

ICAS Bulletin

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A Bimonthly Survey of Research and Analysis on China-US Relations

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Publications

2015 Report to Congress on China's WTO Compliance

United States Trade Representative, December 2015

This annual report, mandated by Congress, details China's policies pursuant to World Trade Organization regulations. An issue-by-issue summary can be found in Table 1 on p. 23. The summary includes US views on Chinese import and export regulations, foreign investment rules, Agriculture, services, and intellectual property regulations and China's legal framework and systems for implementing WTO obligations.

Taiwan's January 2016 Elections and Their Implications for Relations with China and the United States

Richard Bush

Brookings Asia Working Group Paper, December 2015

In a detailed paper, Richard Bush discusses how Taiwan's domestic political processes have factored in cross-strait and US-China relations in the past, and examines potential responses in Beijing and Taipei regarding Tsai Ing-wen's expected win in this month's elections. Bush notes that while the outcome of the presidential election is not really in doubt, there are still a number of unknown factors in play, including whether the DPP will win a majority in parliament, whether such a win would realign Taiwanese party politics, and what kind of message Tsai will deliver in her inaugural address. Bush's preferred outcome for the situation would be for Beijing to dissuade Tsai from

altering the status quo prior to her election while giving her room to make accommodations afterward. He is pessimistic that this will occur, however, because in his view Beijing already has a tendency to judge Tsai on her past statements and may cool relations without waiting to see if her rhetoric changes upon election.

The New China-Russia-US Triangle

Elizabeth Wishnick

National Bureau of Asian Research Analysis Brief, December 16, 2015

Wishnick contends that improving China-Russia relations will not culminate in an alliance, but neither will the differences between the two countries undermine their limited partnership. She describes the nature of US-China-Russia relations as a series of bilateral relationships in “separate spheres” rather than the old “strategic triangle” of the Cold War. Russia and China’s relationship can persist through policy differences, according to Wishnick, because they share a broader view of international order—one that differs from that of the US. This means, among other things, that the US is unlikely to succeed in using stronger ties with China to influence Russia. Wishnick argues that there is room for the US to collaborate with both Russia and China on specific issues, and recommends that the US join the AIIB in order to help diminish the divide between the US and nations like China and Russia on issues of economic governance.

China, the US, and the Coming Taiwan Transition

Douglas Paal

Carnegie Endowment for International Peace, December 29, 2015

Paal describes China’s recent international behavior as a process of mending fences in the region and putting a moderate face on its foreign policy. Against this backdrop, the elections in Taiwan will present the opportunity for strain both in the region and between the US and China. Even though some in Taiwan, the US, and elsewhere see an opportunity to elevate US-Taiwan relations, Paal recommends that the United States guide the likely next president, Tsai Ing-wen, towards a policy of maintaining consistency in relations between Taipei, Beijing, and Washington. Given the fact that the US faces its own presidential transition soon and is preoccupied in other regions of the world, he believes that this is the likely course the Obama administration will take. This would entail helping the DPP leader formulate a statement on cross-strait relations that can satisfy Beijing without undermining her political base.

Does Russo-Chinese Partnership Threaten America’s Interests in Asia?

Stephen Blank and Younkyoo Kim

Orbis 60:1, Winter 2016

The authors assess the state of Russia-China relations and evaluate the impact of this relationship on Asia and the United States’ interests there. While there are certain signs of increased cooperation between Moscow and Beijing on some issues, close alliances run counter to longstanding foreign policy principles in both states. Moreover, Russia and China have conflicting visions in a number of areas, including

North Korea, Vietnam, and the overall Asian security architecture. The authors contend that Russia is by far the weaker of the two nations in the Asian context, and Russia runs the risk of becoming economically subservient to China if it grows too close. From the perspective of the “strategic triangle,” Russian moves either towards China or the United States are of limited impact.

The China-India Relationship: The View from the US

Daniel Markey

The Cipher Brief, January 4, 2016

In this article, Daniel Markey advocates establishing a trilateral US-India-China forum with a permanent secretariat. This is a wise choice for a few reasons. For one, as China joins the US as a leader in global governance, India lags behind, and a multilateral grouping that included the three nations could help foster greater Indian involvement in global issues. More significantly, the warming of US-India relations in recent years complicates US efforts to manage relations with China. A possible India-China crisis would be difficult for the US to cope with given the current lack of a trilateral mechanism.

The End of China’s Rise

Daniel Lynch

Foreign Affairs, January 11, 2016

The author argues that the outlook for the Chinese economy is so poor that the era of “China’s rise” is over. He discusses how demographic issues (mostly caused by the one-child policy), debt, and the long-term negative effects of the PRC’s response to the 2008 financial crisis have combined to bring China’s long run of economic growth to an end. Lynch distances himself from those who foresee an imminent collapse of the Chinese economy, but instead compares China’s current economic situation to what Japan faced in its “lost decade.” He contends that PRC leadership has not adjusted to this new reality, and questions whether Chinese foreign policy in particular is commensurate with the impending problems China faces.

Events

Strategic Consensus in the Indo-Pacific: A Security Partner Dialogue

Heritage Foundation/Center for the National Interest, December 8, 2015

This conference featured four panels of strategic and military experts discussing US and allied reactions to Chinese military developments in the Asia-Pacific region. The first panel dealt with South China and East China Seas issues, and the second discussed PLAN blue water operations. Panels three and four addressed the links between economic interdependence and security, and alliance networks, respectively.

The UN Climate Summit and the Future of US-China Collaboration

Asia Society Northern California Center, December 18, 2015

Former Australian Prime Minister Kevin Rudd and Orville Schell, both of the Asia Society, discuss the COP21 agreement and the significance of climate cooperation to the US-China relationship.

Asia Forecast 2016

CSIS, January 12, 2016

This two-panel conference dealt with the relationship between Asia policy and the US presidential elections before addressing the topic of the regional economic outlook for 2016. Audience members polled on their expectations for the upcoming year were generally cautiously optimistic about limited economic growth, but they were also overwhelmingly “somewhat concerned” about the possibility of armed conflict in Asia in 2016. Members of the first panel remarked on how despite the American public’s clear view that Asia is the most important region in US foreign policy (when polled), Asian issues, for better or for worse, have largely been ignored in the media and by presidential candidates.

Offshore Balancing: Realism or Reality Check for Foreign Policy

Heritage Foundation, January 14, 2016

This panel evaluated the concept of “offshore balancing” in the context of US policy towards the Middle East, Europe, and Asia. The concept, popular among academic political scientists but not policymakers, recommends that the US rethink its investment extensive alliance commitments and global reach of its military deployments. All of the panelists were critical of the idea and argued for the utility of forward-deployed troops or the impossibility of scaling back current alliance commitments. Thomas Mahnken argued that in the Asian context this latter problem of altering alliance commitments is especially unworkable, given the full treaty status of many US relationships in the region.

Commentary

Putting the Status Cart before the Sovereignty Horse

Chris Whomersley

This paper is concerned with a particular aspect of the Philippines/China case about the South China Sea, and is entitled “Putting the Status Cart before the Sovereignty Horse”. Why choose that title?

I

First, it is necessary to explain what is meant by status. The term “island” is defined in paragraph 1 of Article 121 of UNCLOS as “a naturally formed area of land, surrounded by water, which is above water at high tide,” and paragraph 2 states that “islands”

have the full range of maritime zones provided for in the Convention. However, under paragraph 3, “rocks which cannot sustain human habitation or economic life of their own” cannot generate an exclusive economic zone or continental shelf. As many commentators have said, this latter provision raises difficult questions of interpretation. To begin with, the word “rock” is not self-evident in meaning. This word seems to have been used because the provision had its origins in concerns over Rockall, a feature claimed by the United Kingdom in the North-East Atlantic. This is certainly to be regarded as a “rock.” But it is unclear at what point a feature ceases to be a “rock” and thus ceases to fall within paragraph 3.

In addition, the phrases “cannot sustain human habitation” and “cannot sustain ... economic life of their own,” which appear to be used disjunctively, are not self-evident in meaning. But without going into these difficult questions of interpretation here, one must note that a factual enquiry will be required to decide whether a feature falls within paragraph 3 of Article 121.

There is however a third category, namely low-tide elevations. These are defined in Article 13 of UNCLOS as “naturally formed areas of land which [are] surrounded by and above water at low tide but submerged at high tide.” In two cases the International Court of Justice has expressed the view that low-tide elevations, outside a State’s territorial sea, cannot be the subject of national appropriation.¹ The Chinese have disputed this proposition,² but since the Tribunal has declined to rule on any question relating to sovereignty the Tribunal will presumably not give its opinion on the issue.

And actually there is a fourth category, namely “artificial islands”. Under Article 60(8) of UNCLOS they “do not possess the status of islands.” But again the term “artificial island” is not defined. If a State takes a naturally occurring feature above water at high tide which is (say) one metre across and then builds around it so that it becomes ten kilometres across, is the resulting feature an artificial island? From press reports that issue could become live in the South China Sea, but it does not seem to be raised by this case.

But the key point from the perspective of this litigation is that a decision particularly on whether a feature is a rock for the purposes of Article 121(3) or whether it is a low-tide elevation will require an investigation of the facts. That is obviously going to create serious difficulties for the Tribunal if only one party is present to adduce evidence. The problems of interpreting Article 121(3) have been alluded to above, but it is also not straightforward to decide whether or not a feature is a low-tide elevation.

¹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits*, Judgment, I.C.J. Reports, 2001, page 40, at page 102, paragraphs 204-9; *Territorial and Maritime Dispute (Colombia v. Nicaragua)*, Judgment, I.C.J. Reports, 2012, page 624, at page 641, paragraph 26.

² 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, paragraph 25.

One will of course need expert hydrographic information on whether it is above water at low tide and below water at high tide.

II

So, that is what is meant by the “status cart.” So how did it get ahead of the sovereignty horse?

It is important to note that, in its Award, the Tribunal accepted that it did not have jurisdiction to decide on the sovereignty of land features in the South China Sea.³ China had argued in a paper presented to the Tribunal that the “real issue” in the case was about sovereignty.⁴ Because China did not appear at the hearing, it will never be known whether this argument could have been developed further and more convincingly at the oral hearing. On the other hand, Counsel for the Philippines on several occasions disclaimed any intention to seek a ruling on sovereignty over any feature in the South China Sea.⁵

The Tribunal distinguished the recent decision in the case brought by Mauritius about the Chagos Marine Protected Area on the basis that two of Mauritius’ submissions required an “implicit decision on sovereignty” and that sovereignty was “true object” of Mauritius’ claim.⁶ The Tribunal reached the conclusion that none of the Philippines’ submissions required “an implicit determination of sovereignty.”⁷ In other words, the Tribunal decided that it could rule on the status of various features even though the sovereignty over those features is disputed, and even though it concedes that it has no jurisdiction to decide that dispute.

In addition, the Tribunal says it will proceed on the premise that China is correct in its assertions of sovereignty over Scarborough Shoal and the Spratlys.⁸ So, the Tribunal will apparently work on the basis that Scarborough Shoal and the Spratlys belong to China even though it is common knowledge that this proposition is strongly contested.

Below is a table showing the Tribunal’s conclusions on jurisdiction on each of the nine submissions made by the Philippines which deal with the status of features in the South China Sea.⁹ (There are other submissions which do not involve questions of status.)

It is to be noted that in relation to two such submissions the Tribunal said that it unequivocally had jurisdiction; in relation to two others it had jurisdiction subject to caveats; and five other submissions were joined to the merits, because in order to rule

³ Paragraphs 152-3 of the Award (hereafter references to paragraph numbers are to paragraphs of the Award).

⁴ Position Paper (footnote 2 above), section II.

⁵ Paragraph 153.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Paragraphs 397 - 412

on them a decision on the status of a feature referred to in the submission, or a decision on the status of other features, is a necessary pre-condition for the Tribunal to have jurisdiction.

In relation to category (D) in the table, the reason that the status of other features is relevant is that, if a feature claimed by China within 200 nautical miles of the activities covered by submissions 5, 8 and 9 is held to be an island, then there would be an issue of maritime delimitation – which is also outwith the Tribunal’s jurisdiction.

To summarise, it would appear that there are nine Philippines’ submissions which involve the status of features. In dealing with these nine submissions, the Tribunal will have to decide on the status of nine specific, named features. In addition for the purpose of disposing of three of the nine submissions, the Tribunal will have to decide on the status of certain other features. How many of these other features there are is unclear from the Award.

As indicated above, if China continues to absent itself from the proceedings – and therefore the Tribunal only receives evidence from one source - the Tribunal may find it challenging to answer the factual questions necessary to enable it to decide on the status of these features.

III

The real question is whether it was appropriate for the Tribunal to put the status cart before the sovereignty horse.

In relation to each of the nine specific features, as well as possibly in relation to other features covered by the submissions in category (D), the Tribunal will be deciding on the status of the feature, i.e. into which of the categories outlined above it falls. These decisions will be binding on the parties. So, if either China or the Philippines has sovereignty over any of these features, then it will be bound by the Tribunal’s decision as to its status – but it would not of course be binding on Vietnam, if in fact it is Vietnam which has sovereignty over that feature.

It would seem that there is no precedent for an international tribunal deciding on the status of a feature when the sovereignty over that feature is disputed between the parties and the parties have not consented to the tribunal making such a decision. At the hearing, Judge Pawlak asked the Philippines’ legal team if they could quote a precedent,¹⁰ but it does not seem that they were able to do so. Equally, however, there seems to be no precedent for a tribunal declining jurisdiction in such a case.

So, in entering uncharted waters, should the Tribunal have been cautious, and declined jurisdiction? Or should we applaud the Tribunal for being bold?

¹⁰ Final Transcript Day 3 (13-07-2015), page 62, lines 10-13.

Furthermore, one principle which was not raised was this: as a judicial body should the Tribunal have declined to decide the posterior question, ie the status of the features, when it cannot decide the anterior question, i.e. sovereignty? And indeed, the anterior question is hotly disputed.

When asked to give an advisory opinion, the ICJ said in one case that it must “protect the integrity of the Court’s judicial function” and must “satisfy itself as to the propriety of the exercise of its judicial function;”¹¹ and in another that it must consider whether answering the request for an advisory opinion “would render the existence of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.”¹² One might argue that the same underlying theme can be seen where the ICJ has referred to “the fundamental principles of its Statute”¹³ when declining to adjudicate upon a dispute when not all necessary parties are before the Court.

The question is whether these statement reflect a wider principle of judicial behaviour. Might they be generalised to suggest that in a case such as this a tribunal should have declined jurisdiction? Of course, that point was not one which Philippines would make – and China debarred itself from making it by refusing to appear. But if that point had been made to the Tribunal, might it have caused them to pause?

So, the Tribunal’s Award raises have a number of questions about the appropriateness of the Tribunal proceeding in this case. To come back to the title: was it appropriate for the Tribunal to put the status cart before the sovereignty horse?

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TABLE: PHILIPPINES SUBMISSIONS INVOLVING THE STATUS OF FEATURES

(A) WITHIN JURISDICTION

3 – STATUS OF SCARBOROUGH SHOAL (island/rock?)

7 – STATUS OF JOHNSON REEF, CUARTERON REEF, FIERY CROSS REEF (island/rock?)

¹¹ *Accordance with International Law of the Unilateral Declaration of Independence*, I.C.J. Reports, 2010, page 403, at pages 415-6, paragraphs 29 and 31.

¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports, 2004, page 136, at page 156, paragraph 43.

¹³ *East Timor*, I.C.J. Reports, 1995, page 90, at page 101, paragraph 26; affirming *Monetary Gold Removed from Rome in 1943*, I.C.J Reports, 1954, page 19, at page 33.

(B) WITHIN JURISDCITION, SUBJECT TO A CAVEAT ABOUT POSSIBLE EFFECTS OF OVERLAPPING ENTITLEMENTS

4 – STATUS OF MISCHIEF REEF, SECOND THOMAS SHOAL, SUBI REEF (low-tide elevations?)

6 – STATUS OF GAVEN REEF, MCKENNAN REEF (INC HUGHES REEF) (low-tide elevations?)

(C) JOINED TO MERITS: DEPENDS ON STATUS OF THE FEATURE

12 – CHINA’S ACTIONS ON MISCHIEF REEF

14 – CHINA’S ACTIONS ON SECOND THOMAS SHOAL

(D) JOINED TO MERITS: DEPENDS ON STATUS OF OTHER FEATURES

5 – MARITIME ENTITLEMENTS

8 – INTERFERENCE WITH PHILIPPINES’ ACTIVITIES

9 – CHINESE FISHING ACTIVITIES