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MANOJ JOSHI

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ABOUT THE AUTHOR

MANOJ JOSHI is a Distinguished Fellow at the Observer Research Foundation. He is a columnist and author, and his views on a variety of national issues are frequently solicited for panel discussions on television. He was schooled in St. Stephen's College, Delhi, and the Lucknow University. He has a keen interest in issues related to national security and has written two books and a number of scholarly articles, and is co-editor of another book. He obtained his PhD from the Jawaharlal Nehru University.

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ABSTRACT

The verdict delivered in July by an international tribunal on the South China Sea case in The Hague is a stunning defeat for China. The Tribunal has upended the maritime claims of a number of nations in the South China Sea, but China is most affected, as its claims were also most extensive. As China had already rejected the verdict even before it was pronounced, the world sits at a juncture of two possible paths — China could become more assertive in its claims; or all sides could take a step back and permit diplomacy to take charge. The South China Sea issue has become a complex amalgam: There are the overlapping claims of various countries in the region, home to some of the world's most important sea lanes and air routes. There is also China's over-the-top claim to most of the sea through its 'Nine-Dash Line', China's desire to push the US Navy out of what it considers its historic backyard, and the US' decision to reaffirm its Asia-Pacific identity, after the distractions of its wars in Iraq and Afghanistan.

INTRODUCTION

A verdict issued on 12 July 2016 by a Tribunal set up under the United Nations Convention on the Law of the Seas (UNCLOS) has ruled that there was no evidence that China had exercised exclusive control over the waters and resources of the South China Sea (SCS), and therefore had no legal basis to claim historic rights to sea areas within the so-called 'Nine-Dash Line'. Second, it noted that while small groups of fishermen had used the rocky outcrops of the sea, collectively called the Spratly Islands, none

of them were capable of sustaining a stable community and thus could not claim an exclusive economic zone (EEZ). Third, that some of the areas were in fact within the Philippines EEZ and China had violated their rights by interfering with Filipino fishermen and oil exploration teams. Fourth, that Beijing's artificial island programme had violated UNCLOS obligations on protecting the environment.¹

Given China's emphatic rejection of the arbitration process initiated by the Philippines in 2013, it was not surprising that Beijing trashed the Tribunal verdict as "null and void". The Chinese foreign ministry statement noted that "China neither accepts nor recognises it." Rejecting all third-party dispute settlement procedures, it called for processes which respected "historical facts" and upheld state sovereignty.² A government statement reaffirmed China's official maritime claims to the Nanhai Zhudao (South China Sea Islands) on the basis of history, Chinese law, as well as UNCLOS. It said it was willing to discuss all disputes "peacefully through negotiations," pending which it could undertake joint development.³ Taking the low road, Chinese Vice-Minister Liu Zhenmin questioned the credibility of the arbitrators, calling them ignorant of the South China Sea issue and saying they had been appointed by a judge Shunji Yanai who was a former Japanese ambassador to the US and president of the International Tribunal on the Law of the Seas (ITLOS) in 2013 when the Philippines began its case. Liu claimed that Yanai was an ally of Japanese Prime Minister Shinzu Abe. "This tribunal is totally rigged by him," Liu alleged.⁴

It is important to know at the outset what the arbitral award is about and what it is not.⁵ Most important, the award has not addressed the underlying issue—the competing claims to sovereignty of the islands. Likewise, though it has said that entitlements under UNCLOS extinguish the claims of the Nine-Dash Line, it has not declared the line invalid, nor questioned China's claims to the islands within that line. However, in deciding that none of the Spratly Islands were true islands under Article 121 of UNCLOS, with an EEZ and continental shelf, the verdict has sharply limited the maritime entitlements of those who control the islands anyway. What the Tribunal did say was that China's artificial island programme violated its obligations

to protect the marine environment by altering the natural conditions of the features that were disputed. It did not, however, question the principle of the construction activities, nor the building of military installations, except in the case of the Mischief Reef, which it held was part of the Philippines EEZ.

While the Tribunal has no means to enforce its judgement, its impact will be seen hereafter in the behaviour of the countries of the region. No one expects China to abandon the artificial islands that it has created, and the verdict, too, has not called for any roll-back on that score. What remains to be seen is whether China steps up its island building programme and aggressive fishing, or it backs off, albeit discretely. At the same time, in limiting the maritime entitlements of all the claimants, the ruling potentially opens up the region for oil and gas exploration.

This paper looks into the legal issues arising from the conflicting maritime claims of various countries to the South China Sea, China's confusing and expansive claims, as well as the geopolitical tussle around the disputes between China and the US. The premise in this paper is to accept the reasoning and ruling of the arbitral Tribunal when it comes to the legal issues involved.

THE SOUTH CHINA SEA DISPUTE: A HISTORY⁶

According to a historical account by former US diplomat Chas W. Freeman, Jr., the South China Sea was a regional commons before the emergence of nation states, with fisherfolk and seafarers using the sea for thousands of years without going into the issue of the ownership of the largely uninhabited islands. Only two of these islands—Woody (Yongxing) and Taiping (Itu Aba)—were considered habitable. Imperial China began asserting its claims from roughly late 19th century when it clashed with France, which was seeking to consolidate itself in Indo-China. In 1932 France seized both the Paracels and Spratlys, and built some weather stations in the area though without disrupting the traditional fishing being carried out by the Chinese and other nationals.

In World War II, the Japanese occupied the region and made a base on Itu Aba (Taiping) island, putting the two island groups under the administrative

fold of Taiwan, which they had also occupied. When Japan surrendered to the Republic of China, it also gave up these islands, which were then declared part of Guangdong province. Over French protests, garrisons were set up in Woody and Itu Aba; in retaliation, France set up a base in Shanhu island in the south-western part of the Spratlys island group. After the turmoil arising from the defeat of the Nationalists in China and the French in Indo-China, the People's Republic of China occupied Woody and the ROC established itself in Itu Aba, and the South Vietnamese in Shanhu. In 1974, in the closing months of the Vietnamese civil war, the Chinese occupied the entire Paracels group and have been in control of them since. Subsequently, the new government of united Vietnam declared its claim for both the island groups even while other countries like China, Malaysia, the Philippines and Taiwan protested and extended their own claims. (Indeed, not all maritime boundary disputes involve China.)

While Woody and Itu Aba had historically been used by the Chinese seafarers, the more recent development has been the occupation by the various states of the region of every conceivable feature on which a structure can be built— island, rock, or reefs visible only in low tide or the so-called “low tide elevations” (LTEs). The Paracels are now completely occupied by China. In the Spratlys, 25 features are controlled by Vietnam, eight by the Philippines, seven by China, three by Malaysia, and one by Taiwan.

Much of this occupation and settlement has been done between the Chinese seizure of the Paracels in the mid-1970s and now— or a period of some 40 years. Of this, roughly 30 years were those in which the government in China, obeying Deng Xiaoping's dictum, kept its head down and did not assert its claims. There have been two key incidents, though — the Chinese attack followed by the occupation of the Fiery Cross Reef (Spratlys) in 1988, in which more than 70 Vietnamese soldiers died, and the 1995 eviction of the Philippines from the Mischief Reef, also in the Spratlys.

Yet China's economic rise has led to close economic ties between China and many of the states of South-east Asia, including Vietnam and the Philippines. China has been ASEAN's largest trading partner since 2009, while the ASEAN has been the third largest trading partner of China since

2011, in great degree because of the free trade agreement (FTA) between the two since 2010. The relationship is more sophisticated than that presented by statistics. A significant portion of China's economic ties—especially with the bigger economies like Vietnam, Indonesia, Thailand, Malaysia, and the Philippines—are through global production chains which are often controlled by Japanese, South Korean, EU and US firms. However, poorer economies like Myanmar, Cambodia and Laos are more dependent on Chinese largesse.⁷

UNCLOS AND MARITIME CLAIMS

Beginning in the 1980s, advances in seabed mining transformed the status of the region from a regional commons to a sea of conflict. After 1982 when the UN Convention on the Law of the Seas (UNCLOS) was signed, it developed from the struggle between coastal states who sought to expand their control over marine areas. According to UNCLOS, states could claim up to 12 nautical miles (nm) out to sea as territorial zone, and a further 12 nm as a contiguous zone, for a total 200 nm Exclusive Economic Zone in which they had the right to exploit resources living and on the seabed. This can extend up to 350 nm if the state can show that this is part of its continental shelf. Islands, which are defined clearly as islands, would have a territorial sea and EEZ; in the case of rocks, a territorial sea but no EEZ; and features visible only in low tide—or low tide elevations (LTEs)—would have neither.

China's maritime boundaries, according to its declaration at the time of ratifying the UNCLOS in June 1996, would be arrived at as per procedure through consultation with the states with coasts opposite or adjacent to it. Under article 2 of the February 1992 Law on territorial sea and contiguous zones, the PRC reaffirmed "its sovereignty over all its archipelagos and islands" as listed. These were the Diayou (Senkaku), Penghu, Dongsha (Pratas), Xisha (Paracel), Zhongsha (Maccleisfield Bank and Scarborough Shoal), and the Nansha (Spratlys) islands.⁸ Of these, the Diayou/Senkaku are disputed with Japan and under Japanese control; the Penghu and Dongsha/Pratas are controlled by Taiwan; the Xisha/Paracel by the People's Republic of China; parts of the Zongsha/ Maccleisfield Bank and Scarborough Shoal

and the Nansha/Spratlys are controlled by PRC, Vietnam, the Philippines, and Malaysia. A separate law was adopted for the EEZ in 1998 and the PRC remained committed to dealing with overlapping claims with opposite and adjacent coasts “on the basis of international law.” Though there have been plenty of discussions and negotiations, the only issue settled so far has been the maritime boundary between China and Vietnam in the Gulf of Tonkin.

In 2002, in a bid to defuse the tensions, the Association of South East Asian Nations (ASEAN) worked out a “declaration on the conduct (DOC) of parties in the South China Sea” with China.⁹ The parties reaffirmed their commitments to the UN Charter and the UNCLOS. In addition, they emphasised their commitment to “freedom of navigation and overflight above the South China Sea” under international law, including UNCLOS. They also committed themselves to refraining “from inhabiting on presently uninhabited islands, reefs, shoals, cays and other features...” Above all, they said, they would resolve their dispute through peaceful means and in the interim would promote dialogue and joint military exercises, and work together in environmental protection, marine scientific research, and other activities. The parties to this declaration said they would work towards a “code of conduct (COC)” which would be much more specific and binding. However, 14 years later, nothing appears in the horizon. Two China-ASEAN committees are working on this, but yet to no avail. In the current context where the ASEAN itself seems to be divided, it is unlikely that they can come up with a common position with which they could sit with China at the negotiating table.¹⁰ With reference to specific disputes, China has revealed a preference for bilateral negotiations, resisting efforts towards multilateral talks on the plea that this would needlessly “internationalise” the issue. China has also steadfastly opposed any US involvement in the disputes.

Tensions grew in part because of the 2009 deadline set by the UN Commission on the Limits of the Continental Shelf (CLCS), giving states the right to submit claims for a continental shelf beyond the 200 nautical miles of the EEZ. This led to a vigorous assertion of claims previously unseen in the region. Uninhabited maritime features were physically occupied and converted to military bases. In 2009, a joint Malaysian-Vietnamese reference to the CLCS

invoked Article 76 of UNCLOS, saying that there were “unresolved disputes” in an area of the southern part of the SCS which they defined in an attached map, along with detailed coordinates of the limits of the continental shelf.¹¹ In response, the next day, the Chinese Permanent Mission presented a note verbale declaring that “China has indisputable sovereignty over the islands in South China Sea and the adjacent waters.” This position, China claimed, was “widely known by the international community”, and the continental shelf claim of Vietnam and Malaysia had “seriously infringed China’s sovereign rights and jurisdiction in the South China Sea.” The mission asked the CLCS to ignore the Vietnam-Malaysia claim. The document also had a map with a maritime zone depicted by nine dashes, extending down from China to the shores off the Sabah and Sarawak provinces of Malaysia.

On 8 May 2009, Vietnam responded with its own note verbale, claiming sovereignty over the Hong Sa (Paracel) and Truong Sa (Spratlys) and saying that China’s claims as articulated in its note verbale of the previous day, have “no legal historical or factual basis.” Malaysia, for its part, was more circumspect: it said that its claims for a continental shelf flowed from the UNCLOS and were without prejudice to the inter-state delimitation of the boundaries. The Philippines then stirred the pot by calling on the CLCS to ignore the Malaysia-Vietnam joint submission since it overlapped with its own claims, and there was the matter of another dispute it had with Malaysia regarding the Sabah province. The exchange of these notes made it clear that all of them had problems with China’s claim because of the attached map which appeared to make unilateral claims on the EEZs of Malaysia, the Philippines, and Vietnam.

In 2010, Indonesia would weigh in, issuing its own note verbale that it was “not a claimant state to the sovereignty disputes in the South China Sea” but that it had noted the so-called nine dotted line for which, so far, “there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted lines.” Referring to statements of Chinese officials in the recent past, the note said “it is only correct to state that those remote of very small features in the South China Sea do not deserve exclusive zone or continental shelf of their own.” Using these “uninhabited rocks, reefs and

atolls” as baseline points to claim maritime boundaries would undermine the UNCLOS and therefore affect the international community. The following year, in another note verbale to the UN, China added a sentence to its 2009 formulation to note that “China’s sovereignty and related rights and jurisdiction in South China Sea are supported by abundant historical and legal evidence.” It said the Philippines had no claims in the Nansha (Spratlys) islands prior to 1970 and it is only in the 1970s that the claims began to emerge. Further, China said, since the 1930s, it had publicly outlined the “geographical scope” of the Nansha islands which were clearly defined and therefore entitled to a “territorial sea, exclusive economic zone (EEZ) and continental shelf.”

As the dominant regional power, China’s unilateral and ambiguous boundary claim through its so-called Nine-Dash Line added to the complexity of the problem. China’s statements since 2009 have been confusing. On one hand, there is a straightforward land claim for the islands within the Nine-Dash Line. On the other hand, there is a lack of clarification as to whether it is claiming the Line, which means virtually the entire SCS, as its national boundary, or only staking claim to its seabed and sub-sea resources. The Nine-Dash Line did not follow any principle laid down by UNCLOS for determining maritime boundaries. Rather, it appeared to be a political claim which overlapped the EEZs of Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. Indeed, the Nine-Dash Line, which appeared first on a Nationalist China map in 1947, was only officially communicated to the international community through the 2009 note verbales, and immediately objected to by China’s maritime neighbours.¹²

GEOPOLITICAL CONTEXT: THE CHINA-US COMPETITION

A parallel stream leading to the South China Sea issue relates to the tensions between the United States and China. The rapid economic growth of China, sustained over 30 years, has had the inevitable effect of transforming its geopolitical standing in East Asia, if not the world. This has had an impact on the United States, which is the leading world power and the dominant

power in East Asia since the end of World War II. The US has fought two wars in the region and has formal military alliances with Japan, South Korea, and the Philippines; it has close ties with the ASEAN grouping. For this reason, the US Navy has operated in the seas opposite China for a long time. In the period 1950 to 1971, the US viewed China as a hostile power and deployed its Navy in defence of Taiwan. Following the US' recognition of the People's Republic of China, the US has dealt with its coastal zones through the UNCLOS. While the US has not ratified the treaty, it says that it upholds its provisions as customary international law. Among these provisions are the right of innocent passage of ships, military and civil, through the territorial waters of a coastal state, as well as the freedom of navigation and overflight through the EEZs. As a matter of routine, the US conducts so-called "freedom of navigation patrols" to challenge countries, including India, which they say make excessive maritime claims. These are not usually publicised.¹³

At the time of its ratifying the UNCLOS in June 1996, China had made a "national declaration" that a foreign state needed to obtain advance approval, or had to give prior notification, for the passage of its warships through its territorial waters.¹⁴

Moreover, China insists, foreign military ships must seek prior permission to operate in its EEZ. In other words, it treats its EEZ as a territorial sea, and it has repeatedly challenged the US Navy operations in the zone. Some of the more dramatic challenges have taken place near Hainan Island, the site of a key PLAN base, but also sitting at the head of the South China Sea.¹⁵ The issue has yet to be adjudicated upon, but Article 310 of UNCLOS is clear that national declarations cannot trump the basic elements of the treaty and the semantics of the treaty upholds the US view.

Over the years, there have been incidents in 2001, 2002, and 2009, when Chinese ships have confronted US naval vessels. More dangerous have been the aerial confrontations, most dramatic of which was the one in 2001 that led to a US EP-3 signals reconnaissance aircraft being damaged by a Chinese fighter and forced to land in Hainan.¹⁶ These are, however, not borne from simply an American desire to affirm its rights under UNCLOS. According to the Congressional Research Service, a key goal of US grand strategy is

to prevent “the emergence of a regional hegemon in one part of Eurasia or another” because such a development “could represent a concentration of power strong enough to threaten core US interests.” The same report says that “some observers” view China’s military modernisation and the growth of its naval capabilities “as part of broader Chinese effort to become a regional hegemon in its part of Eurasia.”¹⁷ For the US, the military domination of the South China Sea is important for various reasons. The US Navy regularly transits through the South China Sea, especially in recent years in support of their operations in the Middle East. The protection of its aircraft carriers is a major national security interest of the US and Chinese deployments in the Spratlys would be a serious challenge to them. The surfacing of a Chinese Song class submarine within five nautical miles of the *USS Kitty Hawk* during an exercise in the East China Sea 2006 was a major shock to the US. It was repeated in 2012, when Chinese submarines sailed close to the *USS Ronald Reagan*.¹⁸

On the other hand, China is clearly seeking to become the dominant power in its near seas. Begun in the mid-1990s, Chinese naval growth and modernisation accelerated in the first decade of the 21st century. The focus was on enhancing submarine capability, developing a new generation of domestically designed warships, synchronising China’s rise as a great economic power with a new merchant marine built in spanking new shipyards, as well as the enhancement of port capacity. Third, in improving personnel education and fleet maintenance and resupply capabilities.¹⁹ The Chinese also built up a large fishing fleet and a coast guard, both of which have played an important role in guarding its stakes in the South China Sea. While the emphasis now is on subsurface conflict to take on the US deployments off their waters, China is also building aircraft carriers to assert their power in waters far from home. Further, China has developed a significant capability in anti-ship ballistic missiles (ASBM) and land-based aviation equipped with anti-ship cruise missiles (ASCM) and their support infrastructure of long range radars.

Given the US’ economic and military pre-eminence, however, China’s aims are also defensive. At one level, China sees the importance of keeping the US

Navy from operating too close to its key bases, such as Hainan island or in the East China Sea; on another level, it worries about the vulnerability of the sea lanes of communications, as these are crucial to their trade activities. While in the near term, China has seen the importance of a powerful maritime capacity as a means of dealing with unresolved sovereignty issues—such as those related to Taiwan and the South China Sea—in the longer term, it views it as necessary step towards becoming a world power.

The maritime intentions are not hidden. In its 2015 Military Strategy document, China said that the mission of its navy was to gradually “shift its focus from ‘offshore waters defense’ to the combination of ‘offshore waters defense’ with ‘open seas protection.’”²⁰ This is visible in the exercises and operations of the PLA Navy (PLAN). In the South China Sea, the PLAN has carried out large-scale island recapture exercises since 2013. More recently it has carried out live fire drills in the area and plans to conduct a joint exercise with Russia as well. In the last decade, the PLAN has also become a bluewater force operating through the Straits of Malacca to the Indian Ocean, Middle East and Africa. Since January 2009, the PLAN has despatched 22 Task Forces to aid in anti-piracy operations in the Gulf of Aden where it has established a base in Djibouti. Chinese submarines are now increasingly visible in the Indian Ocean ports like Colombo and Karachi. The PLAN almost routinely conducts complex exercises in the Western Pacific Ocean that mimic battle conditions.²¹

Such growth of the PLAN has also come with the maturing of the Chinese submarine nuclear deterrent, built around the Type 094 Jin class submarines with the JL-3 ballistic missile with a range of 12,000 km. Given China’s geography and the constant presence of the US Navy along the first island chain stretching from Indonesia to the Philippines to Taiwan and Japan, the Chinese have found that the best basing option is the Hainan Island, which is at the head of the South China Sea. Chinese behaviour in the region must also thus be seen as an effort to maintain its nuclear deterrence capability, by shoring up the defensive perimeter of the Hainan base. This means the development of military facilities in Woody Island, which also houses the provincial level city of Sansha created in 2012, the deepwater port and a

runway at Fiery Cross reef, 1000 km to the south, and runways at Mischief Reef and Subi Reef.²²

The *South China Morning Post* has quoted a Beijing-based military commentator, Song Zhongping, as saying that “the South China Sea provides the only route for China to establish itself as a real maritime power.” He was referring to the fact that the area’s underwater features and depth made it the best option for the PLAN to break out of the US-led containment chains via the Bashi channel. But the South China Sea is too important a channel for the international community to simply concede the Chinese claims. It carries \$ 5 trillion worth of trade, no doubt, a lot of it from and to China. It is also an important international waterway for the trade of other nations like Japan, South Korea and India. Reports from India say that some 55 percent of the country’s trade goes through the South China Sea.

In 2010 a watershed in the South China Sea issue was reached when then US Secretary of State Hilary Clinton declared American neutrality on the matter of the territorial claims. At the same ministerial meeting of the Asean Regional Forum (ARF) in Hanoi where she made this statement, Clinton also raised the issue of America’s national interest in “freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”²³

Subsequently, in an article in *Foreign Policy* magazine, Clinton articulated the need for the US to make a “strategic turn” to Asia to benefit from its economic growth and maintain its regional primacy. One of the key elements of this was deeper economic and military engagement with existing allies like Japan, the Philippines, and Australia, and developing ties with Vietnam, India, and Indonesia.²⁴ The American “pivot” to Asia (later renamed “rebalance”) was announced by President Barack Obama during a visit to Australia in 2011. In a major speech to the Australian parliament, Obama announced that the US had taken a “deliberate and strategic decision” to refocus on economic opportunities of the Asia Pacific, as well as cope with the emerging security challenges.²⁵ With the wars in Iraq and Afghanistan winding down, the US was keen to reassert its primacy in the Asia-Pacific where it had important economic and political interests and where it felt

that it had lost ground to rising China. But the US rebalance was bound to clash with the rapid rise of China's ambitions and capabilities, both economic and military. Considering that the US Navy had historically operated close to Chinese waters, this has inevitably led to a confrontation between them. Coincidentally, the US found that its project was aided by the fact that the Chinese assertiveness and maritime claims had triggered off concerns of its neighbours like Japan, Vietnam, the Philippines, and Malaysia, with two of the countries being treaty allies of the US.

By 2016, the SCS issue had taken on even more dimensions. First, it was a territorial dispute between China and various other claimants for the islands and smaller formations on the South China Sea. Second was a challenge to the international law of the sea, encapsulated in the UNCLOS which was ratified by 160 countries, including China. Third is the issue related to geopolitics, the increased desire of rising China to prevent the US Navy from operating close to its shores and exercise influence in a region proximate to its borders. At a fourth level, it is related to the desire of the US to maintain its global primacy by ensuring it can protect the interests of its allies in the region.

ARBITRATION

As discussed earlier, there are two streams leading into the tensions and conflicts in the region. First, between China and the US in terms of interpretation of the UNCLOS and the right of the US Navy to operate freely in China's EEZ. Second, the disputes that China has with Vietnam, the Philippines and Malaysia and further north with Japan over the Senkaku (Diaoyu) islands and its efforts to step up control of the islands and features through physical occupation and denial of rights to opposite and adjacent states. However, at another level, the conflict arising from the conflicting sovereignty claims in the SCS has continued—indeed has intensified—with China leading the process by focusing on denying areas to rivals and constructing artificial islands on disputed features.

Among the more serious developments in recent times was the standoff at the Scarborough Shoal (Huangyan islands) in 2012. This had its origin in

clashes between Chinese and Filipino fishermen, assisted by their respective coast guards and erupting intermittently since the late 1990s. In July 2012, China erected a barrier at the entrance of the shoal and began to order Filipino ships away. Chinese maintain pressure on a small military presence that the Philippines has at the Second Thomas shoal in the Spratly islands. China also created a Sansha city, on Yongxing (Woody) Island as an administrative body headquartered in the Paracels which it claims administers Chinese territory in the South China Sea. In January 2013, the Philippines declared that it would take China to a tribunal, mandated in the UNCLOS, which is administratively facilitated by the PCA in The Hague. By then it saw little prospect for settlement of the dispute through bilateral negotiations, alleging moreover that China was double-dealing on Scarborough Shoal. The Philippines was aware that China had declared, under Article 298 of the UNCLOS, that it would not accept dispute resolutions relating to sovereignty and maritime boundaries. It therefore made use of clever phrasing in its memorial filed on 30 March 2014. The note covered 15 issues, all of which are highly technical but which can be broken into three sets. First, the Philippines accused China of interfering with its fishing rights around Scarborough Shoal and harming the environment there. The second, and more complex, issue related to the Spratly Islands: the Philippines asserted that its EEZ and continental shelf extend, and it wanted the Tribunal to determine whether Subi Reef, Johnson Reef, McKennan Reef, Mischief Reef, Itu Aba, Gaven Reef, Fiery Cross Reef, and Second Thomas Shoal were islands, rocks or LTEs and the entitlements that could arise from them under UNCLOS. Some of these were the places where China had built artificial islands. The third set related to the Nine-Dash Line itself, and the Philippines questioned as to whether historical claims could trump the geography-based rules of UNCLOS.

On 7 December 2014, China issued a “Position Paper” in response to the Philippines memorial, asserting that “China has indisputable sovereignty over the South China Sea Islands” with activities there going back 2,000 years. According to this rejoinder, China lost control of the area in the 1930s onwards but resumed control after World War II. In 1948, said the paper, the Chinese government “published an official map which displayed a dotted line

in the South China Sea”. China would “neither accept, nor participate” in the arbitration, the paper said, adding that in 2006, it had made a declaration under Article 298 of the UNCLOS that it would not consent to third-party arbitration on territorial delimitation issues. The paper charged that it was the Philippines that had in fact violated international law by refusing to settle the issue through negotiations “as embodied in bilateral instruments and the DOC.” However, the statement did not make any comment on whether some of the features were indeed LTEs, high tide rocks or islands—one of the major issues flagged by the Philippines in its complaint.²⁶

Analysts point to the fact that when China agreed—freely—to join the UNCLOS in 1996, it also accepted its compulsory dispute resolution mechanism under Article 296. Further, Article 288 (4) of UNCLOS explicitly states that where there is a dispute “as to whether a court or tribunal has jurisdiction,” it is up to the Tribunal to decide.²⁷ Using a position paper issued by China in December 2014 as its counter to the complaint filed by the Philippines, the Tribunal set out to examine whether or not it had jurisdiction over the case. In October 2015 after a set of hearings, the Tribunal determined that it was properly constituted under Annex VII of UNCLOS and that China’s non-appearance did not deprive it of jurisdiction. It upheld the Philippines’ right to take up the process, and found that the Declaration of Conduct did not preclude the compulsory dispute settlement mechanism.²⁸ The Tribunal clarified that it would not decide on sovereignty issues, but would focus on the other questions which relate to the interpretation of UNCLOS and therefore fall within its jurisdiction.

On 12 July 2016, the Tribunal gave its verdict. It invalidated China’s vaunted, but poorly defined claim of historical rights in asserting the Nine-Dash Line. It found that Scarborough Shoal was a “rock” entitled only to a 12-nm territorial sea. It declared that even the larger natural features like Itu Aba, Thitu Island, Spratly Island, Northeast Cay, and Southwest Cay were not legally islands since they cannot sustain stable human communities or independent economic life. Therefore, they could have territorial seas, but no EEZs or continental shelves. China-occupied islands like Johnson Reef, Cuarteron Reef, Fiery Cross Reef, and Gaven Reef were “rocks” with a 12-

nm territorial sea, while Hughes Reef, Mischief Reef are LTEs without any maritime zone and that Kenan Reef is an LTE, while Second Thomas Shoal and Reed Bank were submerged features within the Philippines continental shelf. Mischief Reef was within the Philippines EEZ.²⁹

THE COURSE OF THE CONFLICT

The Philippines' decision to submit the issue for arbitration at The Hague only led to an intensification of the conflict. Parallel to this, in 2013, after a gap of some years, China and the US had restarted their sparring in the seas adjacent to China. In 2013, there was a near-collision between a US cruiser and a Chinese ship some 30 miles off the Liaoning, China's sole aircraft carrier. In August 2014, China conducted a risky intercept of a US P-8 aircraft.³⁰ On 17 May, two Chinese fighters, reportedly based on Woody island, conducted what the US charged was an "unsafe" intercept of a US EP-3 signals reconnaissance aircraft.³¹ Separately, China enhanced pressure on Japan by declaring an Air Defence Identification Zone (ADIZ) which includes the airspace above the Senkaku islands. Efforts were made by various countries to moderate the tension. In April 2014, navies of 21 countries, including China, Japan and the US, signed a Code for Unplanned Encounters (CUES) to standardise protocols for communications and encounters. Following this, the US and China signed a Memorandum of Agreement (MOU) in November 2014 and September 2015 to regulate the behaviour of their vessels and aircraft involved in unplanned encounters.

Tensions between China and Vietnam flared when, in May 2014, the former moved a large oil exploration platform called the Haiyang Shiyou 981 (HYSY 981) into an area within the Vietnamese EEZ under the escort of Chinese coast guard and naval ships. Though the platform was withdrawn a month before schedule because of Vietnamese protests, this was the most serious development in the relations between the two countries since the Fiery Cross incident. The HYSY 981 returned in 2015 and again in 2016 to areas on or close to the Vietnam-claimed maritime boundary.³²

In early 2015 China expanded the LTEs and rocks in the Spratly Islands

into small military facilities, even while claiming that they were merely to aid navigation and search and rescue. To reassure allies, the US then undertook Freedom of Navigation Patrols (FONOP), the first since 2012, when the *USS Lassen*, accompanied by two maritime patrol aircraft which passed within 12 nm of Subi Reef on 27 October 2015. The next patrol took place on 30 January 2016 in the vicinity of Triton island in the Paracels.³³ There was an ambiguity to the US patrols—it is not clear what they were challenging, since the right of innocent passage through territorial waters is permitted under UNCLOS.³⁴ Moreover, the US and its allies, Australia and Japan, stepped up efforts to boost the maritime capabilities of states like Indonesia, Malaysia, the Philippines and Vietnam. Part of the effort is to develop a maritime domain awareness project which involves coastal radars and information sharing systems.³⁵ Following his visit to Vietnam in May 2016, US President Obama lifted the ban on lethal arms sales to Vietnam.³⁶ This only led to a hardening of the Chinese mood and a sharpening of its rhetoric. China carried out a worldwide campaign to garner support and explain their position and in the process, even trashed the Tribunal and hurled abuses at its individual members. Chinese diplomats wrote articles, took out advertisements in newspapers, and lobbied to gain support for China's case.³⁷ In subsequent arguments, China charged that the issue was nothing more than “political intrigue” and that in fact the arbitral Tribunal “has no jurisdiction over the case” and the award violates the principles of UNCLOS and “is null and void.” Indeed, China argued, by refusing to participate in the arbitration, it was “safeguarding the integrity and authority of UNCLOS.”³⁸

In the run up to the verdict, the US announced the deployment of a second aircraft carrier group to the region, while China conducted well-publicised naval exercises and live fire drills in the South China Sea. At the annual Shangri-la Dialogue in Singapore, French Defence Minister Yves Le Drian called for more European naval patrols in the South China Sea, noting that “If the law of the sea is not respected in the China Seas, it will be threatened tomorrow in the Arctic, in the Mediterranean, or elsewhere.” On the eve of the verdict, China sought to send out a strong signal in a meeting in Washington DC in which former State Councillor Dai Bingguo

held forth on the issue. Dai is not any ordinary Chinese official; he has been the Director-General of the Office of Foreign Affairs Leading Group of the Chinese Communist Party Central Committee and DG of the Office of National Security Leadership Group of the Central Committee. He was, in other words, way above the pay grade of the foreign minister, let alone, a vice minister. Speaking in Washington, DC, Dai outlined the history of China's claim and repeated the official formulation that the award would be a mere "piece of paper". Even as he talked tough, he also said that China acknowledged that peaceful settlement of disputes was the way forward and noted that Beijing had settled its disputes over land boundaries with 12 of 14 countries, as well as the dispute over the maritime boundary in the Beibu Gulf (Gulf of Tonkin). Dai took pains to emphasise that there was "no fundamental clash of interests" between the US and China in the SCS. Instead of confrontation, he said, the area could be changed into one of cooperation. Rejecting what he said were Western notions of the SCS being a "strategic issue", he called for a scaling back of the "US's heavy-handed intervention".³⁹

Clearly, China was keeping the door open in case it needed to make an honourable exit from its excessive claims. After all, China is aware that it has deep interactions with the United States. Besides their trade—which tops \$560 billion annually—and China's holdings of \$ 1.3 trillion in US Treasury Securities, there are strong government-to-government and people-to-people ties between the two countries. A conflict over the South China Sea would potentially spell disaster for both the countries, as well as the international community.

AFTER THE VERDICT

History is replete with examples of how great powers like the US or Russia have resisted rulings of international tribunals. Eventually, however, they all found ways of arriving at an accommodation. Whether China follows this pattern depends on several factors. The first is related to the possible implications of the ruling for Xi Jinping and the internal politics of the Communist Party of China in the run up to its 19th Party Congress in the

autumn of 2017. Beijing has been forthright in saying that the ruling arises out of a concerted campaign against China. The second lies in understanding how American policy will now unfold. With a new President on the horizon, shifts are likely. It remains to be seen how the US, Japan, EU and possibly Russia, manage their diplomacy henceforth.

It is in the interest of the international community to manage the fallout in a manner that does not compel China to lose face, and, more importantly, will not make it feel that its security is imperilled in any way. So far, the major players—the US and China—as well as the smaller players, the Philippines and the ASEAN, have been gingerly tip-toeing around the Tribunal verdict. On 13 July, the day after the Tribunal verdict, the Chinese foreign ministry came out with a White Paper which appeared to blow hot and cold on the issue. Even while maintaining a strong critique of the verdict, the 44-page document said that “China maintains that the issue of maritime delimitation in the South China Sea should be settled equitably through negotiation with countries directly concerned in accordance with international law, including UNCLOS.” It said that dispute settlement mechanisms should be based on the consent of the states concerned and that “the will of sovereign states should not be violated.” It repeated its offer of “shelving differences” and getting into joint development pending settlement of the disputes. Assuring the international community of the freedom of navigation and overflight, the statement noted that maintaining peace and stability in the South China Sea ought to be “jointly upheld by China and the ASEAN Member States.”⁴⁰

The Philippines, for its part, appointed former President Fidel Ramos as special envoy to deal with China on the issue. No clarity has yet come forth about Ramos’s mandate, however. What of the ASEAN? After much wrangling and a day’s delay, the joint communique of the 49th ASEAN foreign minister’s meeting on 24 July reaffirmed their shared commitment “to the peaceful resolution of disputes... in accordance with the universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).” Analysts say that Beijing worked to dilute the strength of this first major ASEAN statement following the verdict—and succeeded. There was no specific section dealing

with the SCS. Rather, the statement spoke of “the concerns expressed by some ministers on the land reclamations and escalation of activities in the area,” called for self-restraint, and sought a peaceful resolution of the disputes under UNCLOS. Reference to the important arbitral award under UNCLOS which has upended China’s extensive claims in the region was completely ignored.⁴¹ Likewise, the joint statement issued after the meeting of ASEAN foreign ministers and their Chinese counterpart ignored the arbitral verdict and instead chose to reaffirm the DOC of 2002.⁴²

Meanwhile, the US has initiated quiet diplomacy to bring China around, a process which has not been spurned by Beijing. US National Security Adviser Susan Rice paid a visit to Beijing on 25 July. While her primary mission was to prepare for President Obama’s visit in September, a press release from the White House noted that she also undertook “candid, in-depth, and strategic conversations” with State Councilor Yang Jiechi. The arbitral award was not mentioned in the press note, but it did say that the two sides “agreed on the importance of managing differences constructively” and that they had discussed among other things, “maritime issues.” However, in a background briefing after the visit, a “senior administration official” acknowledged that “they (Rice and her Chinese interlocutors) did not discuss explicitly the South China Sea.”⁴³ It is significant to note that before Rice’s visit and after the verdict, Beijing also welcomed US Navy chief Admiral John Richardson who visited a Chinese submarine academy and the aircraft carrier *Liaoning*. On his return from China, the Admiral said at a press conference that US-China ties “were not at an impasse” and that the US would continue to operate in the South China Sea the way it had always done. In turn, China’s message was that it would do what it has been doing, including more island reconstruction.⁴⁴

China could now seize the initiative and take steps that would allow it to dominate the dispute resolution process, in a manner which safeguards its security interests, even while withdrawing its more extreme claims. To start with, it could permit Filipino fishermen to access Scarborough Shoal, in exchange for the Philippines withdrawing its military contingent from the Second Thomas Shoal. Since China has never acknowledged that it is creating military facilities in the area, it could simply freeze its activities. Likewise,

it could quietly drop references to the Nine-Dash Line in relation to its sovereignty. China and ASEAN could move forward in working out the long stalled Code of Conduct. But China could also just as easily move on another path and aggravate the situation. It could, as one analyst has argued on the basis of Beijing's July 13 statement, declare the Spratlys an archipelago and the seas within as "internal", even though that would enclose the features occupied by Vietnam, the Philippines, Taiwan and Malaysia.⁴⁵ Further, it could evict the Philippines from the Scarborough Shoal and build an artificial structure on it, or station fighter aircraft on the artificial islands and declare an ADIZ over the South China Sea. A base in Scarborough Shoal would be just 185 nm from Manila and at a strategic location which would be unacceptable to Washington DC. Such a posture will bring it to a dangerous edge in its relationship with the US, which is treaty-bound to support the Philippines.

China has sent mixed signals so far. On one hand, it withdrew its modern air defence missiles from Woody Islands two days before the verdict.⁴⁶ On the other hand, six days after, they conducted a combat air patrol over the South China Sea and said it would be a regular practice in the future.⁴⁷ It has welcomed US officials in Beijing, while their own high officials like CMC Vice Chairman Fan Changlong have emphasised China's decision to firmly safeguard its territorial sovereignty and maritime rights and interests.⁴⁸ China needs to think hard, not only about the consequences of a conflict with the US, but also of the damage to its reputation that will likely be caused by its blatant violation of an international agreement. It must take into account its long-term relations with its South-east Asian neighbours, who have in their hands the Tribunal verdict questioning the expansive claims being made on their EEZs by China.

Beijing should be aware that the biggest issue arising from the verdict is the question of the rule-based international system. Since 1972, the global community has made an effort to bring the PRC into the international system. Some efforts have succeeded, and China has entered the fold of the UN Security Council (UNSC), the UNCLOS, the Non-Proliferation Treaty (NPT), World Trade Organization (WTO), and other such regimes. The UNCLOS—the regime which has sought to take into account the interests

of all states, big and small, and to promote the peaceful uses of the seas and oceans—is a major achievement of the UN system. In ratifying the UNCLOS, China voluntarily accepted its processes including its compulsory dispute resolution mechanism.

China should at least be seen to accept the Tribunal's decision because by ratifying the UNCLOS and accepting its provisions, the PRC has made a solemn treaty commitment which it is duty-bound to uphold. As international law expert, Julian Ku has pointed out, compulsory dispute resolution mechanisms are not unusual. China has accepted similar provisions in the Convention on the Settlement of Investment Disputes and the Statute of the International Court of Justice.⁴⁹ In the wake of the verdict, China insists that it remains committed to upholding the UNCLOS; how it will square the circle of the verdict is not clear.

THE WAY OUT

The arbitral award has not resolved the territorial sovereignty disputes, nor has it delimited maritime boundaries, addressed the issue of militarisation, provided a solution to the management of seabeds and fishery resources. These can only be done through continued negotiations. But the award is significant as it has told China to back off. Before this award, China has always held that it was acting within the ambit of the UNCLOS—even as it was doing so on the basis of its own interpretation of the Convention.

Anticipating the award, Chas W Freeman, a former US diplomat, proposed that a balanced response, taking into account the multiple claimants would be to apply the doctrine of *uti possidetis*. This essentially means that the parties will keep what they have without reference to how they got it—all in the interest of peaceful co-existence. Once accepted, this would enable parties to bilaterally negotiate respective entitlements beyond UNCLOS and establish maritime boundaries. The problem would arise, Freeman noted, from the fact that China was a latecomer into the rock occupation business and holds just seven of 44 features, where Vietnam has 25, Philippines has seven, Malaysia three, and Taiwan, one. Acceptance would not be easy for Beijing given their

sensitivity about “loss of territory.” There was need, therefore, for the US to take a less confrontational and more mediatory role in the process.⁵⁰

After the verdict was announced, there was an interesting exchange between Prof. Graham Allison of Harvard and senior diplomat Tommy Koh of Singapore in the pages of *The Straits Times*. In an op-ed piece shortly after the verdict, Allison argued that no P-5 of the UN Security Council had ever complied with a ruling by a UN tribunal involving UNCLOS. This was especially so, when they believed that it infringed on their sovereignty or endangered national security. He said that the Chinese response was in keeping with the traditional disdain that the great powers had towards international law—something, he said, which appeared to be reserved only for the world’s small powers.⁵¹ Ambassador Koh, however, responded that it would be wrong to dichotomise between “great powers” and “small powers” in the context of international law in the era of the Westphalian state. Citing the example of the WTO, Koh said that even big states accept the verdicts of their tribunals “because it is in their enlightened self interest to do so.” Though he noted that the US has been turning towards the idea of ‘exceptionalism’ in recent decades, he also said that overall, there is a record of compliance based on self-interest, if not anything else.⁵²

These three views provide a matrix upon which the current situation could be resolved on the basis of accommodating a balance of the interests of all the affected parties. However, there is the matter of the contention of the two Great Powers—the US and China. The US claims that it is merely upholding customary international law in asserting the right of its navy to sail in Chinese territorial waters and EEZ. Further, it does not take any sides on the issue, but is treaty-bound nonetheless to come to the aid of its allies in certain situations that affect their national security. Clearly this understates the American interest in the maintenance of its primacy in a region of such considerable economic importance.

What China seeks is more complex.⁵³ The region proximate to its mainland is of considerable strategic importance for it, as are its relations with South-east Asia. But so are its ties with the United States. It is not clear what Beijing is seeking to achieve. Does it view the region as a first and critical step in its

march towards becoming a global power rival of the US? Or is it merely a defensive move aimed at keeping the US away from a sensitive area? Are the Spratlys important to affirm China's control of valuable undersea assets, or a means to assert a boundary which will make Beijing the regional hegemon? China has waffled on the score. In recent years, it has often spoken of the "Asia for Asians" security concept, on the other hand, prior to that it was advocating the concept of "new type of great power relations" with the US. At other points it has said that the Pacific was big enough for both countries.

Most recently, during US National Security Adviser's meeting with President Xi Jinping, the Chinese President called on the two countries "to effectively manage their differences and respect each other's core interests." Xi said that the main Chinese interest was in economic growth and that "China had no intention of challenging the present international rules and order, and it will never seek hegemony."⁵⁴ However, in the recent past, observers have noticed China's tendency to expand its list of core interests—Tibet, Taiwan and the socialist system—to include the Senkaku/Diayou islands and the South China Sea claims. None of this gives a particularly clear picture of the future. However, a great deal depends on China's attitude. In the coming decade, the PLAN will become, if anything, even more powerful. Whether China presses its revisionist agenda with the use of force, or it takes the path of negotiation and consultation will decide the nature of the East Asian security order, and, perhaps, the stability and prosperity of the region.

IMPLICATIONS FOR INDIA

The South China Sea issue does not have a direct impact on India's security. However, the sea itself is an important waterway for Indian trade and commerce with South-east Asia, Japan, Taiwan, South Korea and China. New Delhi has routinely signalled its world order concerns by strongly urging the importance of safeguarding the freedom of navigation of the seas, the right of overflight, and the importance of peaceful settlement of disputes within the ambit of international law. These have come out in several joint statements with countries like Vietnam, Japan and the United States. New

Delhi's position has been further burnished by the fact that it has accepted a negative ruling by an UNCLOS tribunal relating to its maritime boundary with Bangladesh. India has had a brush with the issue when in 2011 its warship INS Airavat was warned over the radio to stay off "Chinese waters" by a voice claiming to speak for the PLAN, just 45 nm from Vietnamese coast.⁵⁵ India has low-key defence ties with Vietnam, focusing on capacity building, maintenance and training.

In addition, Indian companies have economic interests in the country, especially in the oil sector going back to 1988. However, in recent years, these companies have also been warned to avoid oil exploration in some blocks awarded by Vietnam because they are disputed by China. In 2011, China put up some oil blocks for bids from foreign companies, among them one which was contracted to the Indian company Oil and Natural Gas Commission.⁵⁶ Since 2013, India has made its concerns over the issue of freedom of navigation explicit through Joint Statements in summits with Japan and the United States. The India-Japan Joint Statement of 2013 first spoke of the commitment of the two to the freedom of navigation and unimpeded commerce "based on the principles of international law, including the 1982 Convention on the Law of the Sea (UNCLOS)."

The India-Vietnam Joint Statement on the occasion of the visit of the Vietnam Prime Minister Ngyuen Tan Dung to New Delhi in October 2014, also spoke of peaceful settlement of disputes under UNCLOS, and the need to uphold the ASEAN DOC of 2002, and ensure the unimpeded movement of commerce.⁵⁷

In 2014, India went a step further when, in an Indo-US Joint Statement during Prime Minister Narendra Modi's visit to Washington, it was noted that the two sides "expressed concern about rising tensions over maritime territorial disputes" and affirmed the importance of "ensuring freedom of navigation and over flight throughout the region, especially in the South China Sea." In January 2015, on the occasion of President Obama's visit to New Delhi, the two sides issued a Joint Vision on the Asia Pacific and the Indian Ocean which again affirmed the importance of "safeguarding maritime security and ensuring freedom of navigation and over flight throughout the

region, especially the South China Sea.”

Following Modi’s June 2016 visit, however, the reference to “South China Sea” was dropped, instead the two sides committed themselves to the peaceful settlement of disputes on the basis of international law and UNCLOS.⁵⁸ It is not clear whether this reflects a shift in policy, but certainly, India like all other countries has responded to the verdict with a degree of circumspection.


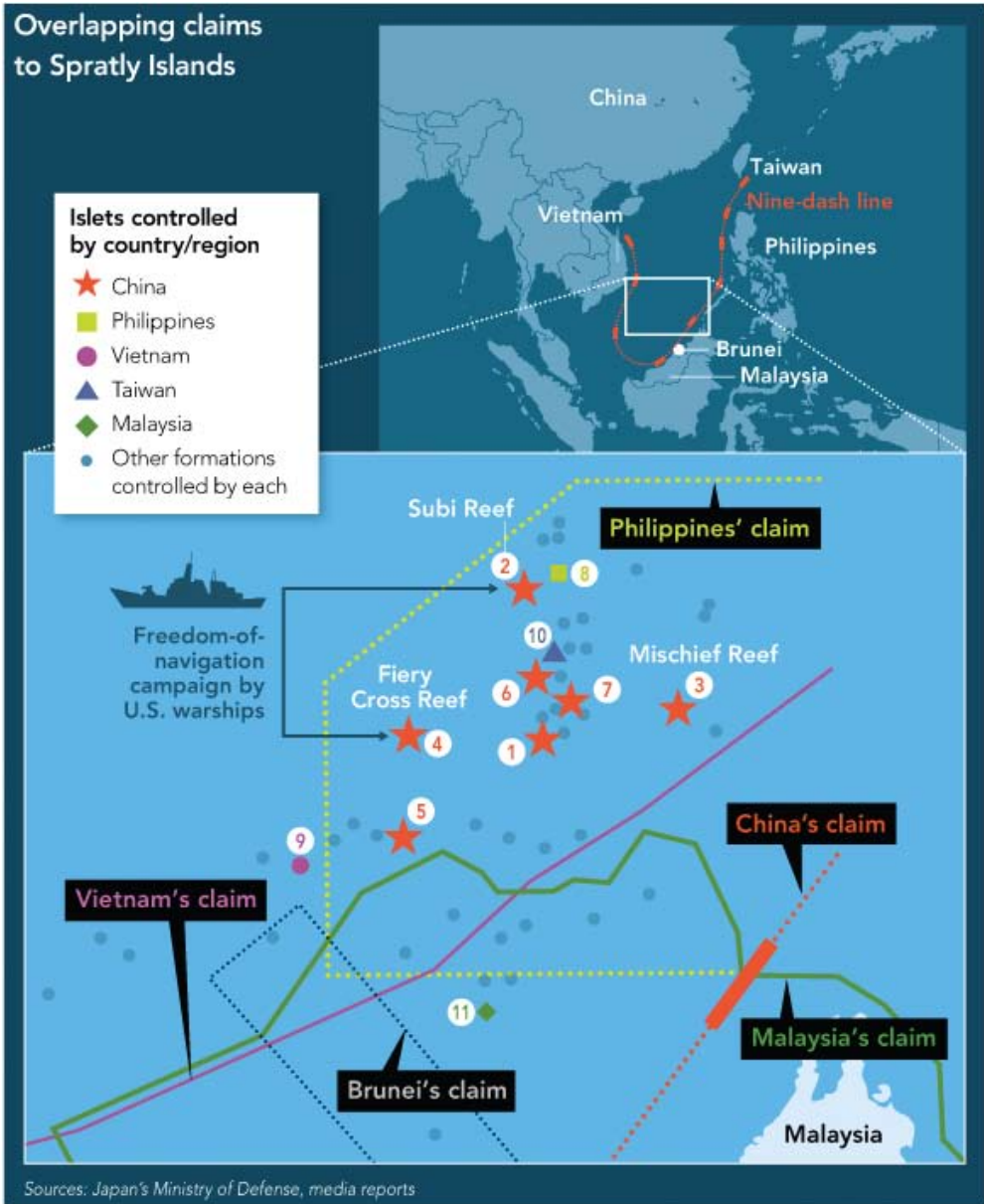
Countries of the ASEAN have privately expressed their desire for India to play a greater (read: balancing) role vis-à-vis China in the region. But just how India should do so is not clear. ASEAN itself is a house divided and, in any case, its constituent nations have much more important economic ties with China than with India. However, as part of its “Act East” policy, India can boost economic ties with the region, as well as build up strategic networks, that do not quite have the status of alliance, with a host of countries like Vietnam, Singapore, Australia, Japan and the United States with a view of helping to stabilise the region and ensuring its goals of assuring freedom of navigation and oversight and the peaceful settlement of disputes. 

FIGURE 1



Source: Nikkei Asian Review

FIGURE 1A

Status of various islands and reefs

Sn	Name of feature	Country	Status
1	Johnson South Reef	China	Rock, installed radar and guns
2.	Subi Reef	China	LTE, runway and telecom facilities
3	Mischief Reef	China	LTE Runway and telecom facilities
4	Fiery Cross Reef	China	Rock, built 3,000m runway and port
5	Cuateron Reef	China	Rock, built operates lighthouse
6	Gaven Reef	China	LTE, built heliport
7	Hughes Reef	China	LTE, installed radar and other facilities
8	Thitu Island	Philippines	Inhabited by civilian and military personnel
9	Spratly Island	Vietnam	Upgraded electricity supply
10	Itu Aba Island	Taiwan	Dock for large warships
11	Swallow Reef	Malaysia	Runway and resort

Source: Nikkei Asian Review

(The first draft of this paper was read by the author at a workshop on the South China Sea issue organised by the ORF in Delhi on 20 July 2016.)

ENDNOTES

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20, Rouse Avenue Institutional Area, New Delhi - 110 002, INDIA
Ph. : +91-11-43520020, 30220020. Fax : +91-11-43520003, 23210773
E-mail: contactus@orfonline.org
Website: www.orfonline.org