

# Occasional Papers on Asia



Dr. Aki Nakai is a Lecturer at the Frederick S. Pardee School of Global Studies, Boston University. He received his MA in Law and Diplomacy from the Fletcher School of Law and Diplomacy, Tufts University, and his Ph.D. in Political Science from Boston University. His current book manuscript: *A Theory of Alliance Restructuring: The Cases in East Asia, 1946-2000*, investigates why some allies restructure their existing alliance relationships in the face of change, but some do not. He is especially interested in advancing the understanding of international security in East Asia through the study of military alliances. His research interests include U.S. alliances in East Asia, Japanese security policy, alliance burden sharing, alliance security dilemma, and war/conflicts escalation.

He has taught courses in international relations, security studies, causes of war and peace, cyber-security, East Asian international relations, and Japanese security at the U.S. Naval War College, Boston University, Tufts University, Newbury College, and Lesley University. At Boston University, he is currently teaching an introductory course of East Asian political and economic development (Title: Making of Asia) and a mid-level course of East Asian international security, "Conflict and Cooperation in Asia".

## South China Sea: Hague and Aftermath

Aki Nakai

In 2015, Harvard Professor Graham Allison and his team completed the Thucydides Project, exploring 16 historical cases since 1500 of a major ruling power being challenged by a rapidly rising one. The Project aimed to provide a valuable analytical lens for describing the recent and upcoming dynamics of Sino-U.S. relations, and Allison's team found that in 12 of the 16 cases, the rivalry between the rising and ruling powers ended up in war, while the remaining four cases (which included the two most recent—the U.S. and the Soviet Union 1940s-1980s; and the UK/France and Germany from the 1990s to present) did not. The team concluded that a war between rising and ruling powers is likely but not inevitable. If you are a realist, you may see the Thucydides trap as an inevitable future and ask which outcome is more likely: China growing as a rising but benevolent power to its neighbors around the South China Sea, or the U.S. sharing with China the dominance in the Western Pacific that America has enjoyed since 1945?<sup>1</sup>

On November 17, 2016, the Center for the Study of Asia (BUCSA) at Boston University's Frederick S. Pardee School of Global Studies hosted its first New England Asia Seminar to focus on the South China Sea issue since the July 2016 ruling of the United Nations Convention on the Law of the Sea (UNCLOS) in the territorial dispute between the Philippines and China. International lawyer Andrew Loewenstein, Partner at the law firm Foley Hoag in Boston, had represented the Philippines in the Permanent Court of Arbitration (PCA) in the Hague, a dispute resolution mechanism provided by the UNCLOS. Loewenstein kicked off the seminar with his presentation regarding what the UNCLOS rulings meant from an international legal standpoint. Peter Dutton, Director of the China Maritime Studies Institute of the United States Naval War College in Newport, Rhode Island, then explored the intersection between international law and power in international politics. Michael McDevitt, Rear Admiral of the United States Navy (Retired) and Senior Fellow of the Center for Strategic Studies at the Center for Naval Analyses in Arlington, VA, provided his analysis of strategic implications of the South China Sea disputes. Finally, Taylor Fravel, Associate Professor of Political Science, Massachusetts Institute of Technology, presented his assessment

1 Graham Allison, "The Thucydides Trap: Are the U.S. and China Headed for War?" *The Atlantic*, September 24, 2015, <https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756/>

of China's response to the South China Sea dispute with the Philippines. The present report summarizes the views of each speaker and presents some concluding thoughts that reflect some of the important recent developments both in the South China Sea region as well as in the United States.

### What did the Hague tribunal decide in its rulings?

Loewenstein made the point that the Hague tribunal addressed the following three main principal issues: (1) the lawfulness of the so-called "Nine-Dash Line" (see Figure 1) for the Chinese claim over the major part of the South China Sea; (2) the maritime entitlement of insular features (e.g., islands or rocks); and (3) the assorted forms of environmental impact associated with the Chinese activities in the South China Sea.

First, China refused to participate at the Hague tribunal and had publicly argued that it has historical rights to claim sovereignty over the greater part of the South China Sea by showing a variety of early Chinese maps spanning the past millennium that suggested that this region was considered part of China. However, the Hague tribunal concluded that no state can claim sovereignty beyond the maximum entitlements granted by the UNCLOS. In addition, the Hague tribunal clarified that there could be a case to allow a state to claim its historical rights if that state previously exercised its exclusive rights (e.g., prohibition and restraint on the exploration of resources), but the tribunal found no evidence that China had ever exercised those exclusive rights for any historically long period. Secondly, the UNCLOS provides a clear definition of what constitutes islands and rock in the Convention, and the Hague tribunal determined which shoals and reefs in the South China Sea are entitled to confer the rights of an exclusive economic zone or continental shelf beyond the 12 nautical mile limit of territorial waters. By definition, "islands" can sustain human habitation or economic life on their own and accordingly a state can claim the right of an exclusive economic zone or continental shelf based on the islands. "Rocks," on the other hand, cannot sustain human habitation or economic life on their own, and therefore a state cannot claim an exclusive economic zone or continental shelf based on the presence of said rocks. Many shoals and reefs (e.g., the triangular chain of reefs and rocks known as Scarborough Shoal) were determined to be rocks, which convey no benefit of exclusive economic zone or continental shelf. Similarly, Itu Aba or Taiping Island, which is currently controlled by Taiwan, was also defined as a rock even though it is the largest exposed land in the Spratly Islands in the South China Sea. Lastly, the Hague tribunal found that China's recent large-scale land reclamation efforts that include the construction of artificial islands had caused severe harm to the coral reef environment. In addition to the construction of artificial islands, Chinese fishermen in this area had illegally harvested giant clams, the meat of which is highly prized in China as a supposed aphrodisiac and the shells carved into jewelry. These illegal fishing practices, which involve widespread bottom-dragging of propellers and other heavy objects to loosen the clams, have caused extensive environmental destruction to the vast area of reefs and once-living corals.<sup>2</sup> The Hague tribunal ruled that China had violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species and inflicted irreparable harm to the marine environment.

In conclusion, Loewenstein clarified that the July 2016 ruling is binding only between the Philippines and China, but the logic behind the decision would be applicable as well to disputes between China and the other countries bordering the South China Sea.<sup>3</sup>

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2 For more information regarding the illegal Chinese fishing practices in the South China Sea, see Rachael Bale, "Giant Clam Poaching Wipes Out Reefs in South China Sea." *The National Geographic*, July 12, 2016: <http://news.nationalgeographic.com/2016/06/south-china-sea-coral-reef-destruction/>

3 For further information, see Milton J. Valencia, "The lawyer who's setting global legal standards from Boston." *Boston Globe*, July 24, 2016, <https://www.bostonglobe.com/metro/2016/07/24/local-lawyer-setting-global-legal-standards-from-boston-law-office/lohDqQIiupaNQWgU997XK/story.html>

## How does China express its national interests through the international legal position?

Dutton began his presentation with the key statement that international law “evolves” through the state’s actions, through international tribunals, and through agreements among states. These actions and agreements reflect the national interests of states, and as these national interests change, the states behave differently; accordingly, agreements among states (i.e., international law) will change as well. Dutton also stated that the dynamics between national interests and international law are influenced by geo-strategic position, politics, and history.

In order to describe the dynamics in the South China Sea, Dutton categorized the legal disputes in the South China Sea into the following three cases: (1) disputes over territorial sovereignty, in the overlapping claims to the South China Sea’s islands, rock, and reef; (2) disputes over which coastal states claim rightful jurisdiction over waters and seabed; and (3) disputes over the proper balance of coastal-state and international rights to use the seas for military purposes. The first two types of legal dispute are between China and coastal-states in the South China Sea, while the third category of legal disputes involves China/coastal-states and maritime user states such as the United States. Also Dutton clarified that the first type of legal dispute is ruled by the traditional international law of sovereignty, but the second type of legal dispute is ruled by the UNCLOS. The disputants of both the first and second legal disputes are six parties including China, the Philippines, Vietnam, Malaysia, Taiwan, and Brunei (see Figure 2), while Indonesia is involved only with the second type of legal dispute.

After categorizing the legal disputes, Dutton described three key Chinese national interests: (1) national security; (2) access to resources; and (3) politics. Ever since the First Opium War in 1839-1842, China has seen external threats coming from the seas. In order to achieve national security, coastal defense has become a priority, and in order to defend the coastal areas, control over near seas such as the South China Sea has recently become critical to Chinese national security. The expansion of ownership over islands and the construction of artificial islands in the South China Sea help China to establish control of near seas. Secondly, resources, most importantly fishing resources, are important to China. Thirdly, political interests include the establishment of leadership status in the region and therefore China will not hesitate to use force with the countries that do not respect Chinese interests. Domestically, the Chinese leadership can demonstrate to the Chinese public that the Communist Party leadership is capable of protecting Chinese national interests. In order to achieve Chinese national interests, China as a major power prefers bilateral negotiations with the small coastal-states but is not hesitant to use as well the option of non-militarized coercion by displaying its military and maritime forces when the small states do not respect the Chinese position. The small coastal-states strongly prefer multilateral negotiations with China in order to mitigate the disadvantages of a power gap. Also, the United States has kept armed conflict options off the table.

Dutton made three points regarding the July 2016 ruling. First, prior to the Hague tribunal ruling, China did not give Philippine fishing vessels access near the Scarborough Shoal, but after the ruling, the Philippines still were unable to fish *inside* the Scarborough Shoal, but could fish *near* the Shoal. This was one positive impact of the Hague tribunal ruling. Secondly, the Hague tribunal ruled that Itu Aba is a rock and cannot claim an exclusive economic zone right. However, there are many countries (e.g., the United States, Japan, Australia, New Zealand, France, and Mexico) claiming an exclusive economic zone right based on maritime features of an even smaller size. Dutton identified the discrepancy between the tribunal decision and the sovereign state practice, and how this will unfold as a future question. Lastly, China land-filled more than 3,000 acres on the seven features of the South China Sea during the arbitration pendency, and built military facilities including runways, ports, aircraft hangars, communication systems, air defense features, and troop stations. The Hague tribunal has no jurisdiction over military matters, but

China claimed that they are not military facilities, ultimately giving jurisdiction to the Hague tribunal. This jurisdiction matter can become an issue in future cases.<sup>4</sup>

In conclusion, Dutton predicted that the July 2016 Hague tribunal ruling can legitimize and/or de-legitimize certain claims in the disputes, and will provide the disputants with options between accommodation and confrontation to the Hague tribunal ruling. China, he noted, has already begun making accommodations to the ruling to some degree.

### **What are the strategic implications of the South China Sea disputes?**

Admiral McDevitt provided his analysis of strategic implications in the South China Sea disputes. First, McDevitt pointed out the size of features that were reclaimed in the South China Sea. For example, the size of Subi Reef is almost equivalent to the size of the Pearl Harbor (see Figure 3). Second, McDevitt explained the potential coverage of missiles from China's larger South China Sea island bases. The deployments of HQ-9 surface-to-air missiles (SAMs) to Woody Island, China's outpost in the Paracel Islands, are of a defensive nature, their coverage restricted to include only most of the Spratly Islands. Third, McDevitt described that the Chinese goal is to get small coastal-states out of the South China Sea without starting a war, and predicted that all land features in the South China Sea will fall under Chinese control because China has slowly but surely taken one feature after another since 1945. Fourth, China wants to protect the sea lanes of communication (SLOC) running through the South China Sea (see Figure 5) because some 82% of crude oil imported by China passes through the Strait of Malacca. Fifth, China wants to create the strategic depth (i.e., the South China Sea as a sea buffer zone) in order to defend the coastal areas in the homeland. Sixth, the JIN-class nuclear-powered ballistic missile submarine (or SSBN) is based at Hainan Island in the South China Sea, and China wants to make sure that the Chinese SSBN can operate in the South China Sea under Chinese control. Seventh, China now can bring land-based air power into the southern part of the South China Sea. Each of the three airfields in the islands can accommodate 24 fighters (for a total of 72 fighters in the southern part of the South China Sea) in order to gain air control. McDevitt also pointed out, however, the vulnerabilities of these remote and non-mobile airfields to attacks in the case of major war. Eighth, there exists an overall military competition between the United States and China in the South China Sea, but McDevitt assessed that the South China Sea is not so strategically important to the United States, because in cases where the U.S. allies and security partners such as Japan and Taiwan are being attacked, the United States would most likely bring additional forces from U.S. bases in the Central Pacific, not from the South China Sea. Lastly, McDevitt predicted that the new Trump administration would continue the Obama policy toward the South China Sea and will ritualize patrol and protest.<sup>5</sup>

### **How has China responded to the dispute with the Philippines?**

Taylor Fravel, in his opening remarks, described the Chinese strategy in the South China Sea as one of "eat soft food, not hard food." In other words, China uses persuasion, not coercion. Fravel divided the Chinese responses to the Hague arbitration process into three stages. In January 2013, the Philippines served China with notification of claim as the initial step in the Hague tribunal, and the first Chinese response was land reclamation in the South China Sea. In the months that followed, China tried to stop the legal process but recognized that they failed to stop the tribunal. In December 2014, China issued a [position paper](#)<sup>6</sup> arguing that the dispute with the Philippines was not subject to arbitration and did not accept the arbitra-

4 For further information, see Peter Dutton. "Three disputes and three objectives: China and the South China Sea." *Naval War College Review* 64, 4 (2011): 42-67.

5 For further information, see Michael McDevitt, eds., *Becoming a Great "Maritime Power": A Chinese Dream* (Arlington, VA: CNA Strategic Studies, June 2016)

6 The "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (2014/12/07) can be viewed at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)

tion initiated by the Philippines. The second Chinese response was taken after the July 2016 ruling of the Hague tribunal. In fact, China did nothing but issue government statements. China also did not initiate the land reclamation nor try to seize the maritime features controlled by the Philippines. China simply ignored the Hague tribunal's ruling that decided 14 of 15 counts in favor of the Philippines, seeking instead to wait and see how the new Philippine President Rodrigo Duterte would respond. Also, China wanted to wait and see whether the United States would try to enforce the Hague ruling even though the ruling was binding only to China and the Philippines. In the end, it turned out that President Duterte had a quite different foreign policy priority than former President Benigno Aquino III, who took a strongly pro-U.S. and anti-China stance. This government change in the Philippines opened a window of opportunity for the third Chinese response to the Hague ruling. President Duterte did not think that it was worth risking a fight against China over the South China Sea disputes, and did not seek to actively implement the Hague tribunal rulings. In the end, China and the Philippines reached a kind of *modus vivendi*: it appears that China promised a tremendous amount of aid to the Philippines in exchange for the Philippine confirmation of the adaptation of non-confrontational policy toward the South China Sea.

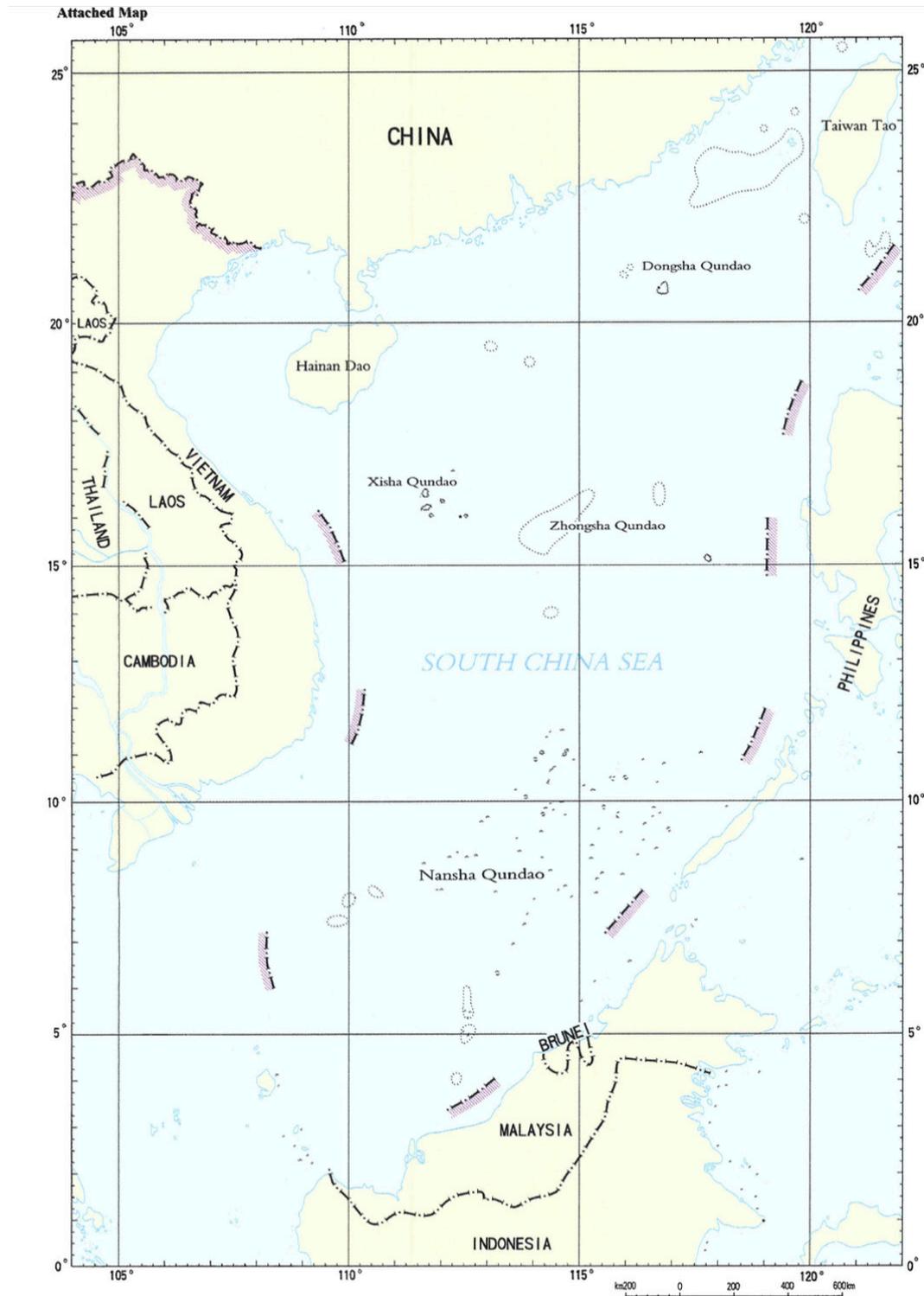
In conclusion, Fravel assessed the future of Chinese behaviors in the South China Sea. He mentioned that the last two major incidents in the South China Sea both occurred during the spring months of a new U.S. administration (see Figure 6). First was the Lockheed EP-3 Incident (or Hainan Island Incident) in April 2001, just ten weeks after President George W. Bush took office in January. A U.S. Navy EP-3E signals intelligence aircraft and a Chinese Navy J-8II interceptor fighter jet collided in mid-air near Hainan Island in the South China Sea, and the incident resulted in a major international dispute between the United States and China. The second incident was the *Impeccable* Incident in March 2009, two months after President Barack Obama was newly sworn into office in January. The U.S. Navy *Impeccable*-class ocean surveillance ship was repeatedly harassed by Chinese aircraft and naval vessels in the South China Sea. The United States lodged formal protests following the incident and dispatched a Navy destroyer to protect the *Impeccable* while operating in the South China Sea. Fravel suggested that the timing of the past two incidents might not have been accidental and hoped that the transition of the new Donald Trump administration would be smoother than the previous two administrations.<sup>7</sup>

## Conclusion

If a broad consensus has come out of this BUCSA seminar, it seems that the new post-Hague reality will continue. The *modus vivendi* between China and the Philippines will improve their bilateral relations. The United States has not viewed the South China Sea as a vital strategic interest and has ruled out an armed conflict option with China over the South China Sea. Recently, the new Secretary of Defense Jim Mattis remarked in Tokyo that “...if we have disputes, we take them to arbitration. We don't settle them by taking military means and occupying land that is subject to question....”<sup>8</sup> and his remarks suggest that there will be no U.S. policy change in the South China Sea. One cautionary question is: can the overall soundness of U.S.-China relations be maintained? As of the writing of the present report, Chinese President Xi Jinping has talked and met directly with President Trump since February 2017. In the first summit in April, Trump used the term “tremendous progress” in the Sino-U.S. relationship, but Xi warned Trump of “some negative factors” hurting the bilateral relations in the most recent phone conversation in July 2017. These negative factors include a \$1.4 billion U.S. arms sales to Taiwan, U.S. sanctions against Bank of Dandong, a Chinese bank over its dealings with North Korea, and the recent sailing of the U.S. Navy destroyer USS *Stethem* within 12 nautical miles of a Chinese-claimed island in the South China Sea. In addition, China may test President Trump by creating a new incident similar to those in 2001 and 2009, and we cannot be so sure how President Trump would react to such an incident.

7 For further information, see Taylor M. Fravel. “China's Strategy in the South China Sea.” *Contemporary Southeast Asia* 33 (3) (2011): 292-319.

8 Defense Secretary Jim Mattis, Joint Press Briefing by Secretary Mattis and Minister Inada in Tokyo, Japan, Official Website of the U.S. Department of Defense, February 4, 2017, <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1071436/joint-press-briefing-by-secretary-mattis-and-minister-inada-in-tokyo-japan>

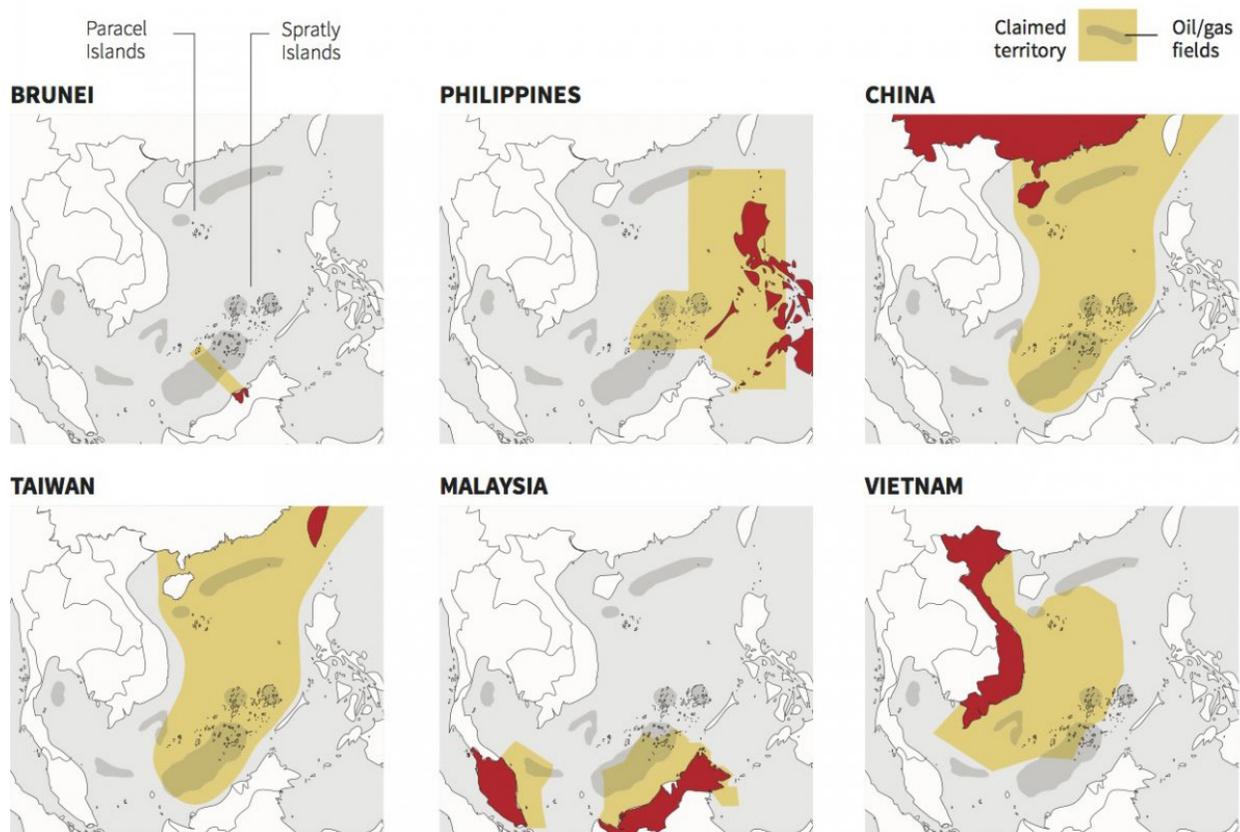


**Figure 1: Map of the Nine-Dash Line**

Source: Communication from China to the United Nations dated May 7, 2009, English version, accessed on February 5, 2017, at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf)

## Claims on the South China Sea

China and five other Asian states contest all or parts of the Spratlys and Parcel islands in the South China Sea.



Sources: U.S. Energy Information Administration, U.S. Department of State, Middlebury College, National Geographic

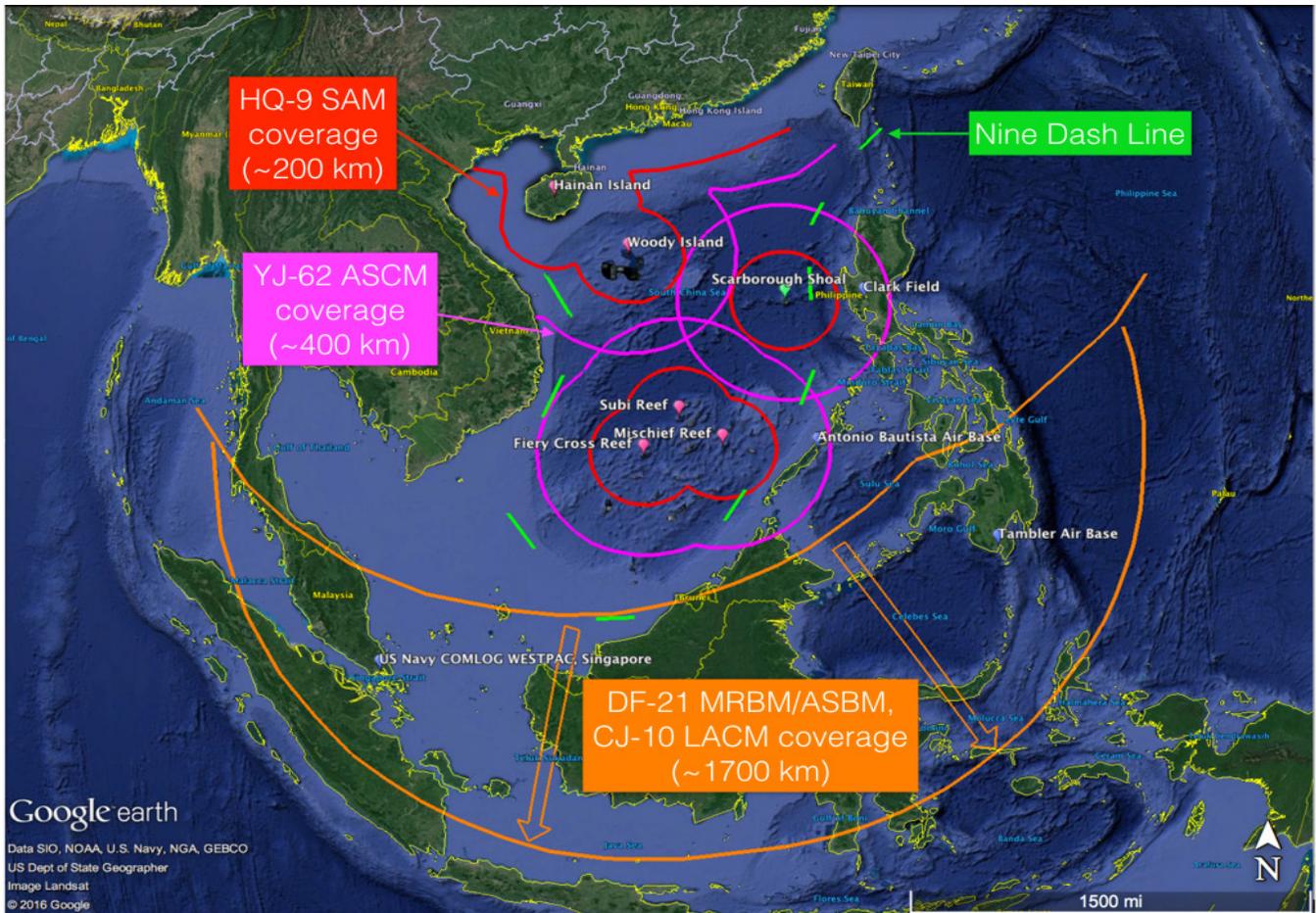
**Figure 2: Claims on the South China Sea**

Source: David Choi, “Well, China just built a farm on a disputed island in the South China Sea.”  
*Yahoo Finance*, June 9, 2016,  
<https://uk.finance.yahoo.com/news/china-built-farm-disputed-island-161425111.html>



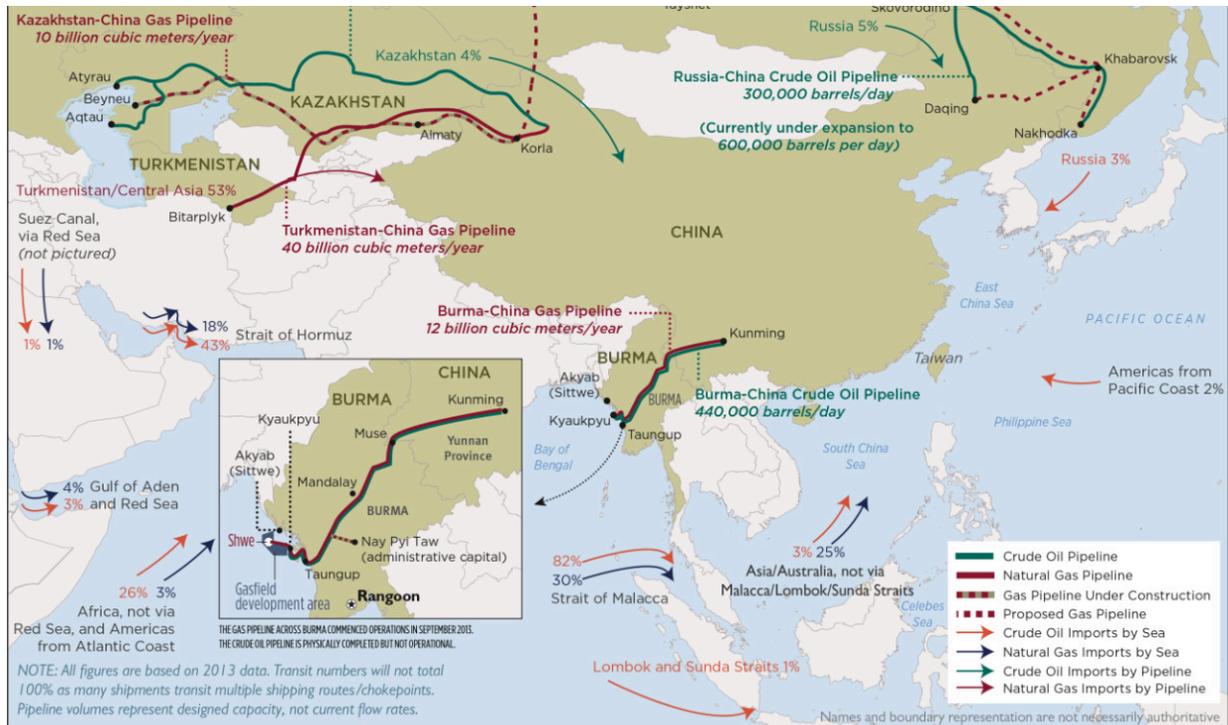
**Figure 3: Subi Reef (upper left), and main portion of Pearl Harbor's naval base (lower right, same approximate scale)**

Source: Thomas Shugart, "China's Artificial Islands Are Bigger (And a Bigger Deal) Than You Think." *War on the Rocks*, September 21, 2016, <https://warontherocks.com/2016/09/chinas-artificial-islands-are-bigger-and-a-bigger-deal-than-you-think/>



**Figure 4: Range arcs depicting potential coverage of HQ-9 SAMs, YJ-62 ASCMs, and DF-21 ballistic missiles from China’s larger South China Sea island bases**

Source: Thomas Shugart, “China’s Artificial Islands Are Bigger (And a Bigger Deal) Than You Think.” *War on the Rocks*, September 21, 2016, <https://warontherocks.com/2016/09/chinas-artificial-islands-are-bigger-and-a-bigger-deal-than-you-think/>



**Figure 5: China's Import Transit Routes**

Source: Office of the U.S. Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2015* (Washington, D.C.: U.S. Department of Defense, 2015): 86

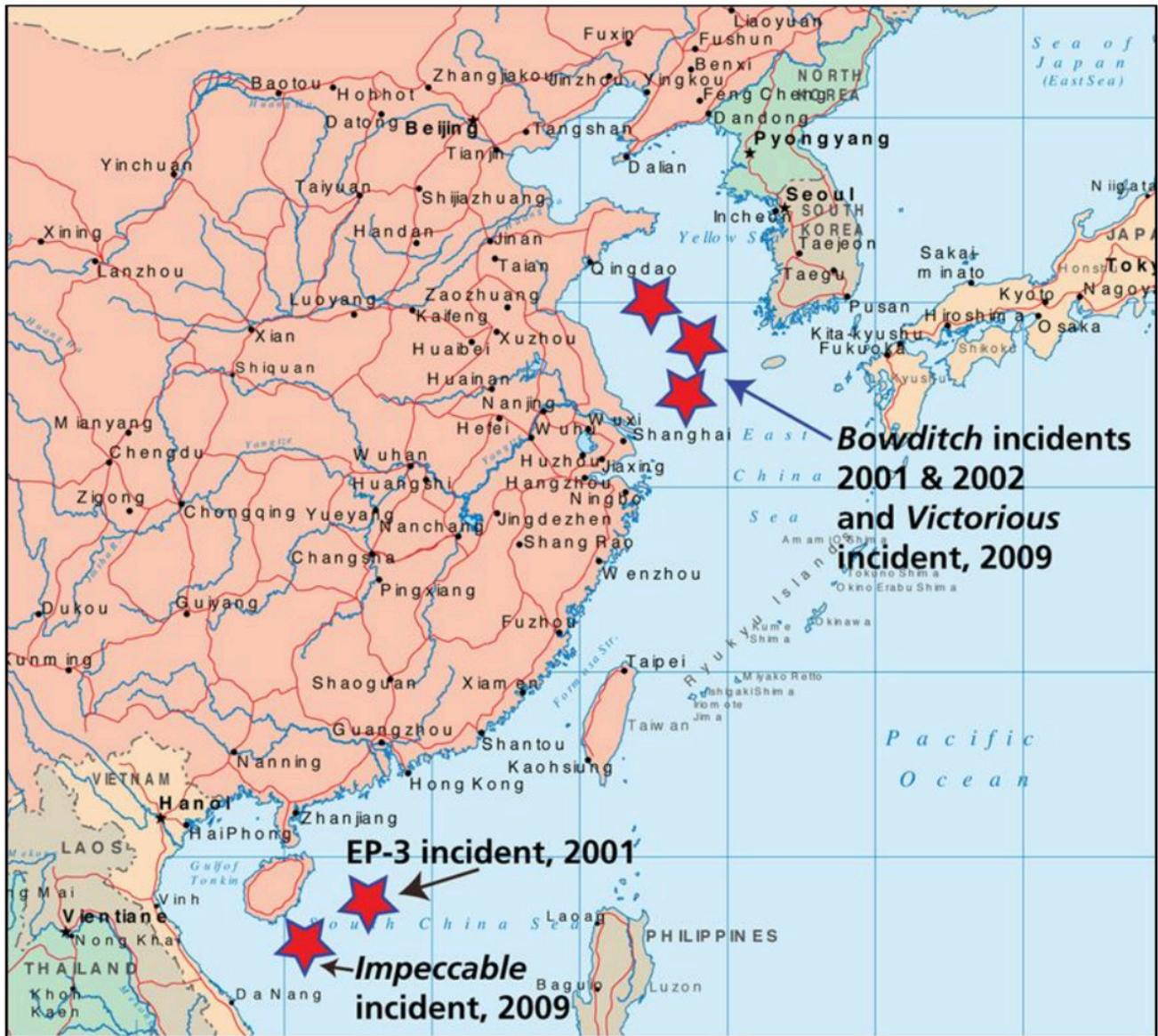


Figure 6: Locations of 2001, 2002, and 2009 U.S.-Chinese Incidents at Sea and in the Air

Source: Mark E. Redden and Phillip C. Saunders, *Managing Sino-U.S. Air and Naval Interactions: Cold War Lessons and New Avenues of Approach*, Washington, Center for the Study of Chinese Military Affairs, Institute for National Strategic Studies, National Defense University, September 2012, reprinted in Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress* (Washington, D.C.: Congressional Research Service, June 6, 2017), p. 11.