Issues for the Next Administration
by
Mark E. Rosen, JD, LLM

Context:

On July 12, 2016, the International Tribunal on Law of the Sea ruled that China’s claims to significantly expanded land and ocean ownership in the South China Sea were without basis and illegal. China was also censured for violations of international environmental norms and for interference with the lawful rights of the Philippines to fish in their EEZ. They also denied the extension of the exclusive economic zones around all of the Spratly features and disapproved of China’s “nine dash line” claim. This ruling was requested by the Philippines because there were clearly intimidated by China’s actions and their refusal to negotiate. But other countries – Brunei, Malaysia, Taiwan, and Vietnam all have claims over parts of the South China Sea, but China is the singular country that has made and enforced outrageous claims.

Excessive maritime claims has been a longstanding problem and one which threatens the foundations of UNCLOS on a multiplicity of levels including breakdown in regulation of shipping, fishing, and, of course, adjudication of ocean territorial boundaries. UNCLOS has the intrinsic tools to deal with many of these issues; however, China’s refusal to conform to UNCLOS norms and unilaterally reinterpret the provisions creates instability both regionally and internationally. Indeed, the threat of major conflict in the East China Sea can, more or less, be attributed to a breakdown in state respect for UNCLOS.

China repeatedly declared that it will not abide by the Tribunal’s decision, despite the fact that they are signers of UNCLOS and participate in all proceedings of UNCLOS bodies—International Seabed Authority (ISBA); Commission for the Limits of the Continental Shelf (CLCS); and International Tribunal of the Law of the Sea (ITLOS). Unfortunately, there is no enforcement mechanism for UNCLOS, so China’s defiance of the Tribunal’s ruling will become the order of the day unless they are legally/diplomatically challenged or militarily challenged.

The effects of this lawlessness are profound. China already has significant fishing vessel assets; by some estimates, over 20,000. Armed clashes are already occurring; fishing vessels have been captured by many countries, to include Indonesia, Vietnam, Japan, the Philippines and soon Malaysia. This becomes a global security issue because the sane and sustainable regulation of fishing is critical to the survival of many people who border the seas and depend on fish as a source of protein. China, and other nations’ illegal fishing activities and gross violations of international environmental norms, are not restricted to the SCS; illegal fishing by PRC vessels occurs worldwide in such places as the Arctic Circle, Antarctica, and the South Pacific.

The South China Sea (SCS) is the focus of the Tribunal’s ruling. Some $5.3 trillion in trade passes through these waters each year (of which the U.S. portion is $1.3 trillion); creating concern that instability
or restrictions on freedoms and navigation and overflight will, for the U.S. have military and commercial implications. Even if China does not establish zone’s which explicitly restrict navigation; conflict in those waters between China and other claimant states will impact commercial shipping patterns and insurance rates. This situation is complicated and multi-faceted, and has the potential to bring about some catastrophic consequences. This is precisely what the United States wants to avoid, while keeping trade routes open, ensuring that nations can sustainably support themselves, and respecting the sovereignty of all nations involved.

The United States is at a crossroads. It either believes in international law or it doesn’t. It cannot, as a nation, ignore the breakdown of law order at sea. Being a member of UNCLOS will enable the U.S. to use the mechanisms inside of the Convention to help restore order. As a member, the U.S. can forcefully oppose China’s use of the treaty’s benefits until it conforms its behavior to UNCLOS norms. The U.S. should also “clean up its own act” and revisit some of its arguably excessive EEZ claims in the South Pacific and its common boundary with Canada in the Beaufort Sea. The U.S. can also, while there are still a few fish left in the oceans and a few coral reefs remaining, put in place tough new enforcement norms to prevent what has happened in the SCS.

**Recommendations:**

1. Ratification of UNLOS must be made a priority. It is a military and economic imperative. UNCLOS = Food and Trade. It is more important today, given China’s lawless behavior, than a free trade agreement or an arms control treaty.
   a. If UNCLOS membership is not in the United States’ arsenal, the only other option is to work through proxies or use military or economic force.

2. United States diplomacy should explicitly embrace the notion that joint development arrangements are possible in the South China Sea and East China Sea. If the parties, as they have in the past, would commit to shelve their sovereignty claims and, instead, focus on the maritime delimitations they and a joint use schemes, an equitable and face saving solution to the problem is possible. The U.S. risks little by openly advocating for these practical solutions which are predicated on existing international law principles versus spending precious time debating grandious grand bargains or sphere of influence arrangements. The recent delimitations involving three states (India, Bangladesh, Myanmar) in the Bay of Bengal is proof that legal solutions both work to defuse tensions and are essential to attract capital for economic development.

3. Every effort must be made in an attempt to avoid conflict and resolve these disputes diplomatically. Despite China’s intransigence, there are forums to attempt to alleviate these tensions. Among them,
a. The United States needs to be much more aggressive at ASEAN and force the negotiation of instruments that, beyond the non-binding 2002 ASEAN Declaration of Conduct and other documents, leavened with diplo-babble.
   i. The U.S. should be prepared to retaliate against states and condition their access to the U.S. capital and consumer market on adherence to legally binding ASEAN agreements that force dispute settlement and good behavior.

b. The creation of a South China Coast Guard forum, similar to the Arctic Coast Guard Forum, should commence immediately.

c. Establish (or reinforce) an Incidents at Sea Hotline between the U.S., China and Japan that covers both naval vessels and white hull vessels for both the East China Sea and South China Seas.

4. While diplomacy is the option of choice, the U.S. must continue to maintain a strong military presence in the South China Sea in keeping with the President’s “pivot to Asia” strategy to keep pressure on China to get along with its neighbors. This should include increased port visits to all concerned and holding joint exercises, if possible, involving the Chinese (i.e. the RIMPAC exercise, in which China has been a participant). The U.S. should also be blunt with the Philippines that U.S. commitments under the Mutual Defense Agreement, given the clear and present dangers in the SCS, is conditioned on regular access to negotiated bases. If deemed necessary by the PACOM Commander, the 2014 Agreement with the Philippines should permit more than just rotational base access.

5. Freedom of Navigation movements should continue in all contested waters, and aviation assets should continue to fly where legally allowed by international law. These operations should continue to be non-hostile operations.

6. What China does fear, and will respond to, are treaties and arrangements that impact trade. One of the most significant, for their sphere of influence, is the Trans Pacific Partnership (TPP). Ratification of the TPP will make China think twice about what they do in the South China Sea, as U.S. will be gaining increased access to Pacific markets. And, contrary to popular belief, U.S. industrial competitiveness is on the upswing because of cheap U.S. energy costs.

7. We should not rule out sanctions on China. As much as we have become a trading partner, they rely on us significantly for trade and our current trade imbalance to finance many of their offshore investments and to stabilize the Renminbi. The U.S. should be prepared to compensate large exporters such as BOEING if trade sanctions are necessary and there is retaliation against U.S. companies that export to China. Trade sanctions worked against Iran and they surely would make China think twice about ignoring the UNCLOS ruling in the South China Sea.

8. Until the U.S. is an UNLOS party, we should consider asking our allies that are parties to UNCLOS to seek to deprive China the benefits of UNCLOS if it remains an “outlaw” to its
dispute settlement processes. As suggested by Rosen in June 21, in *The Diplomat*, [http://thediplomat.com/2016/06/after-the-south-china-sea-arbitration/] three measured and concrete steps that could be taken include:

a. Deprive China the right to make interventions or seek “rulings” from the Commission on the Limits of the Continental Shelf;

b. Unseat the Chinese Judge from the International Tribunal for the Law of the Sea (ITLOS);

c. Shelve China’s pending deep seabed mining claims and prohibit further exploration licenses with the International Seabed Authority.