the principle of international norms and laws. If other nations, such as Japan and Singapore, were to similarly conduct such operations and clearly advocate the need for compliance with international laws, there would be a stronger message sent to China. Broader international solidarity is important, and Australia can play its role.

**Summary of recommendations regarding alignment of Australian policy with US policy regarding the South China Sea:**

- clearly support US policy on freedom of navigation in accordance with international law in the South China Sea; and
- conduct freedom of navigation activities independent of the US.

## Conclusion

This paper has reviewed the highly-complex situation and motivations behind the South China Sea maritime disputes, and considered several measures that Australia could consider supporting in order to assist in the resolution of the disputes. While there is no doubt that Australia's national interests are directly linked to the South China Sea, due to the amount of maritime trade passing through that SLOC, Australia is not a direct participant in the disputes.

Accordingly, it is difficult for Australia to have a strong influence on working towards a resolution. First, China rejects interference from those countries that are not directly involved, and eschews multilateral approaches in favour of direct bilateral discussions with claimant countries. Since China is central to the disputes, its attitude makes it extremely difficult to gain any leverage towards any alternatives to its view. Second, the other claimant countries are mostly ASEAN nations, which have their own approach—the 'ASEAN way', which favours dialogue and consensus—again rendering external brokerage difficult. Finally, Australia's situation is precarious due to its traditional but reducing economic links and ongoing military alliance with the US in contrast with a robust and burgeoning trading relationship with China.

A clear legal resolution to the disputes is extremely unlikely, not least because of China's rejection of legal avenues as a mechanism to solve its disputes. The 'century of humiliation' at the hands of Western powers has left China deeply distrusting of the West and its institutions, such as international law, the International Court of Justice and UNCLOS. China resents that its own longstanding historical claims are ignored. ASEAN countries distrust China's firm resolve that disputes can only be discussed bilaterally, believing this a ploy to divide and conquer them one by one. Notwithstanding, Australia needs to continue to encourage all countries to seek legal resolution through any of the mechanisms available.

If Australia could persuade ASEAN nations to seek resolution of their overlapping claims with each other, it would create precedent and place some pressure on China to resolve the outstanding disputes it had with other states. The creation of an official UNCLOS tribunal-endorsed catalogue of South China Sea land features would also assist in being able to clearly discuss with China points of argument in relation to its view on sovereign territory. Australia also needs to support the UNCLOS tribunal verdict on The Philippines' case, irrespective of the outcome, in order to support the argument for disputes to be resolved by recourse to international law.

Australia also needs to actively support and promote the development and use of confidence-building measures involving all the claimant nations. An ASEAN-developed code of conduct faces many impediments because China is reluctant to agree and would resent the perception of doing so under external pressure. However, Australia should continue to encourage all countries to strive for a code of conduct, notwithstanding that it may not be fully effective, given ASEAN's experience with the Declaration on the Conduct of the Parties.

Encouragement to all nations for lower level confidence-building measures, such as exercises and regional organisations and agreements on basic matters, would also provide some ongoing demonstration of goodwill. The adoption of a Code for Unalerted Encounters in 2014 was a positive step, and Australia should use its experience and leadership in this area to work towards additional behavioural protocols to further enhance this aspect of confidence-building measures.

The prospect of joint development involving China appears to be unlikely. China's approach in the past has left ASEAN countries distrustful of such agreements as being to China's advantage. Nevertheless, Australia should continue to offer encouragement for the many regional agreements and management organisations to improve their practices and build confidence in day-to-day dealings, with Australian diplomats needing to actively seek points of agreement or shared goals and benefits, and act as an honest broker.

In order to do so, Australia needs to retain a degree of independence rather than closely following US policy, although there appears to be tension likely in some regard no matter what policy the US undertakes. However, Australia does need to strongly support any action that

accords with international law and disagree with those that infringe international law. Australia also needs to strongly support US policy on freedom of navigation in line with international law. However, it has been argued that Australia would be best placed to conduct similar actions independently to ensure it can assert its policy independence.

The South China Sea is a region of considerable importance to Australia's national interests and, despite lacking a geographical stake in the disputes, Australia's future wellbeing is clearly interlinked to resolving the disputes or at least reducing tensions in the region. Australian policy at the least must include proactive and honest engagement with all claimant nations, even where that is resented, in multiple bilateral and multilateral forums in order to continually seek avenues that might lead to eventual resolution.

## Notes

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