

## **Bill Hayton on the South China Sea in 2020**

*“There is nothing ‘historic’ about China’s ‘historic rights’ claim” in the South China Sea.*

By Ankit Panda

The South China Sea popped into mainstream news in July with the U.S. State Department announcing a “strengthening” of U.S. policy regarding China’s claims in the sea. But while the statement resurfaced the South China Sea conundrum for the West, analysts of the region have been watching all along – among them Bill Hayton, an associate fellow in the Asia-Pacific Programme at Chatham House. The Diplomat’s Ankit Panda spoke to Hayton recently about the goings on in the South China Sea, from the neverending discussions between ASEAN and China on a code of conduct to the ahistoric nature of China’s “historic” claims and future possibilities of even higher tensions in the region.

Hayton’s upcoming book “The Invention of China” will be published by Yale University Press in October.

### **Where does progress between ASEAN and China on a South China Sea code of conduct stand?**

The Code of Conduct is pretty much where it has been for the past 20 years: stuck between the different agendas of the ASEAN states and China. Put broadly, the ASEAN states want to constrain China’s behavior and China does not want its behavior constrained. ASEAN has little power to compel or induce China to agree to a meaningful Code of Conduct so the talks just go round and round. Technically speaking there is now a “Single Draft Negotiating Text” on the table, but the same old issues are preventing agreement. Will its geographical scope include the Paracel Islands (as Vietnam wants) and Scarborough Shoal (as the Philippines wants) or just the Spratly Islands (as China wants)? Will it be “legally binding” as several ASEAN states want? And what does “legally binding” actually mean? And then there are a list of other issues, some of which China threw into the mix just to delay things. For example, China wants any signatory to be able to veto naval exercises with any navy that is not a signatory (for example between Vietnam and Japan) and that is unacceptable to ASEAN states that rely on their relations with outside powers to try to balance against China. So I imagine there will be more talks, more pieces of paper, and more delay.

### **The U.S.-Philippines alliance has been rocky lately, although Manila did recently decide to suspend its plans to abrogate the Visiting Forces Agreement with Washington for another six months. Did the South China Sea factor into the Philippines’ decision?**

It seems that the suspension of the suspension has more to do with internal Philippines politics than with a reassessment of the agreement itself. It is clear that President Duterte has not changed his view of the United States. He and his coterie are still of the opinion that the U.S. has too much influence in the country and that the Philippines should stand separate from its former colonizer. However, there are plenty of senior figures in the Philippines’ military and diplomatic

communities who have a more realistic appreciation of the country's ability to stand up for itself while China remains in “steamroller” mode in the South China Sea.

The formal six month notice of the suspension of the Visiting Forces Agreement was declared on February 11 and the suspension of that suspension was announced just less than four months later. That was partly because the COVID-19 pandemic had prevented Philippine officials from focusing on the issue, partly because Philippine politicians had challenged the right of President Duterte to suspend the agreement without the formal approval of the Senate, and partly because travel restrictions had prevented meetings between representatives of the U.S. and the Philippines. The suspension-of-the-suspension lasts until December 1, 2020 (and the Philippine foreign minister said it could be extended) so there is plenty of time for the two sides to reach a new accommodation. In the meantime, the VFA remains in force.

**Another recent development that I'd welcome your thoughts on is regarding Spanish oil firm Repsol giving up on exploration in the South China Sea. Commercial interests are at play here, but so is risk. What does this tell us about the effectiveness of Chinese coercive activities in Vietnam's exclusive economic zone?**

Repsol's decision to abandon what appeared to be a very promising gasfield off southeastern Vietnam is a blow for Vietnam and for those who believe that the United Nations Convention on the Law of the Sea (UNCLOS) is the best way to adjudicate between rival claims to the sea's resources. By any reasonable interpretation of UNCLOS, Vietnam has the rights to the resources in those areas: They lie within 200 nautical miles of its coast and much farther than that from China's. An International Arbitral Tribunal ruled in 2016 that none of the rocks and reefs in the Spratlys could generate a claim to those particular oil blocks. However, that ruling only applied to China and the Philippines. If Vietnam wants a similar judgment it will have to bring its own case and Vietnam is very unwilling to upset China by doing so. It keeps dropping hints that it is on the verge of taking that decision – I have been told that all the legal work has been done – but the leadership of the Communist Party of Vietnam has to consider the impact of such a move on the overall China-Vietnam relationship.

When Repsol stopped drilling in 2018, I was told by an oil industry source that the Vietnamese government had asked them to declare that there were “geological problems” which caused them to cease work. However, if that had been the case then Repsol would have been liable for the costs of exploration. Instead, the company demanded a political instruction to stop, which they received and which made the Vietnamese government liable for the costs. In June, Repsol stated that the cancelling of Vietnam's operations would have no impact on the company's financial performance. This suggests that they were indeed compensated by Vietnam.

Overall, the message from this episode is that unless Vietnam is willing to organize the physical defense of oil and gas exploration activities in areas that China disputes, few international corporations will be willing to take the risk. There are ongoing projects operated (for the time being at least) by Exxon of the U.S. and ENI of Italy but they are in less controversial areas – closer to the Vietnamese coast and outside China's vague “U-shaped line” claim area.

**The U.S., in early June, issued a note verbale at the United Nations expressing its disapproval toward China's “historic rights” based claims in the South China Sea. How do you rate the significance of this?**

I see this as a welcome push-back against a Chinese tactic that can be best described as “revanchism.” China is trying to claim that its fishermen (and oil explorers) have rights that go beyond UNCLOS based upon a particularly nationalistic and evidence-free reading of history. If this is allowed to prevail, it would allow China (and perhaps other countries based upon China’s precedent) to exploit resources well outside its legitimate Exclusive Economic Zone. This would be like putting a bomb under UNCLOS, blowing up a key part of the international maritime order. Put simply, under a “historic rights” claim, Beijing would be demanding a share of the marine resources that UNCLOS allocates exclusively to the Philippines, Malaysia, Brunei, Indonesia, and Vietnam.

I have looked into the emergence of China’s “historic rights” claim and discovered that it emerged from the poorly-researched ideas of a few nationalistic Taiwan-based academics-turned-politicians in the late 1980s and early 1990s. There is nothing “historic” about China’s “historic rights” claim. It deserves to be laughed out of court. Unfortunately, this laughable idea does seem to be a key motivator of China’s behavior in the South China Sea at the moment. It would be a tragedy if this joke of an idea caused a conflict.

**Looking ahead to the second half of this year, what are the main issues and areas you’re watching closely in these waters?**

An oil industry source I spoke to recently said they’ve never seen so much geopolitical interference with oil and gas exploration in the South China Sea. They were referring to all sides in the disputes. I also think we’re going to see more confrontations between the U.S. and Chinese navies over the question of freedom of navigation. China seems to have decided that this is the moment to try and establish effective domination of the area inside its U-shaped line and it’s clear from recent deployments – such as the double aircraft carrier exercises in July – that the U.S. has decided to push back. One thing I don’t expect is progress on the Code of Conduct!

*This interview has been edited.*