

Murky waters surround the rule of law in the South China Sea

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Author: Sourabh Gupta, Samuels International

The air is [thick with calls](#) ^[1] for the rule of law to be observed in the East and South China Seas. ‘Japan for the rule of law, Asia for the rule of law, and the rule of law for all of us’, Shinzo Abe [said at the Shangri-La Dialogue](#) ^[2] earlier this year. Nations, he observed — and by which he meant China — must make claims that are faithful in light of international law and resolve them peacefully.



China’s [legal claim to sovereign rights and jurisdiction in the South China Sea](#) ^[3], which asserts an entitlement to exclusive economic zone (EEZ) and continental shelf rights over the relevant waters, is not inconsistent with international law. ‘Islands’ as low-lying as Japan’s Okinotorishima, as small as the US Howland and Baker Islands, [and as remote from a continental coastline as Australia’s Heard and McDonald Islands](#) ^[4] have valid or pending EEZ claims. None are inhabited or can sustain economic activity. What Beijing has to clarify nevertheless is both the scope of its ‘relevant waters’ claim line as well as this line’s association with the ‘historic rights’ that it appears to enforce at times to the limits of the infamous ‘nine-dash’ line.

China has opted out of the compulsory binding dispute settlement provisions of UNCLOS for certain categories of disputes, but this is not exceptional. Numerous states have done so and when or if the US accedes to UNCLOS, it too intends [to opt out](#) ^[5] of these categories of disputes.

The proximate cause of Abe’s declaration [was the unilateral placement of a drilling rig](#) ^[6] owned by a Chinese state-owned oil company in the contiguous zone of a Beijing-administered island in the Paracels chain. The Chinese action is not illegal, nor is there anything new in the

disregard for Article 123 of UNCLOS, which encourages relevant states to cooperate. International oil companies are active in disputed stretches of the South China Sea where claimant states have unilaterally granted prospecting rights in areas deemed to reside on their side of the median line. China's drilling is exceptional only to the extent that the oil rig was positioned in a disputed stretch of water that is generated from a land feature, the Paracels, which is itself in dispute.

No precedent exists in authorising stays on such drilling. The Law of the Sea, furthermore, is an unsatisfactory guide to referee quarrels that reside at the crossroads of disputed sovereignty claims and competing sovereign rights and jurisdiction claims.

Jurisdiction rights over maritime areas emanate from sovereignty over the land territory of a coastal state. So long as they are naturally formed and rise above sea level at high tide, islands are considered land territory and, in the case of the Paracel Islands, can generate a maritime zone halfway to the opposite Vietnamese coast. Japan deems the disputed Senkaku/Diaoyu Islands, the largest of which is smaller than its Paracels counterpart, to generate an entitlement up to the median line from the opposite Chinese coast.

It is much less well known that customary law makes no differentiation in the criteria required for continental landmasses and islands — however small — to generate a zone. The (undisputed) Vietnamese continental landmass and the (disputed) Paracel Islands have equal standing in the eyes of the law to generate such an entitlement. Tribunals have been disinclined to weigh in, limiting their disapproval to instances where small, far-removed islands reach deep into an adjacent or opposite state's coastal projection and impose an inequitable 'cut-off' effect of that state's maritime entitlement. The Paracels do not significantly impair Vietnam's (or Hainan's) coastal projection.

Without a legal challenge to determine either the Paracels' final sovereignty or a delimited boundary in these waters, there cannot be a resolution of the competing sovereign rights and jurisdiction question. [Hanoi won't consent to the former](#) ^[7] for fear of having to permanently surrender its claim to the Paracels, while Beijing won't consent to the latter for fear that a delimitation will permanently limit its sovereign rights in the relevant waters to (much) less than the median line.

That said, it is frankly inconceivable that a court would establish a boundary that cuts through the contiguous zone of the Paracels and thereby strip China of jurisdiction in waters that UNCLOS properly deems as also falling within the law enforcement remit of the sovereign or administering power.

Until such time as China and Vietnam are able to consensually devise mechanisms to jointly develop the contested seabed resources — pending or without prejudice to delimitation — both parties must respect the median line and limit enforcement operations to their respective sides. Hanoi's challenges across the median line are imprudent, risk violent reprisals ([as has been the case previously](#) ^[8]) and invite similar interference [on its side of the median line](#) ^[9].

The multitude of legalities aside, searching political questions are in order for all claimants — and

non-claimants — concerned.

There is no pressing reason why China must develop resources in this doubly-disputed area of the South China Sea unilaterally. Either Beijing's political calculus of deterrence, which extracts too steep a premium in good neighbourliness, must change [or it should lay out its outer continental shelf claims](#) ^[10] with precision. In the interim, it should provisionally refrain from drilling, much like Japan in the Senkaku/Diaoyu area.

For the other claimants, [can shrewd diplomacy match](#) ^[11] the technological, budgetary and law enforcement might that Beijing can summon to lock up the resources in the 'doughnut hole' of the South China Sea to which it also has a rightful claim? Non-claimants may evince concern but they are unlikely to have much appetite to extend their security obligations to slivers of insignificant territory.

For Japan or its friends to censure Chinese unilateralism while turning a blind eye to similar, or worse, behaviour by other claimants is disingenuous. It cannot be that China is guilty of, both harassment across the median line and resisting harassment on its side of the median line. To claim further that it takes no position on the competing sovereignty claims is doubly disingenuous. As per the territorial provisions of the San Francisco Treaty (Articles 2 and 26), [then-prime minister Yoshida](#) ^[12] 'renounced all right, title and claim to ... the Spratley Islands and the Paracel Islands' to the Republic of China in Taipei in 1952.

The rule of law in the contested semi-enclosed seas of Asia needs to be constructed on a foundation that is objective, fair and equitable.

Sourabh Gupta is a Senior Research Associate at Samuels International.

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[1] thick with calls:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143078.pdf

[2] said at the Shangri-La Dialogue:

http://japan.kantei.go.jp/96_abe/statement/201405/0530kichokoen.html

[3] legal claim to sovereign rights and jurisdiction in the South China Sea:

http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf

[4] and as remote from a continental coastline as Australia's Heard and McDonald Islands: <http://chinesejil.oxfordjournals.org/content/9/4/663.full.pdf>

[5] to opt out:

<http://www.tandfonline.com/doi/abs/10.1080/00908320.2012.726828?src=recsys#.U7Xtotlg-M8>

[6] was the unilateral placement of a drilling rig:

<http://www.eastasiaforum.org/2014/06/04/vietnams-strategic-outlook-after-haiyang-981/>

[7] Hanoi won't consent to the former:

http://www.un.org/depts/los/convention_agreements/convention_declarations.htm

[8] as has been the case previously:

<http://thediplomat.com/2014/02/vietnam-and-china-a-dangerous-incident/>

[9] on its side of the median line:

<http://online.wsj.com/news/articles/SB10001424127887323717004578157033857113510>

[10] or it should lay out its outer continental shelf claims:

<http://www.eastasiaforum.org/2012/07/29/china-s-south-china-sea-jurisdictional-claims-when-politics-and-law-collide/>

[11] can shrewd diplomacy match:

<http://www.eastasiaforum.org/2014/06/07/vietnams-deft-diplomatic-footwork-on-the-south-china-sea/>

[12] then-prime minister Yoshida: <http://www.taiwandocuments.org/taipei01.htm>