



ICAS BULLETIN

Institute for China-America Studies

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

Twice a month, the ICAS Bulletin updates a global audience on American perspectives regarding the world's most important bilateral relationship. Research papers, journal articles, and other prominent work published in the US are listed here alongside information about events at US-based institutions.

COMMENTARY

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Judicial Activism
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Special Focus: The US, China, and the G20

How Will China's Success at the G20 be Measured?

Cheng Li and Zachary Balin

Order from Chaos, Brookings, August 29, 2016

Li describes China's meticulous preparation for the G-20 summit and ponders what kinds of outcomes might justify its great efforts. He notes that the summit provides an opportunity for China to prove its importance to any global governance regime, particularly if it succeeds in directing the group towards an agenda of infrastructure investment. Some low-hanging fruit for the summit would be measures dealing with global complaints about overcapacity in China's steel industry, given that China can unilaterally address the problem in order to signal commitment to long-term cooperation.

The Hangzhou Reformers Club

David Dollar

Order from Chaos, Brookings, August 29, 2016

Dollar considers how the US, China and the Eurozone can support each other at this year's G20 meeting in Hangzhou. Dollar argues that these large economies should simultaneously reorganize their domestic growth strategies to boost the global economy, and the G20 provides a platform for coordinating this. He identifies the two main challenges to China's growth as questionable sustainability and the lack of a

positive spillover for its partners. To counter these problems, he suggests the Chinese government should tighten budget constraints, recapitalize banks as needed, and open up its services sectors to foreign trade and investment. The US, on the other hand, should focus on domestic infrastructure investment, immigration reform, and new trade/investment agreements. Finally, Europe should shift its focus from austerity to infrastructure and social needs.

Towards the 2016 G20 – Global Analyses and Challenges for the Chinese Presidency

China & World Economy, Special Issue, July/August 2016

This issue of *China & World Economy* considers the different policy areas of the G20: investment, global governance, trade, finance, and structural reform. Each article considers what a Chinese presidency could mean in each of these areas and how the G20 meeting could address some of China's internal economic challenges.

Publications

China's Infrastructure Play: Why Washington Should Accept the New Silk Road

Gal Luft

Foreign Affairs, September/October 2016

In this article, Luft argues that the US should selectively engage in China's "One Belt, One Road" project. Not participating would allow China to shape Eurasia's future without US input, deny American investors opportunities in the region, and dilute much-needed regional development. As a result, Luft urges the US to approach OBOR with an open mind. He suggests that the US should acknowledge the benefits of the project and aim to find a bilateral forum in which it can discuss a joint economic development agenda. By doing so, the US could create opportunities for American investors, encourage other Asian investors to fund infrastructure-led projects, and ensure that OBOR adheres to international standards. However, Luft warns that the US should not give OBOR "blanket support" because doing so could feed into fears about US-Chinese collusion, disrupt the precarious balance between the Gulf states and Iran, or allow China to change the status quo in the Asia Pacific. Due to these concerns, the US should back the aspects of the project that advance US interests and oppose those that don't.

Parting the South China Sea: Upholding the Rule of Law

Mira Rapp-Hooper

Foreign Affairs, September/October 2016

Rapp-Hooper discusses the political impact of the July ruling in the South China Sea arbitration case. She notes that because the ruling so overwhelmingly favored the Philippines, it counterproductively left China with few options to save face, rendering it more difficult for China to adhere to it. The key challenge for the US and other actors going forward will be to encourage China to accept the ruling for the sake of maintaining the existing maritime order, but also to do this in a way that doesn't make Beijing feel "backed into a corner" or encircled. She lists a number of steps that US officials can take in this regard, including supporting the conclusion of the ASEAN/China South China Sea Code of Conduct, continuing to encourage legal processes for dispute resolution, and reducing the publicity surrounding US Navy Freedom of Navigation Operations.

Chinese Views on the South China Sea Arbitration Case

Michael Swaine

China Leadership Monitor No. 51, Fall 2016

Swaine evaluates official and unofficial Chinese commentary on the South China Sea arbitration ruling. He observes in both groups a widespread rejection of the legitimacy of the arbitration proceedings and suspicion regarding the motives of the Philippines or states like the US which have supported the process. Swaine notes that there is a significant gap in Chinese and Western understandings about the primacy of legal regimes like UNCLOS over historical claims or negotiated political processes. Because he finds that the arbitration case has “inadvertently deepened the strategic rivalry between the US and China,” efforts to force Beijing’s acceptance of the ruling “will almost certainly prove to be extremely damaging to regional order and Sino-US relations.” On the plus side, Swaine observes that most Chinese voices nonetheless advocate a peaceful resolution to the issue, and frequently remark that China’s behavior will depend on that of others going forward.

Future Warfare in the Western Pacific: Chinese Anti Access/Area Denial, US AirSea Battle, and Command of the Commons in East Asia

Stephen Biddle

International Security, Summer 2016

This article aims to address the worry that China’s missile, sensor, and guidance technology will allow China to deny the US military access to crucial parts of the Western Pacific. While Biddle recognizes China’s advanced and growing military power, he suggests that China is not seeking global hegemony and its power is mainly concentrated in the Asian Pacific region. Therefore, in order to secure its allies in the region, the US should focus its efforts on neutralizing any satellite-based sea surveillance systems and establishing its own A2/AD zone against China in the East and South China Seas.

Should the United States Reject MAD? Damage Limitation and US Nuclear Strategy towards China

Charles Glaser & Steve Fetter

International Security, Summer 2016

Glaser and Fetter consider the future of US nuclear policy in light of China’s investments into its own nuclear forces. The article considers whether the US should enhance its damage-limitation capability with a view toward China, taking into consideration China’s rather limited nuclear capabilities and the demands associated with reassuring US regional allies. The authors conclude that the US should not enhance damage limitation capabilities, since doing so would 1) provide little security, 2) be costly to preserve, and 3) aggravate an already-fragile bilateral relationship between China and the US.

Obama’s China and Asia Policy: A Solid Double

Jeffrey Bader

Order from Chaos, Brookings, August 29, 2016

The week before President Obama flies to Hangzhou, China to attend the G20, Jeffrey Bader considers the successes and failures of US-Chinese relations during Obama’s tenure. The Obama administration’s policy towards China is grounded in a few principles: accepting increased influence for a peaceful and internationally-integrated China; building relationships with Chinese officials and people; providing assurance to allies in the Asia-Pacific region, and creating a framework for multilateral cooperation

between China, the US and other states. Using this approach, the US has been able to cooperate with China on a number of issues, including climate change and Iran's nuclear weapons program. However, Bader warns that there are two challenges to US policy in Asia: first, how to react to China's rise and increased influence in the region, and second, US domestic attitudes toward Asia.

The PLA's Latest Strategic Thinking on the Three Warfares

Elsa Kania

China Brief, August 22, 2016

Kania considers Beijing's response to the South China Sea arbitration within its "three warfares" military strategy: public opinion, psychological, and legal warfare. These three types of warfare aim to control international discourse and perceptions in a way that advances China's interests by "weakening the adversary's will to fight" while unifying views back home. China applied this type of warfare in its approach of the South China Sea situation, as is evident in Chinese media coverage of the arbitration and its rejection of the ruling. Kania concludes that China is seeking a more integrated military strategy. Understanding all the fronts of China's warfare will be critical to dealing with an increasingly powerful China.

Dialogue on Nonproliferation and Nuclear Security Cooperation in Southeast Asia

Center for Strategic and International Studies, August 22, 2016

This conference report considers nuclear security a crucial area for cooperation between the US, China and the Southeast Asian states because of the growing terrorism concerns and North Korea (DPRK)'s nuclear capabilities. The report argues that the US, China and others can help build strategic trade controls in Southeast Asia under the auspices of the ASEAN Economic Community and Single Window initiative, and help implement UN sanctions against DPRK in Southeast Asia.

The Pivot to Asia: Can it Serve as the Foundation for American Grand Strategy in the 21st Century?

Douglas Stuart

Strategic Studies Institute, August 10, 2016

This report considers the challenges and failures of the Obama administration's "Pivot to Asia." Stuart argues that the Pivot has been largely unsuccessful because of the administration's failure to establish clear priorities, use all elements of national power (economic power in particular), and reassure its junior partners. However, he acknowledges that limiting the US' political objectives abroad and shifting its focus to the increasingly important Asia-Pacific region is the right approach. Stuart concludes that the US should continue to develop the Pivot through diplomatic, informational and economic instruments of power rather than mere military power.

Do Economic Ties Limit the Prospect of Conflict?

Scott Warren Harold

RAND Corporation, August 9, 2016

This article challenges the notion that strong economic ties will deter countries from entering into war, using Chinese-Japanese relations as a case study. Harold argues that, while economic ties do provide disincentives for conflict, policymakers tend to prioritize other aspects when deciding whether to engage in a potential clash. In China's case, it has avoided clashing with Japan over the East China Sea

because China recognizes that it cannot win against the combination of Japanese and American forces, not because of its economic ties with the two countries. Harold warns that, as China continues to strengthen its military capabilities, it may be more willing to stand up to Japan in the East China Sea. To counter this potential risk, the US should continue to strengthen its security ties with Japan and maintain a strong military presence in the region.

Commentary

No Restraint: Judicial Activism in the South China Sea Arbitration Ruling Sourabh Gupta

Last month, a tribunal at the Permanent Court of Arbitration ruled on the *Philippines v. China* case regarding South China Sea maritime rights. The arbitral panel had an opportunity to chart a constructive approach to one of the foremost legal questions of the Asia-Pacific. However, where it should have chosen to foster mutually cooperative tendencies on ill-understood provisions of the law, the award performed a disservice with consequences that will reverberate for a considerable time to come. On July 12, any illusion of judicial fair-play and moderation in the case was irretrievably shattered.

In a sweeping judgment that was as harsh as it was reckless, the arbitral tribunal in The Hague constituted under the United Nations Convention on the Law of the Sea (UNCLOS) issued a thoroughly one-sided award, ruling that many of China's maritime claims – and actions in defense of those claims – in the South China Sea were contrary to UNCLOS and had thereby violated the Philippines' sovereign rights and freedoms.

The ruling was harsh because although the arbitrators enjoyed ample latitude to carve out a constructive, mid-path interpretation of a critically important but ill-defined provision of maritime law (Article 121 of UNCLOS regarding the definition of "rocks" and "islands"), it instead chose to indulge in a tortuous train of legal thought that lacked basis in case law and produced a zero-sum outcome that overwhelmingly favored Manila. The ruling was reckless because the arbitrators dismissed an earlier ruling in sea law (regarding "historic rights" in maritime spaces) with a breeziness that was inversely proportional to its tenuous reasoning on the "island/rock" issue. At minimum, the panelists bore an obligation to lay out a reasoned basis for overturning legal precedent. Instead, they resorted to a superficial explanation that was lifted almost word-for-word from the Philippines' March 2014 memorial to the court.

Itu Aba – from "Island" to "Rock"

One of the most significant elements of the ruling was its finding that Itu Aba, the largest feature in the Spratly group, currently occupied by Taipei, is not an "island" capable of generating a 200 nautical mile exclusive economic zone (EEZ) but is instead merely a "rock" generating only a 12 nautical mile territorial sea. The ambiguity of Article 121(3) regarding the definition of an "island" capable of generating an EEZ has long vexed legal specialists and lay persons alike: in order to qualify as an island, a feature must be able "to sustain human habitation or economic life of [its] own."

The wording that became the agreed text in April 1975 was the product of an informal consultative process which left few records of its work due to the deep divisions among the state parties regarding the distinction between islands and rocks. No consistent trend had been discernible in state practice. Unable to form a consensus on this "island/rock" distinction, the Meetings of the State Parties of the

Law of the Sea Convention (SPLOS) have periodically prevented statutory international expert bodies from weighing in on the issue until the divergence of views is resolved. Taking the cue, international courts have found artful ways to navigate around this contested definition in the course of maritime delimitation cases. The result was a *de facto* literalist bent to the interpretation of Article 121(3)—to the somewhat preposterous point that even tiny features enjoyed the benefit of the doubt and were granted rights typically accorded to larger, fully entitled islands.

On July 12, the arbitral tribunal threw decades of jurisprudential caution out the window by directly addressing the distinction between “islands” and “rocks,” and added an arbitrary “historical use” test in the case of features that are difficult to define. Effectively, henceforth, features “which *haven’t* sustained human habitation or economic life of its own” are to be categorized as “rocks.” Itu Aba in its natural form, however, can sustain human habitation and economic activity and has shown it to be the case in recent history. As such, the tribunal proceeded to heap another disqualifying test: the “human habitation” referenced in Article 121(3) was to “be [now] understood to involve the inhabitation of the feature by a stable community of people for whom the feature constitutes a home and on which they can remain.”

Having substantially transformed the meaning of Article 121(3) from “rocks which cannot sustain human habitation or economic life of their own” to “rocks which *haven’t sustained a settled community of inhabitants* or economic life of their own” (Itu Aba has served as a temporary residence for extended periods but not a permanent home), the tribunal thereafter struck down the capacity of Itu Aba and every other high-tide feature in the Spratly group to generate an EEZ or continental shelf.

The Tribunal’s interpretation bears little resemblance to the letter or spirit of Article 121 and its reasoning situates itself at the outer end of the academic literature on the subject. The provision lays down no requirement – implicit or otherwise – that the “human” presence referenced be an exclusively civilian one; that the “habitation” on the feature be a “non-transient one who have chosen to stay and reside;” that the feature must furnish an abstract “proper standard” of lifestyle; or that the feature’s entitlement was exclusively intended to benefit an indigenous population. And while the object and purpose of Article 121 was indeed intended not to enable a tiny feature to generate a disproportionately large entitlement to maritime space, there is utterly nothing in the official record of the Law of the Sea negotiations to suggest that a “stable group or community” standard was envisioned to qualify a feature as a fully-entitled island that can “sustain human habitation.”

“Historic Rights” and the Nine-Dash Line

“Historic rights” in maritime spaces obtain in two forms – as an exclusive right and as a non-exclusively-exercised right. The former, typically as a “historic title” or “historic waters” right, pertains to maritime areas appurtenant to a mainland coast, bears the hallmark of state sovereignty, and is directly referenced in the territorial sea provisions of UNCLOS. By contrast, in waters within a semi-enclosed sea that were hitherto the high seas but have since become part of a coastal state’s exclusive maritime zones, a privately-acquired and non-exclusively exercised historic right of access may continue to prevail. This latter right originates not in the text of UNCLOS but from the body of general and customary international law that is preserved by UNCLOS and is applicable in each of the maritime zones created by it.

The arbitral tribunal was right to observe that China cannot enjoy any form of *exclusive* “historic rights” in the South China Sea that is not appurtenant to its mainland coast. Especially in waters that are within its nine-dash line, such exclusive rights to fish or conduct minerals-related activity has been decisively superseded by UNCLOS. However, the tribunal was wrong to observe that China cannot enjoy a *non-*

exclusive “historic right” of access where traditional fishing is concerned, in waters that are within its nine-dash line but have since become part of the EEZ of its littoral neighbors in the South China Sea. Chinese nationals can indeed enjoy such a right.

In a landmark ruling in the late-1990s, *Eritrea v Yemen*, the International Court of Justice (ICJ) ruled that there are “important elements capable of creating “historic rights” [in the semi-enclosed Red Sea] ...falling short of territorial sovereignty.” So long as the right of access for traditional fishermen “constituted a local tradition, [it was] entitled to the respect and protection of the law ... and was not qualified by the maritime zones specified under UNCLOS.” *Mauritius v United Kingdom* (2015) reconfirmed that “states may possess particular rights ... by virtue of ... local custom” which operate “for all intents and purposes equivalently” in each of the maritime zones created by UNCLOS.

On July 12, the tribunal cherry-picked the arguments that were expedient, disregarded those that could have validated a non-exclusive Chinese traditional fishing right of access within the nine-dash line, and was remiss in laying out a reasoned basis for its casual ignoring – and overturning – of a landmark precedent.

The tribunal did agree that Manila is entitled to reach beyond the text of the Convention to enjoy a non-exclusively exercised traditional fishing right in the territorial sea of the Scarborough Shoal, which was part of the body of general international law preserved by UNCLOS. The tribunal’s reasoning for why China was not granted similar allowances in foreign EEZs was unsatisfactory. Its limitation of artisanal fishing rights to territorial seas rather than other exclusive maritime zones constituted an arbitrary narrowing of the jurisprudence created in *Eritrea v Yemen*.

The tribunal offered no reason why the established jurisprudential basis by which non-exclusive “historic rights” form in maritime spaces is, as of July 12, legally unsustainable. In *Eritrea v Yemen*, the ICJ had reached beyond the Western legal tradition to imaginatively rule that such rights accrue as a sort of *servitude internationale* (i.e., as a sort of non-possessory right or interest in access and resources) in waters that were hitherto the “high seas” within a semi-enclosed sea but have since become part of a coastal state’s EEZ. By extinguishing this landmark ruling without so much as an explanatory footnote (in an award otherwise crammed with 1,498 footnotes), the tribunal also tore down an economically useful and rational concept – servitudes/easement – that both the ICJ and its predecessor, the PCIJ, have recognized in judgments spanning the 20th century.

It also begs the question: what legal justification still remains for the preservation of this non-exclusive right of access in territorial seas, such as in the territorial sea of the Scarborough Shoal which the tribunal affirmed in favor of the Philippines? After all, a territorial sea, like an EEZ, is also an exclusive maritime zone and prior to its expansion from 3 to 12 nautical miles by UNCLOS, the waters therein too, like in the case of the EEZ, had hitherto been the “high seas.” What’s good for the goose ought to be good for the gander.

Conclusion

The five-member arbitral panel enjoyed a golden opportunity to chart a constructive, mid-path approach to one of the foremost legal (and political) questions of the Asia-Pacific. It could – and should – have chosen to foster mutually cooperative tendencies on both these critically important but ill-defined or ill-understood provisions of the law. Had Itu Aba been ruled a fully-entitled island, it could have furnished a basis for Sino-Philippine oil and gas joint development in the overlapping area of entitlement. Now, with no geographic overlap to contend with and a *de facto* delimitation of the China–Philippines maritime boundary furnished, the principle of “shelving differences and seeking joint

development” has been rendered hollow and the *raison d'être* that sustains the envisaged Code of Conduct undercut. Equally, had the tribunal re-confirmed that a local custom-based traditional fishing right was preserved across *all* the exclusive maritime zones in this semi-enclosed sea, it could have furnished an incentive for the nine-dash line to be thrown open on equal terms as a common fishing ground for all artisanal fishermen of *every* littoral state that borders the sea.

In lighting a judicial fire under the law and politics of the South China Sea and placing the two on a collision course, the arbitral tribunal has performed a disservice. The consequences will reverberate for a considerable time to come – with international law, likely, ending up the poorer.

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