

DANGEROUS GROUND: THE SPRATLY ISLANDS AND U.S. INTERESTS AND APPROACHES

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The region around the Spratly Islands and the South China Sea is fraught with physical, economic, political, and military hazards that require delicate navigation. This region is important to the economies of the surrounding states in terms of fish resources and the potential for natural gas and oil. This bonanza of riches spurs out-sized claims in the region that result in diplomatic and physical clashes. The large flow of maritime commerce around the Spratly Islands is also crucial to the economic well-being of the region and the world. Although these waters are economically important, the islands themselves have not been. However, occupation of the islands dictates control of the surrounding sea's maritime traffic and economic exploitation. Thus the land features are important to these states for security purposes and because possession of them may be the key to controlling the coveted surrounding waters. Claim to these land features is strengthened by the establishment of around 50 remote military garrisons on these islets by the claiming states, which increases militarization of the dispute, with an increased risk of conflict.

Although direct military confrontations among the claimant states have diminished since the 1990s, civilian enforcement agencies have been active in protecting claimed spaces, sometimes employing violence that results in deaths. Because partner countries rely on the United States to ensure stability in the South China Sea, and to address its own interests in maintaining freedom of navigation rights and economic development

of the international sea bed, the United States should remain engaged with the South China Sea states on issues of mutual concern. The United States has also been embroiled in the region through confrontation with the People's Republic of China (PRC) over rights of navigation and in support of partners and allies. To address these concerns, policymakers need to understand the underlying problems and conflicting claims that threaten security and prosperity in this region.

The use of customary law and the United Nations Convention on the Law of the Sea (UNCLOS) in establishing claims to the Spratly Islands and surrounding waters helps explain the perspectives of the disputants. Their legal positions are especially important for American policymakers as they inform possible solutions and suggest how to contribute to peace and prosperity in the region. Three key legal questions must be answered to help sort the disputes: sovereignty over the islets, the nature of a claimed land feature, and the delimitation of maritime jurisdiction. Sovereignty is claimed through customary law, with the PRC, Taiwan, and Vietnam using historic doctrine to claim the entire South China Sea, while they also use the doctrine of occupation to claim some land features, the method which the Philippines and Malaysia also employ. The establishment of UNCLOS precepts made otherwise unproductive land features valuable.

Since the historic claims are expansive and unconvincingly documented in the views of many

experts, claims made through the customary law doctrine of “discovery and occupation” are more influential. In this, Vietnam, the Philippines, Malaysia, the PRC, and Taiwan each lay claim to parts of Spratly features. Taiwan also claims all of the land features based on its occupation of the largest island which is an interpretation of customary law that is in dispute. The Philippines’ Kalaya’an claim to most of the islands through its proximity is not backed with effective occupation. Each of these states supports its claims with efforts at effective administration through establishing laws governing its possessions under municipal governments, economic activities, or military occupation. Each are also disputed with counterclaims by other South China Sea states, leaving physical possession of a feature the surest guide to ownership, with no state holding effective legal sovereignty over all.

Developed to reflect modern interpretations of international law, UNCLOS offers guidance to maritime disputes in the South China Sea, but it is not a comprehensive solution. Once sovereignty of a land feature is determined, UNCLOS stipulates its jurisdiction over surrounding waters based on its characteristics. This process results in graduated degrees of sovereign rights for the state. Islands designated as inhabitable or economically viable accrue more consideration than uninhabitable rocks and other features, making only some of the occupied areas in the Spratlys eligible to establish a modest maritime jurisdiction, and probably none meet the habitable standard to garner full jurisdiction. This would leave the waters around the Spratlys mainly under the maritime control of the surrounding land masses, or as international waters unless the claiming states cooperate under the guise of the enclosed sea rules to establish a joint maritime zone.

Once sovereignty and feature type are determined, zones of authority may be established by the occupying state depending on the distance from its established shore baseline. Internal, archipelagic, and historic waters are maritime variations of near-full sovereign control, which could be disruptive to economic and navigation activities if awarded to any state exclusively. Vietnam

or China, for instance, could control the entire South China Sea if the historic claim of either nation was affirmed, or the Philippines would control its Kalaya’an claim with an exclusive economic zone (EEZ) if the Spratlys were determined to be an extension of the Philippine archipelago. Islands above the high tide mark establish territorial waters and a contiguous zone, which would carve 24 nautical mile (nm) zones like Swiss cheese holes around the Spratlys, but should allow innocent passage even if restricting most other maritime activities. However, Vietnam, Malaysia, and China do not recognize innocent passage for naval ships, which makes such zones a major concern for the U.S. Government.

The length of the 200-nm EEZ allows much potential overlap among land masses and islands in the semi-enclosed South China Sea, and, like territorial waters, some states restrict military activities within the EEZ. The awarding of an EEZ under several scenarios, then, affects freedom of navigation and the potential for economic development by the United States in otherwise international waters. Although such arguments by claimants for more restrictions in these zones are tenuous, they could be useful justification to cover military actions by states like the PRC, which is the most active in enforcing a restrictive EEZ.

Freedom of navigation in the South China Sea is the most immediate concern for the United States to ensure naval vessels retain all rights of access. Current policies in China, Vietnam, and Malaysia restrict foreign naval activities in their zones beyond those normally attributed to UNCLOS. Concluding a U.S.-PRC *Incidents at Sea Agreement* would clarify the rights and responsibilities between the two, especially when operating within each other’s maritime jurisdictions, including the South China Sea. Other forms of government to government interaction could build confidence in present and future agreements, and leverage common interests, as the U.S. Coast Guard has done so well with its PRC counterparts. U.S. ratification of UNCLOS is another important step to influence the evolution of future interpretations of freedom of navigation towards more open use. Although a more difficult proposition,

the United States should demand the clarification of the historic claims made in the South China Sea so as to facilitate negotiating a settlement and accelerate economic development. Support to Vietnam's current islet occupations in the Spratlys, its claims to coastal EEZ and continental shelf areas in compliance with UNCLOS, and specific historic economic rights could wean Vietnam from its historic claims. The United States has less influence to change China's position on historic rights because the ambiguity of its positions has served China well. Here, appealing to China's future role in world politics may help to change its parochial freedom of navigation perspective into a more global one like the United States holds.

Open economic access to the South China Sea maritime commons is a second U.S. interest, but one which may diverge from freedom of navigation. Access to the resources of the high seas is an important enough U.S. interest to have stalled U.S. ratification of UNCLOS for nearly 20 years. While the United States remains outside the treaty, however, it holds less influence over how maritime law is interpreted and evolves, and thus is at a disadvantage to shape events like whether the South China Sea becomes a wholly divided and claimed sea. Such arrangements as a Joint Development Zone or a Joint Management Zone could stabilize the area and facilitate economic development for its participants. This could detract from potential U.S. economic development activities, but would support broader U.S. security and economic prosperity goals for the region as well as attain a diplomatic settlement through recognized international law. To support any of the joint development solutions, the United States would have to place its security interests over potential economic ones.

To contribute to overall stability and prosperity in the region, and its own freedom of navigation and economic interests, the United States must delicately play the roles of conciliator and balancer as circumstances require. The United States is an honest broker because it shares goals in common with the states around the South China

Sea, in accord with existing U.S. policy. Although the United States may not be truly neutral, it has less direct demands in the disputes, garnered more trust than most other states, and possesses resources to bear on these problems making it a useful interlocutor in resolving problems.

In other circumstances, the United States has intervened in problems around the Spratly Islands in more parochial ways to balance the diplomatic field in aid of allies and defense partners and to directly protect its freedom of navigation interests. Just as the U.S. honest broker role limited the demands that its partners might make in the disputes, the balancer role should deter aggression. The balancer role is also dictated by U.S. treaty obligation to the Philippines and because the Association of Southeast Asian Nations (ASEAN) lacks a defense arrangement by which to counter the influence of a much stronger PRC. As a balancer, the United States has improved ASEAN states' military capabilities and cooperation, and challenged Chinese actions. The balancing role should be minimal so as to not to overshadow the conciliator role.

The United States has again made the Asia-Pacific region a major focus of its stated global interests, and converging national interests between the United States and China may indicate that some progress on the issues outlined here are possible. The importance of the Spratly Islands region to world trade, energy and security, the intricacy of the bitter problems involved, and its own interests require careful American involvement. To best address the disputes, policymakers must understand the underlying territorial and maritime claims of the PRC, Taiwan, Vietnam, Malaysia, Indonesia, Brunei, and the Philippines in order to help manage these issues peacefully and equitably for the regional states, as well as to meet U.S. interests. In the end, the dispute in the Spratly Islands is not one for the United States to solve, but its ability to contribute, facilitate, balance, or support is necessary towards a solution from which all may benefit.

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