

AVERTING CONFLICT IN THE SOUTH CHINA SEA: STEPS TO RESTORE RULES AND RESTRAINT

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EXECUTIVE SUMMARY

Chinese military advancements and increasing capabilities in the South China Sea, as well as the country's bullying enforcement of its disputed maritime claims, threaten to undermine U.S. interests in the Asia-Pacific region, including preserving freedom of navigation, access to the global commons, and a credible security umbrella for allies and partners. The U.S. will find it increasingly difficult, however, to successfully defend the positions of allies and partners who seek to exploit maritime resources or to exercise sovereignty in areas of overlapping or disputed claims in the South China Sea through displays of military presence as deterrence. The U.S. administration has recently announced that it will deploy U.S. Coast Guard cutters to the Philippines to aid in patrolling such disputed areas, which only makes this dilemma more urgent.

Rather than continue to test the limits of the current approach in a situation where failure will be gravely damaging to U.S. interests, the U.S. should change tack and seek a modus vivendi with China that can return the emphasis to international law, clear communication of expectations and, eventually, agreements on resource exploitation and preservation. It would behoove China and the U.S., together with ASEAN South China Sea claimants, to work together before a crisis occurs to pursue a cooperation spiral that could restore trust and reestablish law, rules, and restraint in this vital and heavily-trafficked waterway. Southeast Asian partners are loath to see a Sino-American clash in these waters and would welcome a reduction of military tensions in the shipping lanes, provided their interests could be addressed. While this aim will be extremely difficult to achieve in the current diplomatic atmosphere and given the recent history of the South China Sea issue, U.S. and Chinese diplomats have made progress on challenges

before and could do so again with good will and cool-headed pragmatism.

THE PROBLEM

China's continuing aggressive assertions of its unlawful maritime claims in the South China Sea have inflamed regional tensions, harmed the interests of regional claimants, undermined the Law of the Sea treaty and international law more broadly, and violated China's commitments under the Declaration on Conduct of Parties in the South China Sea (DOC).¹ A Chinese coastguard ship sank a Vietnamese fishing boat in April leading to a flurry of diplomatic protests from around the region. Chinese military exercises, patrols, and construction in the South China Sea have increased, while China's aggressive enforcement of its sweeping claims to all resources in the South China Sea prevents other claimants from duly exploiting resources in their lawful EEZs (exclusive economic zones) and threatens commercial rights and activities in the region, including freedom of navigation, fishing, and other maritime actions. China's reclamation and militarization of land features it occupies has clearly made the disputes more complicated and violated the 2002 DOC principles.

So far, attempts by the international community to shape or counter Chinese behavior in the South China Sea have not been successful. These include attempts at diplomatic isolation, negotiation of mutual withdrawals (the 2012 incident at Scarborough Shoal); international dispute resolution; negotiation of a binding Code of Conduct with other claimants; and increased military pressure against Chinese claims in the form of intelligence, surveillance, and reconnaissance (ISR) and bomber overflights and "freedom of navigation operations" (FONOPs); as well as other presence operations. Despite high infrastructure costs, relative diplomatic losses, damage to China's international reputation, and the imposition of

U.S. sanctions on companies conducting South China Sea construction, China's position has not retreated and, indeed, has hardened. In the face of international pressure to bring its claims into conformance with international law, China has expanded the territory of the South China Sea features it claims to over 3,200 acres of reclaimed land, built significant and permanent civilian and military installations on those features, and declared civilian jurisdiction over the Paracel and Spratly Islands. It also rejected the findings of the International Tribunal on the Law of the Sea (ITLOS) in 2016 with respect to the status of features in the South China Sea and their relevance for lawful maritime claims, claiming that reservations China made at the time of its UNCLOS ratification allow the country to opt out of arbitration. The tribunal specifically rejected this claim in the case. China's disregard of international legal proceedings, international condemnation, and other sanctions for this behavior have contributed to frustration and alarm on the part of the international community and caused it to question China's longer-term intentions and likelihood of conformance to international regimes as its power grows.

China's claims in the South China Sea have assumed increasing prominence in the last 10 years, as China's economic and military power has grown along with its interests. China views the South China Sea firstly as part of its periphery that is increasingly important to defend against perceived external threats. These perceived threats include U.S. intervention in a Taiwan scenario, potential for interference with important shipping lanes relied upon by China, especially for shipments of crude oil through the Malacca Straits, and threats to the security and stealth of China's second-strike nuclear deterrent as provided by its submarine-launched ballistic missile force.² The latter figures increasingly in the calculus, as China feels more vulnerable to a possible U.S. first-strike nuclear attack than at any time since normalization of diplomatic relations. These security interests in the South China Sea have become more acute from China's perspective in the last decade. China also sees the South China Sea as crucial for its continued economic growth and development, as a transport corridor for Chinese cargo shipments to global customers, as a major resource base for fishing, and, potentially, as a new source of offshore hydrocarbon resources.³

U.S. interests in the South China Sea spring from the U.S. security umbrella that has maintained peace in the region since the end of the Vietnam War and the normalization of relations with China. This includes maintaining the credibility of U.S. alliance commitments, monitoring and balancing China's growing military power, deterring aggression, keeping important sea lanes open and orderly, and safeguarding freedom of navigation under international law.⁴ While there is an ongoing debate in the U.S. about whether U.S. military dominance of the western Pacific is necessary (or realistic) going forward, traditional U.S. responsibilities and relationships with allies and partners in the region will inevitably pull the U.S. into any serious crisis or conflict, and a number of these events are just waiting to happen.⁵ For example, the Philippine Sierra Madre tank landing ship perched on Second Thomas Shoal, a low-tide elevation, is perpetually unstable and could touch off a crisis. Conflicts between Chinese and Philippine ships at Scarborough Shoal could again escalate. Indonesia, Malaysia, and Vietnam have all engaged in standoffs with China over resource rights during the last year. And the possibility of accidents in this very crowded air and sea space, between both civilian and military vessels, is not trivial, as has been proven in recent years. Given the potential seriousness of any of these scenarios escalating, it is certainly in the interests of both China and the U.S. to dial down the possibility of such incidents erupting.

One problem in addressing this serious situation has been the impenetrable nature of the South China Sea narratives in each country, with the result that the U.S.-China discussion of the South China Sea has become a dialogue of the deaf. The Chinese narrative is that the South China Sea is China's historical patrimony; that no Chinese leader can compromise on Chinese claims; that China was the last claimant to establish "defensive" installations on its occupied features; that other claimants have been duplicitous, and China must prevent encroachments; that China has an interest and responsibility to protect South China Sea shipping and resource extraction; that parties to the claim disputes can resolve their issues without interference from those outside the region; and that China is not beholden to the ITLOS tribunal's ruling and interprets UNCLOS differently. This narrative is viewed in the U.S. as a smoke screen for China's preponderant but unstated interests: keeping U.S. forces from intervening in a Taiwan or

other regional contingency, degrading U.S. credibility and relations with its allies in the region, upgrading its nuclear deterrent with triad SLBM capabilities, and securing the lion's share of sea and seabed resources for itself.

The U.S. narrative is that China's interest in and claims to the South China Sea have tracked its military expansion and designs on newly-discovered resources. According to this narrative, China has proven that international commitments and law will not prevent Chinese encroachments or interference with freedom of navigation and that this is a foretaste of coming 'grey zone' coercive moves at the expense of other claimants and U.S. allies in the region. Moreover, China's aggressive approach to its South China Sea claims reflect a determination to exclude the U.S. from those waters, thus undermining U.S. security partnerships in East Asia. The U.S. narrative is viewed in China as a smokescreen for U.S. preponderant but unstated interests: thwarting China's burgeoning naval capability and preventing the execution of China's nuclear plans and strategic naval expansion by escalating close-in U.S. surveillance and reconnaissance of Chinese installations, especially Chinese submarines. The U.S. maintains that FONOPs are aimed at "neutral" exercise of rights protected in international law, whereas China views the increasing frequency, publicity, and risk profile of recent FONOPs as indicators of intent to provoke.

While dueling narratives are setting up the South China Sea as a zone of confrontation and possibly conflict, it would be the height of human folly for the U.S. and China, two nuclear armed major powers and global leaders, to come to blows over conflicting interpretations of customary law or over uninhabited land features in the South China Sea. While neither side will eschew the possibility of conflict, both sides would prefer to avoid it. Certainly, countries in the region do not want to see a U.S.-China conflict in the South China Sea, much as they may wish to see a moderation of Chinese behavior. A major power conflict in the South China Sea would reverse hard-won gains in the region over recent decades and gravely damage global stability and prosperity.

OBJECTIVES

In the absence of any marked change in current trends, U.S. partners with claims to South China

Sea features (rocks) are likely to continue to lose ground in the South China Sea to de facto beefed-up Chinese presence and capabilities. Some American security specialists have said that the U.S. should not pursue a goal of reducing tension and avoiding conflict in this region, as it must be resolved to "push back" against Chinese aggression. Others maintain that the U.S. should only safeguard freedom of navigation and avoid involvement in disputes over excessive maritime claims in the South China Sea, leaving claimants, who almost all have excessive claims, to settle differences over South China Sea features and resources among themselves. Neither of these scenarios offer much hope for improving long-term security and stability in the region, a goal that should be at the forefront of U.S. interests. They also tend to ignore the interest of U.S. partners in the region and hold the potential to gravely damage U.S. credibility or reliability.

The U.S. and China are already engaged in an escalating security dilemma in the maritime and aerospace domains in the South China Sea, with their forces operating in increasing proximity. This configuration could lead to crisis or conflict should tit-for-tat provocations and determinations to show resolve continue apace. In a scenario in which China decides to test U.S. commitments to enforce its interpretation of international law or to defend the maritime rights of its partners regarding claimed EEZs, continental shelves, or shoals and rocks in this area, the U.S. may find itself faced with an unhappy choice: military escalation with China or perceived abandonment of regional friends and an emboldened China. U.S. equivocation at such a test would be catastrophic for the U.S. position in Asia, but an outright conflict with China over such a test would likewise be catastrophic. Any Chinese test is unlikely to be clear-cut and will be designed to peel-off allied support. There are many partial scenarios with which the U.S. would have a very hard time dealing effectively, and in which U.S. interests are likely to be badly damaged no matter the response.

The U.S. goal should therefore be to discourage China from testing U.S. commitments to partners in the South China Sea who have claims to land features and from interfering with clearly outlined actions to ensure freedom of navigation. This must be done by concluding enforceable agreements, laws, and understandings that codify acceptable

behavior and impose reasonable restraints, even as claims and interpretations remain disputed. Many will say that China will not agree to such restraints nor abide by agreements and rules in the region and wants to dictate terms to ASEAN claimants, preserve space for unilateral moves, and build its naval and other military capabilities in the service of “might makes right.” This is a theoretical possibility, but it remains untested.

The U.S., China, and all countries in the region share some fundamental interests: they want to avoid major power military conflict in the region; they want to keep shipping lanes open, accessible and orderly; and they want to preserve the common marine environment for future generations and mitigate damage and natural disasters. China also wants stable relations with the U.S., wants to be viewed as a “responsible leader” in the region, cares about its international reputation, has prioritized economic development over conflict in the service of long-running claims disputes, and wants to prevent the U.S. from “stirring up trouble” in its backyard. These common and other interests should provide a basis for intensified diplomatic work. Before the U.S. and China stumble into a conflict in the South China Sea, they owe it to their peoples, the region, and the world to look seriously at possibilities for deconfliction and compromise.

RECOMMENDATION: VIRTUOUS ESCALATION LADDER TO LEND STABILITY AND AFFIRM ACCESS FOR ALL

The current U.S. approach in the South China Sea is to use military FONOPs and other surveillance and presence operations to deter China from testing U.S. commitments and to counter China’s maritime expansion. Such an approach is provocative, escalatory, and unlikely to be effective, given the changing military balance in the region. China’s strategy is clear and unlikely to change unless the U.S. changes. Senior Colonel Zhou Bo of the Central Military Commission’s Office of International Military Cooperation recently wrote,

“If U.S. ships and aircraft continue to maintain high-intensity surveillance of the South China Sea, there is always the POTENTIAL of a confrontation... Eventually, it may be that the sheer size of China’s military prompts a US rethink. The Chinese army enjoys the

convenience of geography, to say the least. Its navy also outnumbers the U.S. navy in terms of warships and submarines, although the U.S. fleet is more heavily armed.”⁶

Ideally, the U.S. and China would seek a modus vivendi together with others in the region that could stabilize the South China Sea for commerce and resource exploitation by various claimants, preserve access for legitimate activities, and provide space for environmental conservation. It should be possible in such a compromise for both sides to preserve their priority interests (although falling short of maximalist goals) and avoid a worst-case outcome for one or both sides. China might see such a modus vivendi to be in its interest, given a serious and thoughtful approach by the U.S.

Developing a cooperation spiral on the South China Sea could not only help avert a conflict or a wasteful arms race in the region, but it could also lead to clarifying an interim legal regime, improving definition and adherence to agreed maritime practices, and solidifying international understandings around the status quo and de facto administrative control of South China Sea land features. The idea of cooperation spirals to deal with difficult issues in U.S.-China relations was elaborated by Lyle Goldstein in his book *Meeting China Halfway*.⁷ There are many difficult issues and conflicting interests in the South China Sea among relevant parties, and the cooperation spiral below focuses particularly on building confidence over the legal regime for navigation in claimed waters and over conflicts related to features of the Spratly Islands, which tend to be linked in U.S. and Chinese conceptions of interests in the region.

What a South China Sea Spratly Islands cooperation spiral could look like:

Step 1: The U.S. proposes a high-level U.S.-China strategic discussion on the South China Sea with a view toward developing a roadmap for diplomacy and notes willingness to present details of its positions on issues in the South China Sea.

Step 2: China, at that meeting, presents the details of its claims and positions with respect to military activities, maritime and territorial claims, resource management, and access control. (At this point, both sides will have reiterated and clarified their positions to the extent possible.)

Step 3: The U.S. declares its intent to ratify UNCLOS. This, of course, must be approved by Congress, and China may not really be interested in seeing U.S. ratification. It is a necessary signal, however, of U.S. commitment to rules; will reinforce China's continued membership in UNCLOS, which is in U.S. and global interests; and could be presented in a way that induces an appropriate positive response by Beijing.

Step 4: In the interest of maintaining its claims in the South China Sea (within the nine-dash line) but at the same time eliminating confusion regarding access for military vessels, China unilaterally declares a change to its interpretation of UNCLOS requiring permission for military activities in the EEZ and innocent passage in territorial seas. (China's position that military vessels require permission to operate in EEZs or in innocent passage combined with the claim that the entire South China Sea is effectively China's EEZ has amplified concerns about freedom of navigation. If China modifies its interpretation, it would remove the stimulus for certain freedom of navigation operations to protest this excessive claim.)

Step 5: It is understood that, since China's claims in this regard no longer conflict with UNCLOS, U.S. FONOPs meant to challenge this claim are no longer necessary. (Of course, FONOPs meant to challenge other claims might continue.) The U.S. makes a statement to this effect. The subsequent tempo of FONOPs meant to challenge permission claims decrease.

Step 6: The U.S. and China hold consultations about informal understandings about close-in military maneuvers, the Taiwan Strait, Aleutian Islands, and transit in international waterways. The two sides agree to a mutual notification (not permission) mechanism when transiting these sensitive waterways.

Step 7: Based on balanced and smooth implementation of the above understandings, the U.S. could offer assurances that it would not sail within 15 NM (nautical miles) of South China Sea features when conducting presence or freedom of navigation/overflight operations in the interest of crisis and accident avoidance, noting that this would be strictly voluntary.

Step 8: The U.S. could propose a joint U.S.-China-ASEAN survey of environmental health of the South China Sea and sponsor a joint project for plastic removal.

Step 9: The U.S. could propose a South China Sea environmental resource commission, with interested observers, to support marine conservation efforts.

Step 10: Both sides could reach a mini agreement on the stabilization of the status quo regarding Spratly Islands features including:

- Recognition of de facto administrative control of features without prejudice to settlement of claims, as per the DOC;
- Agreement by all claimants on limits to further military development of features;
- Agreement by all claimants on no occupation of Scarborough Shoal or other unoccupied features, in accordance with the DOC;
- Removal of the Sierra Madre ship from the Second Thomas Shoal by the Philippines. Because this is a low-tide elevation clearly within Philippine EEZ, Philippines is recognized as having "de facto administrative control" until claims are peacefully adjudicated; and
- Although Mischief Reef, an LTE, was developed outside of UNCLOS and is considered artificial, recognize Chinese de facto administrative control without prejudice to settlement of claims.

Step 11: China agrees to establish a regional marine scientific collaboration center on Mischief Reef and allows access to other SCS claimants.

Step 12: Claimants jointly declare marine preservation zones in the South China Sea with understandings negotiated about use and access.

CONCLUSIONS

While many of the steps outlined above may seem far-fetched, one-sided, or subject to other criticism, they are clearly possible given sufficient political will and leadership from the parties involved. While the political will or vision to realize these steps may not exist today, political will could evolve or, indeed, events may force change. The first step, which will be crucially important, requires engaging in a more serious discussion both domestically and among the parties about what is at stake and how to realistically avoid worst case outcomes and work toward the common interests of security, stability, resource conservation, and prosperity in the decades to come.

REFERENCES

- 1 See “Declaration on Conduct of Parties in the South China Sea,” Association of Southeast Asian Nations, November 4, 2002, https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2, in particular, “The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.”
- 2 Leszek Buszynski, “The South China Sea: Oil, Maritime Claims and U.S.-China Strategic Rivalry,” *Washington Quarterly* 35 no. 12 (Spring 2012): 139-156.
- 3 See Wu Xinbo, “Regional Security Roles and Challenges” in *Debating China*, Nina Hachigian, ed. (Oxford, UK: Oxford University Press, 2014).
- 4 See for example, Oriana Skylar Mastro, “Military Confrontation in the South China Sea,” (New York: Council on Foreign Relations, May 2020), <https://www.cfr.org/report/military-confrontation-south-china-sea>.
- 5 Secretary of State Mike Pompeo noted in 2019, for example, that the U.S. is obligated by treaty to respond to any attack on Philippine forces on the seas, regardless of whether they occur in disputed areas. See Raul Dancel, “US will defend Philippines in South China Sea: Pompeo,” *Straits Times*, March 2, 2019, <https://www.straitstimes.com/asia/se-asia/us-will-defend-philippines-in-south-china-sea-pompeo>.
- 6 Zhou Bo, “The Risk of U.S.-China Military Conflict is Worryingly High,” *Financial Times*, August 25, 2020, <https://www.ft.com/content/0f423616-d9f2-4ca6-8d3b-a04d467ed6f8>.
- 7 Lyle Goldstein, *Meeting China Halfway: How to Defuse the Emerging U.S.-China Rivalry*, (Washington, D.C.: Georgetown University Press, 2015).