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The South China Sea Disputes: Formula for a Paradigm Shift

- A Rejoinder

By Robert C Beckman and Clive H Schofield

Synopsis

Our proposal that China bring its maritime claims into conformity with international law and UNCLOS in particular has been critiqued by Professor Raul 'Pete' Pedrozo of the US Naval War College as "problematic" and "counterproductive". We beg to differ. While he offers an interesting perspective and is entitled to his own views of China's policy on the South China Sea, we believe that several of his points warrant a rejoinder.

Commentary

IN HIS response to our joint commentary, Professor Raul 'Pete' Pedrozo of the US Naval War College articulates six reasons why our proposal "will not work". The first two points raised are the assertion that China has no legitimate claim to sovereignty over the islands in the South China Sea and that our proposal "rewards Beijing for its illegal occupation of the Paracel and Spratly Islands".

These comments disregard the fact that we intentionally left issues of territorial sovereignty out of our proposed formula for a paradigm shift in the South China Sea disputes. Thus, we did not address the merits of China's claim (or those of any other claimant State) to sovereignty over any disputed islands in the South China Sea. Further, we did not suggest that any of the other claimants should acquiesce to China's claim to sovereignty over the islands.

Intractable disputes

Rather, it is our contention that the sovereignty disputes are intractable and will not be resolved at any time in the near or medium term so it would be futile to debate the relative merits of multiple competing sovereignty claims. That such irreconcilable claims exist is a reality. Against this longstanding, complex and contentious backdrop, we are firmly of the belief that the only viable option is to set aside the sovereignty disputes and focus on cooperation and joint development in the areas of overlapping claims.

Our commentary is written on the understanding that at present there is no agreement on the areas of overlapping claims in the South China Sea. This is to a large extent due to the fact that China appears to base its maritime claims at least in part on the nine-dash line map, while the other claimants do not accept as legitimate any claims to maritime space that are not made from land territory (including islands).

Where we propose a significant shift is for all claimants, including China, to bring their maritime claims into conformity with international law and the UN Convention on the Law of the Sea (UNCLOS). It is perhaps worth noting that this is what the US Government has been consistently pushing for. Indeed, this is one of the themes of US Assistant Secretary of State for the Asia-Pacific Daniel Russel in his testimony before the House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, as highlighted in our commentary.

At no point did we suggest that other claimants need accept China's revised maritime claims. Consequently, under this approach, although areas of overlapping maritime claims would still exist in the South China Sea, their spatial scope would be significantly narrowed and they would be more clearly defined in a manner that is consistent with the rules and principles in UNCLOS. Accordingly, in our view, such remaining overlapping claims areas are likely to be more readily subject to "provisional arrangements of a practical nature", including joint development, as provided for by UNCLOS.

"Full island" status?

In his third point, Professor Pedrozo criticises our position that the larger islands in the Spratlys could be entitled in principle to an exclusive economic zone (EEZ) of their own. He quotes article 121(3) of UNCLOS which provides that only features that can "sustain human habitation or economic life of their own" are entitled to claim an EEZ. This is correct as far as it goes, but Professor Pedrozo fails to state any test for when this condition is satisfied.

When article 121 of UNCLOS was drafted numerous proposals were made regarding the tricky issue of distinguishing between islands capable of generating continental shelf and EEZ claims and mere "rocks" which cannot. Many of these proposals focused on criteria related to size and the presence of vegetation and/or water sources. Ultimately, no consensus was reached then and subsequently no definitive position has been determined through State practice or by virtue of an authoritative ruling from an international judicial body.

Nonetheless, we have taken island size, coupled with the presence of vegetation as useful, though not necessarily definitive, indicators of islands that may, in principle, be capable of generating continental shelf and EEZ rights. This view is underpinned by the fact that substantial State practice exists where relatively small islands have been considered to be capable of generating the full suite of zones of maritime jurisdiction available under UNCLOS. In this context it is worth noting that, in keeping with the practice of many other States, the United States claims hundreds of thousands of square miles of EEZ around tiny uninhabited and arguably uninhabitable islets in the Pacific Ocean, some of which may not even be vegetated.

Fourthly, Professor Pedrozo suggests we are advocating that features which are not islands could somehow be upgraded to 'full' island status through land reclamation. This is not our position, and we do not believe there is anything in our commentary to suggest this.

Building trust and rule of law

The final two points of Professor Pedrozo's commentary reveal that he believes China intends to assert sovereignty and jurisdiction over all of the South China Sea notwithstanding the rules and principles of international law and that the only solution is for ASEAN and other States to stand up to China's brinksmanship. He is entitled to that viewpoint, but it is one that we neither share nor find especially helpful.

We eschew this essentially pessimistic perspective and instead offer an avenue whereby China's maritime claims can be brought into conformity with UNCLOS at relatively limited cost but potentially substantial benefit to itself and to the other South China Sea claimant States. Our proposal necessarily assumes that China's long-term interests are to have a relationship with its neighbours based on trust, mutual respect, cooperation and the rule of international law.

We believe that our proposal potentially provides a platform for constructive discussions on cooperation and joint development in the areas of overlapping claims defined on the basis of UNCLOS, which would be to the benefit of all parties to the South China Sea disputes.

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