

Managing security tensions in the East China Sea and the South China Sea: a legal perspective

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Indo-Pacific Maritime Security: Challenges & Cooperation

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At the heart of the security tensions in the East China Sea and the South China Sea lies several territorial disputes over many different maritime features that spread across the region. The jurisprudence of international law is, at least partly, fuelling tensions rather than helping contain them, with the central requirement of ‘effective and peaceful display of sovereignty’ to make a superior claim for a title to the territory in dispute,¹ as well as the risk that the absence of effective reaction can be regarded as acquiescence.² In addition, the entitlement to the ‘sovereign rights’ and jurisdiction within extended maritime zones created under the law of the sea – namely, the exclusive economic zones and the continental shelf – has considerably increased the political and economic significance of remote, small islands and other maritime features.³

The highly political nature of the territorial dispute – often involving strong national sentiment attached to those islands and other maritime features in dispute, as well as the political and economic interests associated with them – means that it is not easily amenable to political or diplomatic settlement.

The recourse to third-party adjudication is often the only way to peacefully settle any territorial dispute, which will then open the possibility of diplomatic negotiations for maritime boundary delimitation.

The key to the management and ultimate resolution of these disputes, therefore, is: (1) to create de-politicised space where specific aspects of the dispute can be managed or resolved; and (2) to reduce political incentives to engage in destabilising conduct; and (3) to generate political incentives among the parties involved to move towards third-party adjudication of the dispute.

Creating de-politicised space for managing the dispute

One of the root causes of the disputes in the East China Sea and the South China Sea is the geographical indeterminacy in the renunciation of territorial title and claim made by Japan under the 1951 San Francisco Peace Treaty.⁴ In the East China Sea, Japan renounced its claims to Formosa (Taiwan) and the Pescadores,⁵ while placing the Nansei Shoto Islands under the United States’

administrative authority,⁶ without specific reference to the Diaoyu/Senkaku Islands in either of these provisions. In the South China Sea, Japan renounced ‘all right, title and claim to the Spratly Islands and to the Paracel Islands’,⁷ but without specifically identifying individual islands that were capable of appropriation (and hence the title to which was renounced) or the legal effect of the renunciation for territorial claims (i.e., whether the renunciation turned the islands into *terra nullius* open to territorial acquisition *de novo*). If a feature was not capable of appropriation under international law, Japan would have had no title or claim to renounce in the first place.

These are technical questions concerning the juridical fact that can be addressed separately to the highly political question of territorial title. The upcoming tribunal decision under the Annex VII arbitral proceedings initiated by the Philippines against the People’s Republic of China (PRC) in 2013 could shed light on some of the juridical fact questions in the South China Sea, especially with respect to the ability of certain maritime features to generate maritime zones under the Law of the Sea.⁸ The outcome may also encourage other disputing parties to initiate similar proceedings against the PRC or to reach an agreement among themselves to settle technical questions through third-party adjudication.

Given that these uncertainties stem from the indeterminacy in the language of the 1951 San Francisco Peace Treaty, original signatory parties to the treaty – in this case, Vietnam and the Philippines – can also refer those technical

¹ See, eg, *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, 704-722 paras 146-208; *The Frontier Dispute (Benin v Niger)* [2005] ICJ Rep 90, 127 paras 75-77; *Land, Island and Maritime Frontier Disputes (El Salvador v Honduras; Nicaragua intervening)* [1992] ICJ Rep 351, 557-579 paras 331-368; *Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ (Ser A/B) No 53, 45-46; *Island of Palmas Case (The Netherlands v USA)* [1928] II Reports of International Arbitral Awards 831, 839.

² See, eg, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 12, 121.

³ See, Hitoshi Nasu and Donald R Rothwell, ‘Re-Evaluating the Role of International Law in Territorial and Maritime Disputes in East Asia’ (2014) 4 *Asian Journal of International Law* 55, 71-73.

⁴ *Treaty of Peace with Japan*, signed 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952).

⁵ *Ibid*, Art 2(b).

⁶ *Ibid*, Art 3.

⁷ *Ibid*, Art 2(f).

⁸ Donald R Rothwell, ‘The 1982 UN Convention on the Law of the Sea and Its Relevance to Maritime Disputes in the South China Sea’ in Leszek Buszynski and Christopher Roberts (eds), *The South China Sea and Australia’s Regional Security Environment* (National Security College Occasional Paper No 5, 2013) 13, 17.

questions unilaterally to the International Court of Justice (ICJ) in accordance with Article 22 of the Peace Treaty.⁹

Even though the PRC is not an original signatory party to the treaty, the ICJ's ruling would provide an objective, authoritative determination of juridical facts concerning the status of the relevant features under general international law. Of particular significance is whether the maritime features in dispute are capable of appropriation, given that a large number of them in the South China Sea are low-tide elevations.

The jurisprudence of international law largely, but not conclusively, indicates that low-tide elevations are not subject to territorial acquisition.¹⁰

The focus on technicality in the clarification of certain juridical facts under general international law may then create foundations or opportunities to prompt the disputing parties to adjust their approach to the territorial and maritime disputes.

Critical to this technical clarification is an evidential issue with respect to the original state of all the different maritime features, particularly due to the land reclamation activities and climate change-induced sea-level rising. The Association of Southeast Asian Nations (ASEAN) could coordinate, on its own initiative or through the ASEAN Regional Forum, an independent, comprehensive survey to catalogue the natural state of land and maritime features in the region.

Reducing political incentives to engage in destabilising conduct

Regional states have been negotiating for more than a decade to adopt a legally binding code of conduct in the hope that it will somehow reduce the tensions in the South China Sea.¹¹ However, the disputing parties have already committed themselves to the exercise of self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability in the 2002 Declaration on the Conduct of the Parties in the South China Sea. The Declaration essentially reaffirms existing rules of international law regarding the threat or use of force and peaceful settlement.¹² It is therefore dubious if a legally binding code of conduct will help in reducing political incentives to engage in destabilising conduct, which could ultimately lead to an 'inadvertent war'.¹³

On the other hand, the new Code for Unplanned Encounters at Sea (CUES), adopted at the 14th Western Pacific Naval Symposium held in Qingdao in April 2014, has a greater potential to set parameters for hostile confrontation in a de-politicised manner. A new set of rules of behaviour for so-called 'unplanned' encounters may best serve the purpose of reducing political incentives to engage in destabilising conduct if it provides a clear understanding of what is considered as hostile behaviour

that will be met with forcible action in self-defence, instead of attempting to prevent a hostile encounter or an escalation of the conflict by merely reaffirming the existing legal obligations (or worse, watering them down as aspirational goals).¹⁴ CUES, in its current form, fails to provide this clear understanding of what would be considered as hostile behaviour and legitimate action against such behaviour, although it provides a list of actions that 'could be misinterpreted'.¹⁵ The disputing parties will continue to find political or strategic incentives to engage in brinkmanship through small-scale use of force as long as there remains room to exploit uncertainty in terms of how the opponent could react to it.

The situation surrounding the Senkaku/Diaoyu Islands is somewhat different to that in the South China Sea: the dispute is between two (or three if Taiwan is to be included as an independent entity) large economies with advanced defence capabilities; and there is a credible deterrence mechanism based on the US-Japan Security Treaty,¹⁶ reducing the prospect of an 'inadvertent war'.

⁹ It reads: 'If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice'.

¹⁰ See, eg, *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624, 641 para 26 (stating that 'low-tide elevations cannot be appropriated'); cf *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)* [2001] ICJ Rep 40, 101-102 paras 204-205.

¹¹ Declaration on the Conduct of Parties in the South China Sea, adopted 4 November 2002, para 5, available at http://www.asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

¹² See, eg, *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS xvi (entered into force 24 October 1945) Arts 2(3) and 2(4).

¹³ See, Rob McLaughlin and Hitoshi Nasu, 'The Law's Potential to Break – Rather than Entrench – the South China Sea Deadlock' (2016) *Journal of Conflict & Security Law* forthcoming.

¹⁴ See criticisms against the rules of behaviour concluded between the US and the PRC in September 2015 for safety of air-to-air encounters of military aircraft in James Kraska and Raul 'Pete' Pedrozo, 'The US-China Arrangements for Air-to-Air Encounters Weakens International Law', *Lawfare* (9 March 2016), available at <https://www.lawfareblog.com/us-china-arrangement-air-air-encounters-weakens-international-law>.

¹⁵ Code for Unplanned Encounters at Sea, adopted 22 April 2014, s 2.8, available at <https://news.usni.org/2014/06/17/document-conduct-unplanned-encounters-sea>.

¹⁶ *Treaty of Mutual Cooperation and Security between Japan and the United States of America*, signed 19 January 1960, 11 UST 1632.

evertheless, there is room in which the gap in the existing legal regime can be exploited for gaining strategic and tactical advantages in premeditated attempts to seize the control of the disputed islands. This threat is officially acknowledged in Japan as ‘grey zone’ situations, meaning ‘confrontations over territory, sovereignty and economic interests that are not to escalate into wars’.¹⁷

The Chinese concepts of ‘people’s war’ and ‘unrestricted warfare’ provide the philosophical foundation for ‘hybrid warfare’ using fishing vessels as maritime militia to advance China’s strategic interests in territorial and maritime claims, without the risk of open conflict.¹⁸ The ambiguous degree of the Chinese government’s involvement and the low intensity of the militia’s activities restrict the legal options available to justify Japan’s forcible response. This is because such attacks may not reach the gravity threshold required for an ‘armed attack’ as the basis for exercising the right of national self-defence under international law,¹⁹ while the minimum use of force in law enforcement may not be adequate in responding to the incoming threat. These ‘grey zone’ situations could also pose challenges to the applicability of the law of armed conflict, for example, to the targeting of fishing vessels and the legal status of captives – whether they are entitled to prisoner-of-war status, especially when any of the Japanese Self-Defense Force (SDF) personnel is captured during the maritime policing operation and falls into the hands of a foreign power.

There is not much Japan can do to rectify this situation, given that it is the legal requirements developed through the jurisprudence of international law themselves that have created this legal ‘grey zone’ that can be exploited, while restricting the legal options available to the responding state in dealing adequately with low-intensity threats. In some circumstances, the minimum use of force in law enforcement authorised by the domestic law may not be adequate. While the enactment of the new security legislation in September 2015 is encouraging,²⁰ it does not specifically address ‘grey zone’ situations, leaving a potentially critical gap within the framework of Japanese national security legislation. Japan may need to revisit the legislative framework for the SDF’s operation in ‘grey zone’ situations and make necessary changes so as to allow the SDF to take rigorous action proportionate to the degree of threat that confronts them.

Generating political incentives towards a third-party adjudication of the dispute

There should be no illusion that the territorial dispute will somehow dissipate or can be ‘shelved’ if the relevant parties can come to an agreement to work together for the joint development of resources in the disputed area. First of all, the PRC’s proposals for joint development have been viewed with scepticism as an attempt to secure a larger share of the resources from the continental shelf of neighbouring countries.²¹ Second, the joint development

of resources will not, on its own, produce the anticipated effect of ‘shelving’ the dispute while the underlying national security concerns, due to the strategic significance of the area, remain unaddressed. Third, even if the dispute were to be ‘shelved’ when the political relationship is stable, the issue will keep resurfacing every time the political tension intensifies between the disputing parties.

In any event, the option of ‘shelving’ the dispute is unlikely to garner political support any time soon, at least between Japan and the PRC, given how badly it ended recently. The dispute is now ‘unshelved’, with Japan blaming the PRC for the surge in Chinese vessels entering the disputed area, while the latter accused Japan for its nationalisation of the disputed islands in 2012.²²

While the two parties may develop a *modus operandi* to manage the hostile encounters through a series of confrontations, the political incentives to move towards a settlement of the dispute must be found elsewhere.

It is important to acknowledge that the security tensions in the region are multifaceted, involving several different issues such as security threats posed by naval activities, the management of fishing, environmental degradation and mineral resources, as well as the territorial dispute of political and strategic significance. The disputing parties may easily find themselves deadlocked over a particular issue with irreconcilable interests – for example, the territorial claim over a particular island. However, an opportunity may open itself up when multifaceted issues are negotiated at the same time, for example, with a view to developing a special legal regime in the South China Sea that accommodates competing interests in a range of different issues as a regional ‘package deal’.

¹⁷ Ministry of Defense, Defense of Japan 2014 (2014) 2; National Defense Program Guidelines for FY 2014 and Beyond (17 December 2013) 1, available at http://www.mod.go.jp/j/approach/agenda/guideline/2014/pdf/20131217_e2.pdf; National Defense Program Guidelines for FY 2011 and Beyond (17 December 2010) 3, available at http://www.tr.emb-japan.go.jp/T_06/files/National_Defense_Program_FY2011.PDF.

¹⁸ James Kraska and Michael Monti, ‘The Law of Naval Warfare and China’s Maritime Militia’ (2015) 91 *International Law Studies* 450, 451-457.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14, 101 para 191 and 127 para 249.

²⁰ *Law for Partial Amendments to the Self-Defence Forces Law and other Existing Laws for Ensuring Peace and Security of Japan and the International Community*, Law No 76 of 2015; *Law concerning Japan’s Cooperation and Support Activities for Foreign Military Forces and other Personnel in Situations that the International Community is Collectively Addressing for Peace and Security*, Law No 77 of 2015.

²¹ See, eg, Nguyen Hong Thao and Ramses Amer, ‘A New Legal Arrangement for the South China Sea?’ (2009) 40 *Ocean Development & International Law* 333, 342.

²² Shannon Tiezze, ‘China and Japan’s Abandoned Senkaku/Diaoyu Agreement’, *The Diplomat* (6 January 2015), available at <http://thediplomat.com/2015/01/china-and-japans-abandoned-senkakudiaoyu-agreement/>.

This may mean that the United States needs to compromise its diplomatic position that, while it does not take sides on any competing territorial claims, it opposes any effort to restrict overflight or freedom of navigation.²³

The principles and rules of international law as codified in the Law of the Sea Convention provide the foundational legal framework in which competing maritime interests are to be reconciled for a peaceful settlement of the disputes.

Indeed, Article 123 of the Law of the Sea Convention requires the states bordering an enclosed or semi-enclosed sea – such as the South China Sea – to cooperate with each other in the exercise of their rights and duties under the Convention over the whole range of issues. However, how relevant rules are to be interpreted and applied is open to further development. Within this legal framework, therefore, the parties involved in the dispute and other interested parties could, if they wished, develop a special legal regime in the South China Sea consistent with the Convention in a way that accommodates the underlying national security concerns of each disputing party in light of the peculiar geopolitical circumstances surrounding the area. Confucius' teaching indeed tells us: 'he who wishes to secure the good of others has already secured his own'.

²³ Most prominently, for discussion concerning the right to conduct military activities in the exclusive economic zone of a foreign country, see, eg, Raul (Pete) Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 *Chinese Journal of International Law* 9; Haiwen Zhang, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? – Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' (2010) 9 *Chinese Journal of International Law* 31.

²⁴ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994) Art 123.