Yukinori HARADA

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Editor of the SEARC Working Paper Series
Professor Mark R. Thompson

Southeast Asia Research Centre
The City University of Hong Kong
83 Tat Chee Avenue
Kowloon Tong, Hong Kong SAR
Tel: (852 3442 6330
Fax: (852) 3442 0103
http://www.cityu.edu.hk/searc
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Yukinori HARADA

Summary

China’s assertive behavior has been gaining considerable attention recently and many scholars and diplomats are increasingly concerned about the possibility of war as China continues its rapid military build-up. Although its military modernisation is noteworthy, since China submitted a second note verbale against the Philippines on April 14 2011 (Beckman 2011, Swaine & Fravel 2011), Beijing has also been engaging in “aggressive legalism” to legitimate its sovereignty claims in the South China Sea (Chen 2012, Dutton 2008, Kotani 2011). Some scholars have noted that China believes the South China Sea dispute will be brought to the International Court of Justice in the future. Thus, Chinese scholars are conducting research in search of judicial precedents and examining maritime shipping in the contested waters in an attempt to legitimate China’s sovereignty claims in accordance with international law.

As mentioned above, China has attempted not only to modernize and develop its military but also explore legal enforcement for legitimating its sovereignty claims in accordance with international law. The author attempts to show in this study that China’s new maritime strategy involving the activities of maritime institutions and fishers has been strongly influenced by the standoff with the Philippines over the Scarborough Shoal in April 2012. Moreover, the paper highlights China’s motives and the possibility of Beijing going to war by examining comments from Chinese government officials and scholars. A critical evaluation of the situation reveals that
China is attempting to legitimate its sovereignty claims by adhering to international law and since People’s Liberation Army (PLA) officials and Chinese scholars have adopted a cautious stance towards using force, the possibility of the country going to war seems limited.

1. China’s Small Stick Diplomacy: The Implications of the Standoff between China and the Philippines over Scarborough Shoal

   In recent years, China has softened its hard line diplomatic policy on the South China Sea disputes (Taylor, 2012). China has adopted a new strategy of dispatching paramilitary vessels instead of navy ships to highlight its sovereignty over the well known and controversial “nine dot line” that incorporates most of South China Sea. China maintains a presence in the disputed waters by dispatching maritime law enforcement ships known as the “Five Dragons” consisting of the China Marine Surveillance, Fisheries Law Enforcement Command, Maritime Safety Administration, Maritime Coast Guard and Maritime Customs.

   The new Chinese maritime strategy is most obvious in the activities of Chinese state vessels in disputed waters. Until 2010, official Chinese vessels, including the People’s Liberation Army Navy (PLAN), showed more aggressive behavior such as aiming weapons at foreign fishers. However, since 2011 complaints from other disputants such as the Philippines and Vietnam against such provocative activities by PLAN have gradually decreased. Instead, complaints about interruptions such as cable cutting and obstructing resource surveys conducted by other countries’ private companies have increased significantly (Taylor 2012) (see table 1). In recent years, there have been several new methods of sovereignty enforcement such as increasing
law enforcement activities and marine surveys by Chinese maritime law organizations in the South China Sea (Taylor, 2012).

Table 1: Recent Maritime Incidents in the South China Sea

<table>
<thead>
<tr>
<th>Year</th>
<th>March</th>
<th>May</th>
<th>April</th>
<th>June</th>
<th>July</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>USNS Impeccable Incident.</td>
<td>China submits to the Commission on the Limits of the Continental Shelf under the UNCLOS its Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 Nautical miles.</td>
<td>Malaysia Navy and China’s Fisheries Law Enforcement Command ships are in 18 hours standoff at Swallow shoal.</td>
<td>Chinese Fisheries’ 311 point a gun in Indonesian coast guard vessels to help shackled Chinese fishermen.</td>
<td>The largest Joint Military exercise is conducted in the South China Sea.</td>
</tr>
<tr>
<td>2010</td>
<td>Chinese maritime law enforcement ships expel Philippines oil-well drilling 6 ships from PLAN North Sea fleet conduct a military exercise in the South China Sea.</td>
<td>China dispatch military ships from PLAN East Sea fleet to help Chinese fishing boats contained by Vietnam coastguard ships. Vietnam immediately withdraws its coastguard ships until PLAN arrives at the disputed area.</td>
<td>China dispatch military ships from PLAN East Sea fleet to help Chinese fishing boats contained by Vietnam coastguard ships. Vietnam immediately withdraws its coastguard ships until PLAN arrives at the disputed area.</td>
<td>Chinese Fisheries’ 311 point a gun in Indonesian coast guard vessels to help shackled Chinese fishermen.</td>
<td>The attempt failed and the China’s fisheries ship helped the fishing boat. China Marine surveillance dispatch a state-of-the-art ship 31 to Singapore.</td>
</tr>
</tbody>
</table>

China has learned many lessons from its diplomatic failure in 2010. The year 2010 was a memorable year, both bitter and sweet, for China. On the positive side, the year was significant as China became the world’s second largest economy by overtaking Japan. Meanwhile, many Chinese government officials remembered 2010 as a frustrating year due to a growing number of conflicts with neighboring countries (Global Times, Dec 24 2010). Since then, China has decided to opt for so called “small-stick” diplomacy, which emphasizes a more moderate policy, characterized by the dispatch of paramilitary vessels instead of the more aggressive approach of deploying PLAN ships (Fravel, 2012). The benefit of this “small stick” approach is that China can use its growing People’s Liberation Army Navy (PLAN) as a deterrent helping to avoid military confrontations that have attracted international attention while maintaining its effective control over the disputed areas through continuous activities in the area including patrol activities by official non-military vessels (Holmes & Yoshihara, 2012, Li Mingjian, 2012). Some scholars have pointed out that the adaptation of “small-stick” diplomacy, which strengthens China’s sovereignty claims while managing the risk of military confrontations, is reflected in the fact that Beijing has been seeking to make a “clever move” to strengthen its sovereignty in the South China Sea employing a tactical diplomatic policy.

China’s tactical maritime actions have resulted in consistent progress over time. In fact, the present actions have become increasingly strategic and sophisticated. An example is Chinese fishers assuming an active role in maritime affairs. It has become part of the accepted truth that the Chinese government has politically utilized its civilian fishers since the late 1940s (Kastner, 2012). Recently, Chinese fishers have assumed more dynamic roles in China’s sophisticated maritime strategy by receiving financial support from the Chinese government (Nanfang Zhoumo, May 3 2012). Holmes and Yoshihara (2012) highlight the effectiveness of utilizing fishers when
other countries dispatch their naval or coast guard vessels to evict Chinese fishers, by arguing that China gains legitimacy by adopting non-military means. Moreover, China is able to display its sovereignty by dispatching its domestic maritime law enforcement ships to the disputed waters.

Exploring the strategic intentions behind China’s new maritime strategy has helped to shed light on the implications of the standoff between China and the Philippines at Scarborough Shoal, over which several scholars have raised concerns (Kastner, 2012; Holmes & Yoshihara, 2012).

Some observers have expressed concern about the possibility that dispatching Chinese fishing boats to other countries’ Exclusive Economic Zones (EEZ), where the rival claimants’ jurisdiction is well established, is a strategically-planned action on the part of the Chinese
government (Holmes & Yoshihara, 2012). The aim of these actions is probably to create an inevitable situation in which other countries are unable to react. China’s assertive behavior in the disputed areas has led to confrontation between other claimants’ naval and coast guard vessels and Chinese maritime law enforcement and fishing boats. PLAN’s exponential military buildup over the past decade has made it difficult for the other claimants to take the risky step of initiating armed conflict with China. It is worth noting that the choice of confronting China seems unrealistic for both the politically and militarily small countries of ASEAN. It is obvious that nations with strong military power will dominate weaker countries. Despite being faced with limited choices, a withdrawal of ships from the disputed waters by the contesting ASEAN countries will have a significant impact on sovereignty issues because this decision is likely to be regarded as a disclaimer of sovereignty, giving China effective control of the shoal. Holmes (2012) has pointed out that China will exercise the same tactical actions towards other claimants’ EEZs. Therefore, the next move from the Chinese government will be closely watched by all concerned.

2. China’s Enforcement of “Aggressive Legalism”: Progress in Researching Precedents in China

In line with the maritime strategic change, Chinese scholars, as well as staff in domestic maritime organizations have been actively researching precedents regarding sovereignty. In this context, there are two prominent factors that have been crucial in efforts to prove the legitimacy of sovereignty claims: effective administration and reaction toward other countries’ actions in the disputed waters (Buszynski, 2012). Experts in international law affirm that one of the most important issues in sovereignty disputes is whether disputants have any claims on other countries’ activities in the contested region. Torode (2012a) indicates that other important
actions for claiming sovereignty include implementing fisheries regulations, construction and management of buildings and investigation of crimes, which only countries that are able to exercise sovereignty can implement.

Another important issue relates to the rule of “critical date,” which normally refers to the point when the dispute occurs (Sakai et al 2011 p.192). It is defined as “the date after which the actions of the parties can no longer affect the issue” (Fitzmaurice, G. 1995, p.261). Tanaka (p.3) has also noted the importance of the date when the dispute crystallized in the context of a territorial dispute. The sovereignty judgment between Indonesia and Malaysia over Pulau Ligitan and Pulau Sipidan in 2002 (ICJ Reports 2002, p.682. p. 135.) is a good example in which “the court cannot take into consideration acts having taken place after the critical date” (Tanaka, p.3). The case demonstrates that after the decision of critical date by the courts, any actions with the intention of strengthening sovereignty by claimants is seen as completely invalid. Thus, it is worth noting that the legitimacy of sovereignty claims has been judged solely on the acts that claimant countries executed before the critical date and the time when the existence of sovereignty disputes has apparently been revealed (Torode, 2012a).

Under these circumstances, an increasing number of Chinese scholars have been paying attention to legal precedents and have been even willing to cite important cases to reinforce Chinese sovereignty claims. For example, in 2012, Zhang HaiWen, deputy director of the China Institute for Marine Development Strategy under the China State Oceanic Administration, cited the principle of “critical date” to deny sovereignty claims to Scarborough Shoal by the Philippines. He pointed out that in the maps published in accordance with the Paris Convention (1898) and the Washington Convention (1900), both the Kalayaan islands and Scarborough Shoal were not included in Philippines territory. It was not until 2009 that the Philippines declared it had sovereignty over these territories. Zhang also criticized Vietnam’s sovereignty
According to international law, he stated, there is a doctrine of *estoppel* that limits someone’s authority to allege or deny previous acts, allegations or denials. In this context, when China announced the declaration of territorial waters on the 4th September 1958, Pham Van Dong, Vietnam’s prime minister, sent a letter recognizing China’s declaration and noting his agreement with his Chinese counterpart Zhou En Lai. Moreover, in diplomatic talks between both countries one of Vietnam’s diplomats admitted that the Spratly and Paracel islands had belonged to China since the Sung dynasty. Therefore, he reiterated that recent Vietnamese sovereignty claims were invalid.

Zhong Sheng, a columnist for the *Global Times*, the international version of the communist mouthpiece, the *People’s Daily*, and scholars such as Jing Yong Ming, director of the International Law Research Center at the Shanghai branch of the Chinese Academy of Social Sciences, asserted that in accordance with international law China’s sovereignty claims over the Scarborough Shoal are clearly legitimate. This prominent trend by Chinese scholars implies that China recognises the possibility that the sovereignty issues of the South China Sea are likely to be judged under international law in the future. Thus China has to act immediately to strengthen the legitimacy of its sovereignty claims while criticizing the inconsistency of other claimants (Torode, 2012a).

3. The Possibility of China’s Use of Force in the South China Sea

Chapter I, article 2 (4) of the United Nations Charter established a ban on “the threat or use of force against the territorial integrity or political interdependence of any state, or in any other manner inconsistent with the purpose of the U.N.” (Heselhaus, 2002). It declares that the use of force to strengthen sovereignty claims is entirely prohibited without any exception. For China, this means that provocative activities by the country’s maritime law enforcement agencies
can be regarded as a use of force, which is a violation of the U.N. charter mentioned above. It is obvious that the occurrence of this situation has led to a significant loss of legitimacy of Chinese sovereignty.

Moreover, the UN Convention of the Law of the Sea (UNCLOS) only permits countries to expand their sovereignty rights in areas such as the management of natural resources and environmental protection, within their EEZ or approved continental shelf, and does not support historical claims (Buszynski, 2012). As already mentioned, China has already recognized the importance of adherence to international law for enhancing its sovereignty claims to some extent. In 2012, Zhang Hai Wen noted that contemporary international law strictly prohibits the use of force to capture territory. Thus, it can be argued that seizing territory through military action would make Chinese sovereignty claims illegitimate. As mentioned above, the Chinese government also recognizes very clearly that an assertive attitude toward ASEAN countries will only cultivate a sense of distrust in the region. China is also aware that political disputes have an adverse impact on economic relations with ASEAN countries, China’s third-largest trading partner in 2011 (Nan, 2012).

Since the rise in regional tensions in 2012, Ma Xiao Tian, the deputy head of the general staff department of the People’s Liberation Army, and other PLA officials have maintained a cautious stance toward sovereignty dispute. For example, Ma deliberately underscored the fact that the PLA is not being mobilized and diplomatic measures are the most preferable solution for resolving the South China Sea disputes. According to Perlez (2012), Ma has also insisted that the claimants should avoid turning these disputes into a military issue. The intention behind this low-key statement is to dispel the concerns of the international community regarding active military involvement by China. From another standpoint, the statement implied that there is a consensus among the Chinese leaders and PLA high-level officials that China emphasises diplomatic efforts
to solve the South China Sea disputes and should avoid military conflicts (Taylor & Fravel, 2012). Thus, it is unlikely that China will resort to arms against other claimants (Lague, 2012).

Unfortunately, however, it is not completely beyond the realm of possibility that China could resort to the use of force to solve the South China Sea disputes. For example, Hong Lei, Chinese foreign ministry spokesperson, and many other Chinese scholars believe that China may exercise military force as a last resort “when the nature of the problem has altered” (Hong Lei, May 21 2012). Gu DeXin (2011, p.10) mentioned the possible conditions under which China could take military action: (1) Chinese action would be recognized as legitimate by global society; (2) countermeasures are taken that can nullify other countries’ attacks; (3) Intervention by third parties after the collapse of bilateral negotiations between China and the other claimants.

Furthermore, Holmes (2012) asserts that some western scholars have noted that if the Chinese government fails to control individual acts by Chinese fishers, there are substantial risks that incidental conflicts will occur. They have also pointed out that there are jurisdictional issues within government institutions. For example, since the Chinese government has several maritime institutions and their responsibilities are not well-demarcated, there is a serious jockeying for power among them. Each institution pursues its own interests rather than the overall Chinese diplomatic interests (International Crisis Group, 2012). This lack of coordination among the Chinese government’s maritime institutions can result in unforeseen actions by Chinese maritime law enforcement vessels in the disputed waters. This is the reason that there were few criticisms in 2011 from the Philippines and Vietnam directed against PLAN and Chinese maritime law enforcement vessels. This sort of incidental conflict could increase tension in the region and the potential for unexpected violence.
4. Possible Solutions for Sovereignty issues

Under tense circumstances, claimant countries and international scholars are keeping a watchful eye on the legal interpretations of the UNCLOS and its dispute settlement procedures (Ross, 2012). The settlement procedure under the UNCLOS is premised on a bilateral agreement between claimants. China is unlikely to agree with other claimants to allow a court to judge sovereignty disputes (Beckman, 2012a). Thus, it does not seem as though UNCLOS is effectively functioning as a dispute resolution mechanism in the South China Sea. However, some international law experts have suggested that there are loopholes, which claimant countries can make use of to help bring their cases to the ICJ. For example, a claimant can appeal the legitimacy of law enforcement by Chinese maritime ships and Chinese fisher’s activities in their EEZ, which is not related to the legitimacy of sovereignty. Here, this paper highlights some precedents to examine the possibility of a legal solution to the dispute.

(1) Effective Control: The Pedra Branca dispute (International Court of Justice, May 23 2008.)

The Pedra Branca dispute was a territorial dispute between Singapore and Malaysia over several islets at the eastern entrance to the Singapore Strait in 2008. On May 23 2008, the court ruled that Pedra Branca is under Singapore’s sovereignty. The supporting evidence was that Singapore has exercised territorial sovereignty over the island, even though the court agreed that the Johor Sultanate, now known as Johor state in Malaysia, had original title to Pedra Branca. The failure of Malaysia to respond to the consistent sovereignty displays by Singapore also affected the ruling (Hu, 2011, Torode, 2012a).

(2) A Use of Force
① Legitimacy of the Use of Force for Fisheries Jurisdiction (International Court of Justice, Dec 4 1998.)

Spain filed an application instituting proceedings against Canada after Canadian patrol boats fired warning shots at a Spanish fishing vessel, named Estai, in international waters. Spain maintained that Canada had violated the charter of the United Nations chapter I article 2 (4) while Canada insisted that the “ICJ lacked jurisdiction to deal with the case by reason of a reservation made in its declaration of 10 May 1994, which stated that the court had compulsory jurisdiction over all disputes except disputes arising out of or concerning conservation and management measures taken by Canada” (ICJ, 1998). The court concluded that the measures taken by the Canadian coast guard were legitimate because their purpose was conservation and management within its jurisdiction. Thus each country has the right to use force adequately within its jurisdiction, which differs from the exercise of violence (Nishimura, 2011).


This case related to the legitimacy of law enforcement acts carried out by two Suriname naval patrol vessels, which ordered a Guyanese drilling ship and its support vessels out of disputed waters claimed by both countries. Guyana insisted that Suriname’s naval vessels restored to the use of force on June 3 2000 by expelling its drilling ships while Suriname asserted that this was an adequate law enforcement act in its own waters. The Arbitration tribunal concluded that the action by the Suriname was more consistent with a military action than mere law enforcement activity and violated the charter of the United Nations chapter I article 2 (4) (Tanaka, 2007; Kagami, 2011).
The challenges to Chinese sovereignty claims by invoking indirect laws are expected to lead to appeals over the legitimacy of overall Chinese maritime claims. There are high expectations for exploring immediate and effective solutions that will help to avert unnecessary armed conflicts by the disputants.

5. Conclusion

Since China revised its maritime strategy from a military-centered approach to a more sophisticated policy, Chinese maritime law enforcement agencies have risen to prominence. This paper examined the possibility of going to war by China in the South China Sea, as well as shedding light on the intentions behind China’s new maritime strategy. As mentioned above, although the presence and assertiveness of Chinese maritime law enforcement ships in the disputed area has expanded significantly, Chinese government officials and prominent scholars have recognized that use of force would seriously undermine not only the global reputation of China, but also the legitimacy of its sovereignty claims. The paper has suggested that China has attempted to legitimate its sovereignty claims by adhering to international law while the People’s Liberation Army (PLA) officials and Chinese scholars have adopted a cautious stance towards using force. Under these circumstances, the possibility of China going to war seems limited in the immediate future.
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