

# Maritime Security Issues in East Asia

CNA Maritime Asia Project: Workshop Four

Catherine K. Lea • Michael A. McDevitt



DOP-2013-U-006034-Final  
September 2013

Strategic Studies is a division of CNA. This directorate conducts analyses of security policy, regional analyses, studies of political-military issues, and strategy and force assessments. CNA Strategic Studies is part of the global community of strategic studies institutes and in fact collaborates with many of them.

On the ground experience is a hallmark of our regional work. Our specialists combine in-country experience, language skills, and the use of local primary-source data to produce empirically based work. All of our analysts have advanced degrees, and virtually all have lived and worked abroad.

Similarly, our strategists and military/naval operations experts have either active duty experience or have served as field analysts with operating Navy and Marine Corps commands. They are skilled at anticipating the “problem after next” as well as determining measures of effectiveness to assess ongoing initiatives. A particular strength is bringing empirical methods to the evaluation of peace-time engagement and shaping activities.

The Strategic Studies Division’s charter is global. In particular, our analysts have proven expertise in the following areas:

- The full range of Asian security issues
- The full range of Middle East related security issues, especially Iran and the Arabian Gulf
- Maritime strategy
- Insurgency and stabilization
- Future national security environment and forces
- European security issues, especially the Mediterranean littoral
- West Africa, especially the Gulf of Guinea
- Latin America
- The world’s most important navies
- Deterrence, arms control, missile defense and WMD proliferation

The Strategic Studies Division is led by Dr. Eric V. Thompson, who is available at 703-824-2243 or [thompson@cna.org](mailto:thompson@cna.org). The executive assistant to the director is Ms. Rebecca Edelston, at 703-824-2604 or [edelston@cna.org](mailto:edelston@cna.org).

Cover photo: U.S. Navy photo.

Approved for distribution:

September 2013



Eric V. Thompson, Ph.D.  
Vice President and Director  
CNA Strategic Studies

This document contains the best opinion of the authors at the time of issue. It does not necessarily represent the opinion of the Department of the Navy.

Approved for Public Release; Distribution Unlimited. Specific authority: N00014-11-D-0323. Copies of this document can be obtained through the Defense Technical Information Center at [www.dtic.mil](http://www.dtic.mil) or contact CNA Document Control and Distribution Section at 703-824-2123.

**Copyright © 2013 CNA**

This work was created in the performance of Federal Government Contract Number N00014-11-D-0323. Any copyright in this work is subject to the Government's Unlimited Rights license as defined in DFARS 252.227-7013 and/or DFARS 252.227-7014. The reproduction of this work for commercial purposes is strictly prohibited. Nongovernmental users may copy and distribute this document in any medium, either commercially or noncommercially, provided that this copyright notice is reproduced in all copies. Nongovernmental users may not use technical measures to obstruct or control the reading or further copying of the copies they make or distribute. Nongovernmental users may not accept compensation of any manner in exchange for copies. All other rights reserved.

# Contents

<b>Maritime security issues in East Asia.....</b>	<b>1</b>
South Korean security issues in the maritime domain .....	2
Inter-Korean relations.....	2
U.S.-ROK alliance.....	3
East China Sea disputes and the potential for regional maritime conflict .....	5
China’s strategy in the East China Sea .....	5
The Senkaku/Diaoyu Islands dispute and regional security .....	7
U.S. interests in the East China Sea.....	9
Prospects for dispute resolution through international mechanisms .....	10
ITLOS as a venue for maritime disputes resolution in East .....	12
The Sino-Philippines arbitration on the South China Sea .....	12
Policy implications.....	14
Improve capabilities to deter and dissuade North Korea...	15
Develop regional mechanisms for multilateral resolution of maritime disputes.....	16

This page intentionally left blank

# Maritime security issues in East Asia

As part of its Maritime Asia project, the Center for Naval Analyses (CNA) conducted a joint workshop on maritime security issues in East Asia with the Sea Lanes of Communication (SLOC) Study Group from Yonsei University in Seoul. The purpose of this workshop was to explore the commonalities and contrasts between the U.S. and Korean perspectives on the most pressing security issues in the East Asian maritime domain. The security of the maritime environment is a critical issue for South Korea because it is effectively an island nation: its only land border is with North Korea, which is openly hostile to its very existence. Moreover, its near seas are the thoroughfare by which security threats have approached it in the past and are likely to approach it in the future.

South Korean commercial maritime trading companies and exporters founded the SLOC Study Group in 1981 to conduct research on maritime law, maritime jurisdictional issues, and maritime security and safety. Membership in the SLOC Study Group has since expanded to academic institutions, the South Korean navy, and the South Korean coast guard. The SLOC Study Group also works collaboratively with other maritime-oriented think tanks in South Korea, including the Korean Institute of Maritime Studies (KIMS), with which CNA has a long-standing relationship. Members of the SLOC Study Group regularly participate in bilateral meetings with maritime-oriented think tanks outside of South Korea to exchange views on pressing maritime issues. This was the first such meeting held in the United States.

Participants in this Maritime Asia workshop discussed a broad range of East Asian maritime security topics and, among these, identified flashpoints which could result in open hostilities in the region. The SLOC Study Group's research interests are very timely topics because of the unresolved maritime boundary disputes in East Asia. This essay summarizes key arguments offered by workshop presenters and raises several points of discussion from this Maritime Asia workshop.

This report begins by examining South Korean security issues related to the maritime domain and covering inter-Korean relations and current issues in the U.S. alliance with South Korea. Next, it discusses East China Sea disputes and the consequent potential for conflict there. Finally, it addresses the prospects for international legal mechanisms to resolve maritime disputes in East Asia.

## **South Korean security issues in the maritime domain**

South Korea's first and foremost security concern in the maritime domain is the potential for provocations by North Korea to escalate into open conflict. The tragic events of 2010, when a North Korean mini-sub sank the South Korean navy corvette *Cheonan* and North Korean artillery units shelled Yeonpyeong Island, underscore the fact that that the maritime domain is the current arena for North Korean aggression against South Korea.

### **Inter-Korean relations**

According to one of the workshop presenters, the separation of North and South Korea by the Demilitarized Zone (DMZ) creates a competitive rivalry in which South Korea currently holds the dominant position but North Korea remains determined to act as a spoiler. Liberal democracy and capitalism have led to the South Korean "economic miracle" that has made it one of the wealthiest countries in the world. In contrast, North Korea's economic and diplomatic choices—especially since the end of the Cold War—have caused it to become an international pariah and an economic basket-case. The result is that North Korea's status in international society is far below that of South Korea.

As a consequence, over time, North Korea has had to find new areas in which it can compete with South Korea—and it has settled on its nuclear program and its long-range rockets targeted against Seoul. North Korea's declaration as a nuclear country and its subsequent nuclear tests and nuclear development programs demonstrate its strength to its own people, to international society, and, perhaps most importantly, to South Korea. North Korea also has a decided advantage over South Korea in ballistic missile technologies. It has distributed over 8,600 self-propelled guns and 4,800 multiple rocket launchers along the DMZ, which, due to their mobility, cannot be

easily targeted by South Korea.<sup>1</sup> In both of these areas, South Korea has made a policy choice to accept a capability gap with North Korea. Therefore, despite South Korea's remarkable economic development, North Korea still retains an advantage over its neighbor: it holds the South Korean economy at risk with its long-range artillery arrayed just across the DMZ.

While inter-Korean rivalry is one driver of North Korean policy toward South Korea, another participant made the case that the reasons for the 2010 sinking of *Cheonan* and shelling of Yeonpyeong Island were more directly related to the impending leadership succession in North Korea and politics inside the regime there. Similar internal forces are likely to drive future violent provocations. North Korean provocations in the maritime domain create a very dangerous situation around the Korean Peninsula, which could compel the United States to become involved in defense of South Korea.

## **U.S.-ROK alliance**

One workshop participant noted that the U.S. and South Korea's restrained response to North Korea's 2010 provocations effectively gave North Korea a "free shot." South Korea was determined not to allow that again; therefore, the Lee Myung-bak administration developed South Korea's proactive deterrence strategy in order to counter future North Korean maritime provocations more effectively. This strategy focused on doctrinal changes designed to address the North Korean threat by reorganizing South Korea's military command and control and force structure. With these changes, South Korea's orientation shifted from one of deterrence by denial (depriving North Korea of the benefits of an attack by defending against small-scale attacks and containing provocations) to proactive deterrence (prompt, focused, and proportional retaliation against North Korean attacks).<sup>2</sup>

---

<sup>1</sup> Based on an unpublished work by Jong-Yun Bae of Yonsei University, "Naval Security in the Korean Peninsula and North Korea's Perspective on Inter-Korean Relations," p. 7.

<sup>2</sup> Based on an unpublished work by Ken E. Gause of CNA, "Dealing with North Korean Provocations in the Maritime Environment: A Challenge Facing the US-ROK Alliance," p. 4.

Proactive deterrence allows South Korean forces to respond to North Korean provocations in a timely and effective manner.

The United States has confirmed that it will support South Korea's response under the proactive deterrence strategy. Practically speaking, this means that the United States will be part of any follow-on South Korean response to a North Korean counter-response to a South Korean initial response to a provocation.<sup>3</sup> Attribution is a major concern, though, because it will drive the manner and speed in which the alliance can respond.<sup>4</sup> Thus, the greater danger for South Korea in the future may be covert vice overt North Korean military provocations. In fact, during the most recent crisis on the Korean Peninsula, in March and April 2013, President Park Geun-hye announced that she had granted South Korean military commanders the authority to respond to any North Korean provocation. For their part, the North Korean leadership exercised an abundance of caution during the crisis to avoid ratcheting up escalation beyond a point of no return.<sup>5</sup>

South Korea's proactive deterrence policy could potentially lead to a disproportionate response to a future North Korean provocation—which raises the specter of a war caused by spiraling escalation. Maintaining proportionality in response to future North Korean provocations, however, will require a deep understanding of its goals and red lines; the potential danger stems from the lack of understanding of red lines between Seoul and Pyongyang.<sup>6</sup> Given the situation on the Korean Peninsula, the United States and South Korea should not assume that they will be able to effectively deter North Korean escalation or impact the decision-making that leads to a provocation in the first place.<sup>7</sup>

Japan has a central role to play in the defense of South Korea because logistics support from bases in Japan enables U.S. participation.

---

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid., p. 3.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., p. 5.

Due to the history of strained relations between Japan and South Korea, South Korea does not incorporate Japan into its security planning—and the position of the U.S. participants was that it should. Our Korean interlocutors, however, indicated that South Korea does not consider a strong Japan to be in its best interest, regardless of the benefit to the United States. Along these lines, South Korea opposes the revision of Article 9 of the Japanese Constitution, as proposed by the administration of Prime Minister Shinzo Abe, which would allow Japan to engage in collective self-defense and legalize the Japan Self-Defense Forces as a national military force.

## **East China Sea disputes and the potential for regional maritime conflict**

The ongoing dispute between China and Japan in the East China Sea has great potential for miscalculation, which could inadvertently lead both nations into open conflict affecting the entire region. The dispute between China and Japan over the Senkaku/Diaoyu Islands has risen to prominence since 2012, when Japan purchased three of the islands from their private Japanese owner—much to China’s consternation. Although South Korea is not a party to this dispute, it is watching events carefully to see how the United States will uphold its commitments to its treaty allies in the region against encroachment by a rising China. The following section of this conference report reflects workshop presentations covering China’s strategy in the East China Sea, the effect of the Senkaku/Diaoyu Islands dispute on regional security, and U.S. interests in the East China Sea.

### **China’s strategy in the East China Sea**

The East China Sea contains the primary sea lanes of approach to China’s eastern seaboard, which makes that body of water tremendously sensitive to China for strategic and economic reasons. China’s concerns about the security of its maritime approaches are based on three factors. First, China’s economic center of gravity is its eastern seaboard, where its largest cities and commercial ports are located. Second, China has an interest in deterring Taiwan’s independence and, if it chooses to attack Taiwan, to be able to deter or defeat any approaching U.S. Navy task group via the East China Sea. Finally,

China's economic growth depends on oil, natural gas, and other raw materials that are delivered by ships through the East China Sea.<sup>8</sup>

Given these interests, China has been developing capabilities to defend its seaborne approaches through the East China Sea. By doing so, it is creating a security dilemma for its neighbors in that its defenses are becoming so robust that neighboring countries fear for their own security.<sup>9</sup> In effect, China has been working on making the East China Sea a no-go zone in case of conflict with its neighbors or with the United States.<sup>10</sup> China's desired strategic outcome is to keep U.S. naval and air forces as far from it as possible; this has obvious strategic implications for the East China Sea littoral states that depend upon the United States to underwrite their security as alliance or strategic partners. As a result of China's robust military and civilian presence in the East China Sea, if any of these states get into a confrontation with China the United States *may not be able* or willing to support them.<sup>11</sup>

The end result is that China's strategy in the East China Sea has complicated the security calculus both for the East China Sea littoral states—including South Korea—and for the United States, which has security commitments there. U.S. strategists refer to China's defensive capabilities in the East China Sea as "anti-access area-denial" (A2AD), while People's Liberation Army (PLA) strategists refer to it as "counter-intervention operations." Though China may emphasize that its forces in the East China Sea do not constitute a threat to either its neighbors or U.S. forces in the region, its intentions may change over time. What really matters are the military capabilities of China's counter-intervention forces.

---

<sup>8</sup> Based on an unpublished work by Michael A. McDevitt of CNA, "The East China Sea and the Potential for Sino-US Conflict," 6 August 2013, p. 2.

<sup>9</sup> Ibid., p. 12.

<sup>10</sup> Ibid., p. 11.

<sup>11</sup> Ibid., p. 12.

## The Senkaku/Diaoyu Islands dispute and regional security

The consequences that China's East China Sea strategy has for regional security are clearly demonstrated in its dispute with Japan over the Senkaku/Diaoyu Islands. This is a volatile situation that could lead to open hostilities between Japan and China. The United States has a clear incentive to deter possible military conflict between Japan and China for two reasons: First, such a conflict could be destabilizing to the entire region, which is not in the United States' national interest. Second, such a conflict could draw in the United States due to its treaty obligations to Japan. Over the long term, China may hope that the Senkaku/Diaoyu Islands dispute will weaken the U.S.-Japan alliance because Washington has undoubtedly made clear that it wants to avoid getting into a direct shooting war with China over uninhabited islets that have no indigenous population, no geo-strategic value, and no intrinsic value in and of themselves.<sup>12</sup> Nevertheless, since Japan's nationalization of the Senkaku/Diaoyu Islands in September 2012, Beijing has persistently challenged Tokyo's administrative control of the islands and their surrounding waters, through military escalation, diplomatic efforts, and massive public protests.<sup>13</sup>

According to one point of view, in a volatile situation such as the dispute between Japan and China over the Senkaku/Diaoyu Islands, war becomes increasingly probable when three factors are present: an external alliance, an existing rivalry between the disputants, and an arms race between them.<sup>14</sup> Japan and China both have external alliances and an existing rivalry; however, they are not engaged in an arms race with one another.

---

<sup>12</sup> It is worth noting that in August 2012 President Ma Ying-jeou made known that Taiwan was also an interested player in this dispute. He proposed an East China Sea Peace Initiative, while at the same time asserting the Republic of China's (Taiwan's) claim to what they call the Diaoyutai Islands. Ma is personally invested in the dispute. He wrote his Harvard Law School dissertation on the topic.

<sup>13</sup> McDevitt, "East China Sea," p. 10.

<sup>14</sup> See Paul D. Senese and John A. Vasquez, *The Steps to War: An Empirical Study* (Princeton, NJ: Princeton University Press, 2008), pp. 272-273.

Furthermore, even though both Japan and China both have external alliances, only the U.S.-Japan alliance is likely to become operative should China and Japan ever get into a conflict over the Senkaku/Diaoyu Islands. The United States has unequivocally stated that its mutual security treaty with Tokyo includes the Senkaku/Diaoyu Islands. During remarks with the Vietnamese foreign minister in 2010, Secretary of State Hillary Clinton stated that

With respect to the Senkaku Islands, the United States has never taken a position on sovereignty, but we have made it very clear that the islands are part of our mutual treaty obligations, and the obligation to defend Japan.<sup>15</sup>

Article V of the treaty specifically states that “each party would act in accordance with its constitutional provisions and processes in response to an armed attack.”<sup>16</sup>

China’s alliance with North Korea, by contrast, is not likely to be a factor in a China-Japan conflict over the Senkaku/Diaoyu Islands. While China and North Korea have an alliance, the North Korean military is not capable of undertaking a long-distance deployment and is therefore unlikely to be able to assist China in any way in the event of a conflict with Japan over the Senkaku/Diaoyu Islands. Regardless, Article 2 of the China-North Korea treaty declares that “the two nations guarantee to adopt immediately all necessary measures to oppose any country or coalition of countries that might attack either nation.”<sup>17</sup> The treaty obligation for North Korea to defend China

---

<sup>15</sup> Secretary of State Hillary Clinton, “Remarks with Vietnamese Foreign Minister Pham Gia Khiem,” 2010, U.S. Embassy Seoul website, last accessed 9 September 2013, at [http://seoul.usembassy.gov/p\\_rok\\_1030cnka.html](http://seoul.usembassy.gov/p_rok_1030cnka.html).

<sup>16</sup> See “Japanese Treaty (Bilateral),” on U.S. Department of State website, Office of the Legal Advisor, Treaty Affairs, U.S. Collective Defense Arrangements, last accessed 9 September 2013, at <http://www.state.gov/s/l/treaty/collectivedefense/>.

<sup>17</sup> Ki-Joo Kim, “A Korean Perspective on Territorial Disputes in East Asia: The Potential for Sino-Japan Conflict,” briefing to CNA Maritime Asia Workshop 4: “Maritime Security Issues in East Asia,” 6 August 2013. See also “China Quietly Readies Itself for War with America,” 2 April 2013, last accessed 9 September 2013, at

does exist, therefore, and ostensibly would be in effect in the event of a conflict with Japan over the Senkaku/Diaoyu Islands.

By any reckoning, Japan and China have an existing rivalry based on historical animosity and distrust. They have experienced multiple wars as well as militarized interstate disputes over the past 150 years.<sup>18</sup> More recently, as China's military and commercial presence have increased in Japan's near seas, several events—including naval encounters—have heightened their preexisting rivalry. Notably, since Japan's nationalization of the Senakau/Diaoyu Islands in 2012, China has increased the presence of its civilian maritime law enforcement vessels in the vicinity of the Islands. Japan has responded by increasing its coast guard presence and amending its laws to allow closer coordination among relevant domestic agencies such as the immigration bureau and the Okinawa Prefectural Police.<sup>19</sup>

Despite their external alliances and rivalry, however, China and Japan are not currently engaged in an arms race; rather, both sides are building and modernizing their navies. Japan has not dramatically increased its defense budget in response to China's growing activity in the region.<sup>20</sup> China's defense budget, by contrast, has been increasing; however, this may be due to factors beyond its dispute with Japan, such as the desire to protect seaborne trade in its near seas. Nevertheless, China and Japan's competitive naval build-up and mutual threat perception increase the chance of an arms race.<sup>21</sup>

## **U.S. interests in the East China Sea**

The strategic interests of the United States and Japan largely overlap in the East China Sea. They include:

- The peaceful resolution of territorial disputes

---

<http://gopthedailydose.com/2013/04/02/china-quietly-readies-itself-for-war-with-america/>.

<sup>18</sup> Ibid.

<sup>19</sup> Interview with a Japan Coast Guard officer, July 2013.

<sup>20</sup> Kim, "A Korean Perspective."

<sup>21</sup> Ibid.

- Assuring the defense of Japanese territory
- Non-interference with the high seas freedoms associated with the use of international waters
- Acceptance of internationally agreed upon norms regarding freedom of navigation for military purposes that were negotiated in the development of the United Nations Convention on the Law of the Sea (UNCLOS), which the United States has signed but has not yet ratified.<sup>22</sup>

On the final point, freedom of navigation for military purposes includes the right to conduct surveillance in the exclusive economic zones (EEZs) of any nation. As the presenter noted, as long as China refuses to renounce the use of force against Taiwan, the requirement for up-to-date intelligence will continue to exist for the United States. Thus, American air and naval reconnaissance missions, which are a major irritant to China, are likely to continue.<sup>23</sup> Until agreed-upon rules for Sino-U.S. maritime interactions in China's EEZ are established, China's desire to limit military activity in its EEZ creates the potential for a future incident similar to the 2010 confrontation between USNS *Impeccable* and PLA Navy ships.

## Prospects for dispute resolution through international mechanisms

Another presenter noted that East Asia lacks regional institutional architecture, which could be useful in resolving maritime disputes. Given the lack of regional institutions, international legal mechanisms are a logical venue for the resolution of territorial and maritime disputes. In the past, however, the countries in the region have not agreed to seek arbitration before using existing legal mechanisms to resolve their maritime disputes. This is because in some cases they are not willing to even concede that a dispute exists, which is the case with Japan in the Senkaku/Diaoyu Islands dispute. In other instances, countries in the region are not willing to submit to the jurisdiction

---

<sup>22</sup> McDevitt, p. 4.

<sup>23</sup> Ibid.

of an international legal body; an example of this is South Korea in the Dokdo/Takeshima Islands dispute with Japan.<sup>24</sup>

Many of the current disputes are long-standing and have actually been complicated by the very international efforts that were intended to simplify them. Often these disputes find their origins in the arbitrary decisions of external powers that altered national maps, which were then further exploited by post-colonial nationalists.<sup>25</sup> The 1952 San Francisco Peace Treaty, which ended the U.S. occupation of Japan after World War II, did not clearly establish either maritime boundaries or sovereignty over disputed territories in East Asia. UNCLOS made the situation even more complex by heightening the importance of the maritime zones in East Asia.<sup>26</sup> As a result, the delimitation of EEZs and the continental shelf boundaries is fraught with difficulty because countries in the region do not accept each other's territorial baselines, which prevents agreement on equidistant lines.<sup>27</sup>

Aside from the resolution of territorial and maritime disputes, the lack of a regional architecture in East Asia has prevented the countries there from developing coordinated responses to regional challenges. As such, tensions fester across a number of fronts. For example:

---

<sup>24</sup> Japan has attempted on three separate occasions to take the case to the International Court of Justice. South Korea did not agree to participate in Japan's first two arbitration attempts, and the court will not hear the case unless both parties consent to jurisdiction. In the third instance, Japan chose to drop its case. See Michael A. McDevitt and Catherine K. Lea, *Japan's Territorial Disputes* (Alexandria, VA: Center for Naval Analyses Conference Proceedings DCP-2013-U-005049), June 2013, p. 9.

<sup>25</sup> Min Gyo Koo, "A New Type Great Power Relationship between China and the U.S. and Its Implications for Maritime Security in East Asia," briefing to CNA Maritime Asia Workshop 4: "Maritime Security Issues in East Asia," 6 August 2013.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

- Over-fishing not only depletes fish stocks in East Asian waters but also occasionally leads to confrontations involving regional coast guards, which escalate into bilateral incidents.<sup>28</sup>
- The release of radiation into the sea at the Fukushima Daiichi nuclear power plant affects the entire region.
- Exploitation and development of the potential natural gas reserves beneath the East China Sea is a looming regional issue. Any undersea natural gas exploration agreements must currently be concluded bilaterally.<sup>29</sup>

### **ITLOS as a venue for maritime disputes resolution in East**

The International Tribunal for the Law of the Sea (ITLOS) is a potential mechanism for peaceful resolution of East Asian maritime disputes. Located in Hamburg, Germany, the ITLOS adjudicates disputes arising out of the interpretation and application of UNCLOS.<sup>30</sup> Thus far, it has not gotten involved in resolving East Asia maritime disputes. A recent case brought by the Philippines against China, however, could have far-reaching implications for both the ITLOS and international legal mechanisms to resolve maritime disputes in East Asia.

### **The Sino-Philippines arbitration on the South China Sea**

On January 22, 2013, the Philippines filed a Notification and Statement of Claim initiating Annex VII arbitration proceedings against

---

<sup>28</sup> Ibid. One need look no further than the fatal stabbing of a South Korean coast guard officer by a Chinese fishing boat captain in 2011 as a single example of this larger phenomenon. See for example, Jonathan Watts, "South Korean Coastguard Stabbed to Death While Seizing Chinese Boat," *The Guardian*, 12 December 2011, last accessed 13 September 2013, at <http://www.theguardian.com/environment/2011/dec/12/south-korean-coastguard-stabbed-boat>.

<sup>29</sup> While the natural gas deposits beneath the waters in the region are unproven, bilateral agreements are not likely to be sufficient given the track record of maritime disputes among East Asian countries.

<sup>30</sup> See ITLOS website, last accessed 11 September 2013, at <http://www.itlos.org/index.php?id=15&L=0>.

China under UNCLOS “in order to . . . clearly establish the sovereign rights and jurisdiction of the Philippines over its maritime entitlements in the West Philippine Sea.”<sup>31</sup> This case is clearly one of the most important to have been filed under UNCLOS procedures, because the findings of the tribunal will have major consequences for UNCLOS dispute resolution procedures. Therefore, it is a test for UNCLOS mechanisms as well as for countries which are parties to UNCLOS.<sup>32</sup>

Strategically speaking, the Philippines stand much to gain, and relatively little to lose, by filing its claim.<sup>33</sup> If ITLOS decides in favor of its claim that will establish a legal precedent for its South China Sea claims. In the worst-case scenario, the court will rule against the Philippines on jurisdictional grounds.<sup>34</sup>

China has responded by officially refusing to participate in the arbitral proceedings.<sup>35</sup> The basis of China’s refusal is its 2006 Declaration to opt out of UNCLOS dispute resolution concerning sea boundary delimitations, historic bay or titles, and territorial sovereignty disputes.<sup>36</sup> It is therefore possible that based on China’s 2006 Declaration, the tribunal may conclude that it has no jurisdiction in this matter. By refusing to participate in the claim brought by the Philippines, however, China has only succeeded in losing its chance to ap-

---

<sup>31</sup> Department of Foreign Affairs (DFA), Republic of Philippines, *Notification and Statement of Claim*, 22 Jan. 2013, at <http://www.pia.gov.ph/news/piafiles/DFA-13-0211.pdf>.

<sup>32</sup> Based on an unpublished work by Seokwoo Lee of Inha University Law School, “Recent Judgments of ITLOS and Implications of its Jurisprudence,” unpublished paper, p. 22.

<sup>33</sup> Ibid.

<sup>34</sup> Julian Ku, *Game Changer? Philippines Seeks UNCLOS Arbitration with China Over the South China Sea*, *Opinio Juris*, 22 Jan. 2013, at <http://opiniojuris.org/2013/01/22/game-changer-philippines-seeks-unclos-arbitration-with-china-over-the-south-china-sea/>.

<sup>35</sup> “China Rejects Philippines’ Arbitral Request,” *China Daily*, 19 February 2013, at: [http://www.chinadaily.com.cn/2013-02/19/content\\_16238133.htm](http://www.chinadaily.com.cn/2013-02/19/content_16238133.htm).

<sup>36</sup> Lee, “Recent Judgments of ITLOS,” p. 17.

point a sympathetic arbitrator or president, and losing its chance to persuade the tribunal with its submissions. This may ultimately have a negative effect on the tribunal's findings on both the jurisdiction and the merits of the case.<sup>37</sup>

The worst-case scenario for China would be that it loses on both the jurisdiction and the merits. In that case, it would have to decide whether to comply with the tribunal.<sup>38</sup> It could even withdraw from UNCLOS in the event that the ITLOS rules in favor of the Philippines. This would be a blow not only to UNCLOS but to international dispute resolution system in general. If a major economic and regional power, and member of the UN Security Council, not only refused to participate in proceedings but also openly ignored the tribunal's decision, it would set a poor example for the international community and weaken the authority of international institutions in general.<sup>39</sup> Were China to do so, however, it would not be without liability. By choosing to flagrantly ignore the decision of an internationally constituted legal body, China would risk not only isolation in international society but also diminished standing.

## Policy implications

This section of the report presents several of the conclusions, recommendations, and policy implications that arose in the workshop discussion. The workshop demonstrated that both the United States and South Korea have broad interests in East Asian waters, though the U.S.-South Korea alliance and the threat of North Korean provocations in the maritime domain are foremost concerns in the relationship. South Korea closely follows the evolving U.S. role in the region—especially in light of the U.S. rebalance to Asia—to draw conclusions about its relationship with the United States. Furthermore, both South Korea and the United States support the concept of creating multilateral regional fora as well as using existing international legal mechanisms to enhance regional maritime security.

---

<sup>37</sup> Ibid., p. 21.

<sup>38</sup> UNCLOS does not have enforcement mechanisms, like, for example, the Dispute Settlement Understanding of the WTO.

<sup>39</sup> Lee, "Recent Judgments of ITLOS," p. 23.

Broadly speaking, the workshop underscored that the United States and South Korea share both interests and security concerns in East Asian waters.

## **Improve capabilities to deter and dissuade North Korea**

Given the mutual concern regarding North Korea in the maritime domain, one presenter noted that South Korea should act proactively to influence and lead North Korea rather than risk finding itself in the position of responding to North Korean provocations. Together, the United States and South Korea can improve the alliance's capabilities to dissuade North Korea from conducting provocations in the first place or, failing that, to respond to provocations once they occur. To this end, the United States and South Korea can make it clear that:

- They are united in their commitment to deterrence and will respond forcefully to any provocation.
- The alliance is able to respond in a proportional way to a range of North Korean provocations.<sup>40</sup>

With respect to North Korean provocations, the United States and South Korea should also:

- Ensure that intelligence on North Korean movements is current, and thoroughly analyze potential motivations.
- Respond to provocations in a timely and proportional manner.<sup>41</sup>

By improving their collective abilities to respond to North Korean provocations, the United States and South Korea could potentially impact North Korea's calculus for serious provocations in the future. If the United States and South Korea can convince North Korea that its maritime provocations do not achieve the desired ends, they would remove a significant source of tension in the maritime spaces surrounding the Korean Peninsula.

---

<sup>40</sup> Gause, "Dealing with North Korean Provocations," p. 5

<sup>41</sup> Ibid., p. 6.

## Develop regional mechanisms for multilateral resolution of maritime disputes

Addressing the larger issues of sovereignty in the East Asian maritime domain is far more complex, because it involves multiple countries that have national interests which are at odds with one another. Bilateral dispute resolution has clear limits; however, the prospects for multilateral resolution of maritime disputes are dim at best. Northeast Asian countries face significant barriers to establishing a regional architecture or mechanisms to resolve disputes of any type, and the countries in the region have repeatedly demurred when presented with the opportunity to use international legal mechanisms to resolve their maritime disputes.

Regardless of the barriers to both bilateral and multilateral dispute resolution in the maritime domain, one participant noted that leaders in the region should continue to discuss these options. Such a multilateral framework for resolving maritime disputes in East Asia could include:

- Using a sequential scheme for multilaterally delimiting the maritime boundaries
- Adopting a consensus-based code of conduct in East Asian waters
- Negotiating the principle of baselines and then setting up provisional lines and zones based on median lines
- Modifying the provisional lines and zones as required by special circumstances existing in history and in law
- Suspending without prejudice individual countries' claims in favor of joint development of maritime resources.<sup>42</sup>

The ensuing discussion underscored that these and other innovative ideas have the potential to advance the cause of peace and prosperity in East Asian waters.

---

<sup>42</sup> Koo, "A New Type Great Power Relationship."



DOP-2013-U-006034-Final



4825 Mark Center Drive, Alexandria, VA 22311-1850 703-824-2000 [www.cna.org](http://www.cna.org)