

Focus on sovereignty claims blocks resolution to South China Sea disputes, write Jerome A. Cohen and Jon M. Van Dyke

High stakes

Of the many signs of China's increasingly assertive foreign policy, none has troubled its neighbours – and the United States – more than its claim to some form of jurisdiction over much of the South China Sea. Yet the People's Republic has never explained exactly what it is claiming or why regarding these strategically important waters, so rich in mineral, fishery and other resources.

Much of the attention of contesting states has revolved about their conflicting claims to sovereignty over two sets of tiny islets that, properly viewed under international law, should not significantly influence maritime delineation. The Paracels (Xisha), in the north of the South China Sea near China and Vietnam, have long been claimed by both. The Spratly Islands (Nansha), in the south near Vietnam, Malaysia, the Philippines, Indonesia, and Brunei, are even tinier, but have long attracted claims by all those countries, in addition to China.

China claims sovereignty over both sets of islets based on historical linkages to

It will be much easier to compromise ... if all agree that these tiny islets ... should not become the tail that wags the dog of maritime delimitation

them during the past millennium, although traditionally it did not exercise "effective occupation and control" over them. The other coastal countries make similar claims.

None of these islets had been inhabited historically, but in the recent half century the competing countries have put military garrisons on many of them. The People's Republic did not take an active interest in these islets until about 1970. By then, most of the features above water at high tide were controlled by others. In 1974, China used force to oust the South Vietnamese government from the Paracels shortly before its collapse, and in 1988, when China began to "occupy" some of the low tide elevations in the Spratlys, it forced socialist Vietnam from Fiery Cross Reef.

The breadth of China's claim to the sea area is usually attributed to a map

published in 1947 by Chiang Kai-shek's Nationalist government, shortly before the communist revolution chased it from the mainland to Taiwan. The map drew 11 dashed lines extending all the way to the southern part of the South China Sea. Later, communist-era maps eliminated the two lines in the Gulf of Tonkin, but the other nine lines have appeared repeatedly in a tongue-like configuration swinging deep through the South China Sea. Last year, China attached a version of this map to its official protest against a joint Malaysia-Vietnam claim to part of the continental shelf in the central-southern part of the area.

It seems that China is putting forward an "historic" claim to much of the South China Sea, but it has never clarified whether it is claiming these waters as internal waters, territorial sea, exclusive economic zone, extended continental shelf, or some status unique to the region. It has merely published straight baselines for delineating the 12-nautical-mile territorial sea boundary to which the Paracels are entitled, but has never done so for the Spratlys.

Last year, the Philippines filed with the UN Commission on the Limits of the Continental Shelf a formal claim to shelf areas around those islets in the eastern part of the South China Sea that it claims, and Malaysia and Vietnam filed their unusual joint continental shelf claim. China strongly protested against both actions.

After US Secretary of State Hillary Rodham Clinton in July challenged China's broad but vague claims, China provided symbolic support for its position by announcing in late August that its national flag had been planted in the seabed at one of the deepest points in the South China Sea. When, soon after, China applied fierce pressures against Japan for arresting a Chinese fishing captain off the disputed Senkaku/Diaoyu islets in the East China Sea, this alerted the world to the increasing danger of conflict in the South China Sea as well.

What can be done to improve the situation? China seems to prefer negotiating territorial and boundary claims with each of the other contending countries in a series of bilateral talks. Presumably, these would be similar to the Sino-Vietnam negotiation that in 2004 resulted in China's first maritime boundary agreement, a mutually satisfactory compromise that approximately divided jurisdiction over the adjacent Gulf of Tonkin. Other contending states, finding security and bargaining power in numbers, prefer a collective negotiation.

Although many have interpreted the



2002 Declaration on the Conduct of Parties in the South China Sea, signed by the Asean members and China, as calling for a collective settlement, the declaration prescribed settling disputes only "through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognised principles of international law, including the 1982 UN Convention on the Law of the Sea". The parties further agreed to continue their consultations and dialogues "through modalities to be agreed by them". It should not strain the imagination of diplomats to find a formula that will take account of the virtues of both bilateral and collective negotiations.

Just as in the East China Sea, the first substantive step that should be taken is for the parties to agree on the unimportance, for purposes of sea boundary delimitation, of the disputes concerning sovereignty over the islands in question. The Spratlys are uninhabitable and incapable of sustaining economic life of their own, and hence they are not entitled to an exclusive economic zone or continental shelf under the Convention of the Law of the Sea. Although the Paracels may now be deemed habitable, parties bent upon compromise should be able to negotiate limits to the

claims this status might generate. It will be much easier to compromise upon sea boundaries if all the neighbouring countries agree, as China apparently has, regarding the comparable Senkaku-Diaoyu problem, that these tiny islets and reef features should not become the tail that wags the dog of maritime delimitation.

Following this approach, a fair delimitation can take place drawn from the land boundaries of the continental and large island land masses of the adjacent states, recognising the Paracels as relevant features and thus giving China substantial ocean space in the area nearest to it. This would permit the countries of the region to work together to exploit the resources of the South China Sea for the benefit of their citizens and ensure the "peace, stability, economic growth and prosperity", plus the "freedom of navigation and overflight" their 2002 declaration endorsed.

Jerome A. Cohen is professor and co-director of the US-Asia Law Institute at NYU School of Law and adjunct senior fellow for Asia at the Council on Foreign Relations. Jon M. Van Dyke is professor and Carlsmith Ball Faculty Scholar at the William S. Richardson School of Law at the University of Hawaii at Manoa