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Issue Brief

China's Creeping Maritime Assertiveness

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S*ummary*

The December 15, 2016 incident involving the seizure of an American underwater vehicle (UV) by a PLA Navy vessel has prompted broad speculation about Chinese intent, including whether China was signalling even more expansive claims over the SCS, since the area of incident was beyond the controversial nine-dash line. The incident has also revived questions about Chinese strategic ambiguity regarding the nature of jurisdiction over waters enclosed within the nine-dash line which has since been nullified by The Hague Arbitration Tribunal judgement.

China's maritime assertiveness in the South China Sea (SCS) was on display on December 15, 2016 when a PLA Navy (PLAN) vessel retrieved an unmanned underwater vehicle (UUV) of the US Navy (USN) in international waters about 50 nautical miles (NM) northwest of Subic Bay in the Philippines. The UUV was being operated by USN Ship (USNS) Bowditch which was in the process of recovering the UUV. At the time of the incident, both the ships were within 500 yards distance of each other. Despite radio communication from the USNS Bowditch, the Chinese warship reportedly did not return the UUV and proceeded away with the UUV.¹ The incident created furore in the US with commentators terming the Chinese act as 'theft'.² The US registered its diplomatic protest and demanded that the UUV be returned immediately. The Chinese media termed US surveillance as continued provocation.

The Chinese Ministry of National Defence (MND) in a statement gave the following explanation:

'A Chinese naval lifeboat located an unidentified device in the waters of the South China Sea. In order to prevent the device from causing harm to the safety of navigation and personnel of passing vessels, the Chinese naval lifeboat verified and examined the device in a professional and responsible manner. Upon examination, the device was identified as an underwater drone of the United States. The Chinese side had decided to hand over it to the US in an appropriate manner'.³

The UUV was returned to the USN destroyer USS Mustin by China on December 20, 2016. The MND on December 21, 2016 stated that 'China has handed over the US underwater drone it captured *'in its waters'* to the United States [Emphasis added]'.⁴ The map of the area published by *The Washington Post* shows the area of incident outside China's proclaimed nine-dash line.⁵ No geographical details of the area of the incident were provided by the Chinese authorities. Based on information available in the public domain, the location of the incident seems to be within Philippines' Exclusive Economic Zone (EEZ). In essence, China has no valid

¹ Helene Cooper, 'US Demands Return of Drone Seized by Chinese Warship', *The New York Times*, December 16, 2016, at <http://www.nytimes.com/2016/12/16/us/politics/us-underwater-drone-china.html> (accessed December 20, 2016).

² Editorial, 'China Tests US Resolve', *Wall Street Journal*, December 18, 2016, at <http://www.wsj.com/articles/china-tests-u-s-resolve-1482086206> (accessed December 21, 2016).

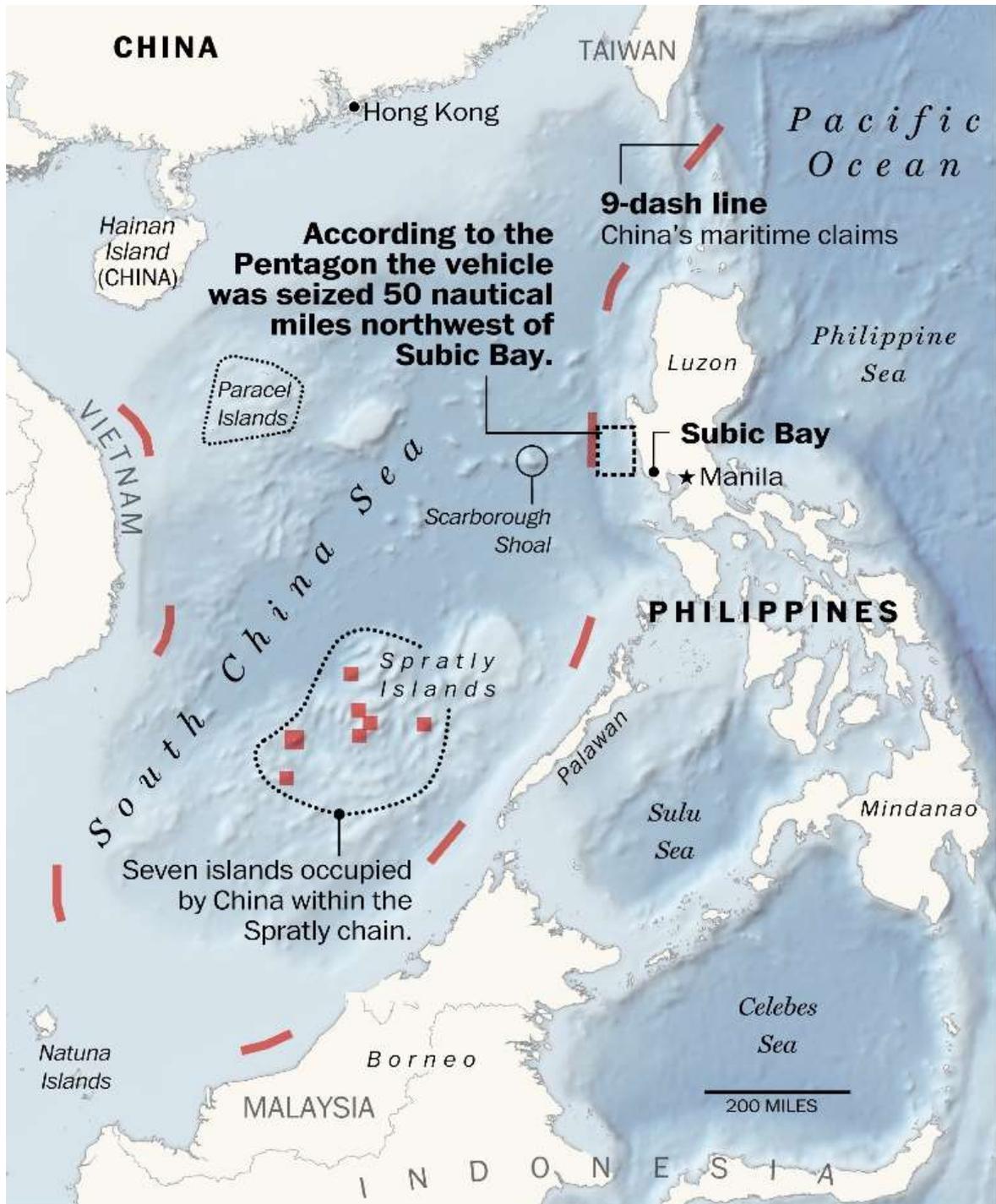
³ People's Republic of China, Ministry of Defence Press Statement, 'China to Hand over Underwater Drone to US in Appropriate Manner', December 18, 2016, at http://eng.mod.gov.cn/DefenseNews/2016-12/18/content_4767100.htm (accessed December 21, 2016).

⁴ People's Republic of China, Ministry of Defence Press Statement, 'China Hands over Underwater Drone to US', December 21, 2016, at http://eng.mod.gov.cn/DefenseNews/2016-12/20/content_4767308.htm (accessed December 28, 2016).

⁵ Missy Rayan and Dan Lamothe, 'Pentagon: Chinese Naval Ship Seized an Unmanned US Underwater Vehicle in South China Sea', *The Washington Post*, December 16, 2016, at <https://www.washingtonpost.com/news/checkpoint/wp/2016/12/16/defense-official-chinese-naval-ship-seized-an-unmanned-u-s-ocean-glider/> (accessed December 21, 2016).

jurisdiction to interfere with the oceanographic survey being conducted by the USN ship in the international waters or within EEZ of another country.

Figure- Location of UUV Seizure⁶



Sources: U.S. Navy and Pentagon

THE WASHINGTON POST

⁶ Ibid.

The incident has prompted broad speculation about Chinese intent, including whether China was signalling even more expansive claims over the SCS, since the area of incident was even beyond the controversial nine-dash line. The incident has also revived questions about Chinese strategic ambiguity regarding the nature of its jurisdiction over waters enclosed within the nine-dash line, which has since been nullified by The Hague Arbitration Tribunal judgement.⁷

Nine Dash Line: China's Strategic Ambiguity

The Chinese government, through two *note verbale* submitted in the UN in May 2009, asserted its 'indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof'.⁸ Nine line segments (dashes) — encircling waters, islands, and other features of the SCS — were displayed on the map submitted along with the *note verbale*. As a reiteration of its jurisdictional claim, China submitted another *note verbale* in 2011 which asserted that 'China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence'.⁹

As per the UN Commission on the Law of the Sea (UNCLOS), coastal states enjoy varying degree of jurisdictional rights and privileges in different waters, viz, territorial sea, contiguous zone, internal waters, archipelagic waters, international straits, historical waters. China has not clarified about the legal basis or nature of its jurisdiction within nine dash lines through any legislation, proclamation or any other official statement. China has also not published geographic coordinates specifying the location of the dashes.

The above claims of jurisdictional control through the nine-dash line does not form part of China's submissions of records as per UNCLOS. The claim, about its sovereign jurisdiction through historical rights, was submitted as an objection to the continental shelf claims of Vietnam. China had submitted baseline coordinates in compliance with UNCLOS Article 16(2) with respect to mainland and Xisha (Paracel) Islands in SCS with claims of UNCLOS zones viz territorial waters and EEZ in July 1996 and September 2004 respectively which has no reference to nine-

⁷ Jeff M. Smith, 'China's Drone Grab and the Dangers of "Strategic Ambiguity"', *The Diplomat*, at <http://thediplomat.com/2016/12/chinas-drone-grab-and-the-dangers-of-strategic-ambiguity/> (accessed December 28, 2016).

⁸ Permanent Mission of the People's Republic of China, Notes Verbales CML/17/2009 and CML/18/2009, May 7, 2009, at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vn_m_e.pdf and http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf (accessed December 21, 2016).

⁹ Permanent Mission of the People's Republic of China, Note Verbale CML/8/2011, April 14, 2011, a http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf (accessed December 21, 2016). This Note did not contain a dashed-line map.

dash line.¹⁰ However, its legislative declaration about Maritime Zones has provided a caveat that this legislation does not prejudice its historical rights with no explanation about nature or geography of said historical rights.¹¹

At the core of Chinese claims in SCS is a Chinese government map circulated in 1947 drawing an eleven-dash line to indicate the geographical scope of its authority over the SCS. In 1953, two dashes were removed from the eleven-dash line, leaving nine segments that was published as a new map which is cited as Chinese jurisdictional claims.¹² While asserting its indisputable sovereignty over the Islands and the adjacent water enclosed therein, China has maintained strategic ambiguity over geographical limits and scope of sovereign jurisdiction over areas enclosed within the nine-dash lines. China's policy of strategic ambiguity, as it has been euphemistically called, serves its purposes well.¹³

Chinese scholars have defined the nine-dash line as a line to preserve both its title to territory and its historic rights. Analysts note that China seems to have three purported reasons for its nine-dash claims. 'First, it represents China's title rights over island groups that it encloses and signifies sovereignty, sovereign rights, and jurisdiction — in accordance with UNCLOS — over the waters and seabed and subsoil adjacent to those islands and insular features. Second, it preserves Chinese historic rights over the oceanic resources in the waters and on the continental shelf surrounded by the line. Third, it is likely to allow for such residual functionality as to serve as potential maritime delimitation lines'.¹⁴

The view about the possible rationale of the nine-dash line as a potential negotiation reference was also expressed by the spokesperson of the Ministry of Foreign Affairs in February 2012, when it was stated that no single nation claims sovereignty over the entire SCS and that the dispute was only about the 'islands and adjacent waters'.¹⁵ This had raised hopes in the region that China may

¹⁰ 'China submission in compliance with the deposit obligations pursuant to the United Nations Convention on the Law of the Sea (UNCLOS)', at <http://www.un.org/depts/los/legislationandtreaties/statefiles/chn.htm> (accessed December 26, 2016).

¹¹ 'Article 16: The provisions of this Act shall not affect the historical rights of the People's Republic of China', China Exclusive Economic Zone and Continental Shelf Act, at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf (accessed December 28, 2016).

¹² United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 'China: Maritime Claims in the South China Sea, Limits in the Seas, No. 143', December 5, 2014, at <https://www.state.gov/documents/organization/234936.pdf> (accessed December 28, 2016).

¹³ Gregory B. Poling, 'Time to End Strategic Ambiguity in the South China Sea', Center for Strategic and International Studies, at <https://www.csis.org/analysis/time-end-strategic-ambiguity-south-china-sea> (accessed December 23, 2016).

¹⁴ Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications', *The American Journal of International Law* 107 (1), 2013, pp. 98-124, doi:10.5305/amerjintelaw.107.1.0098 (accessed December 28, 2016).

¹⁵ People Republic of China, Ministry of Foreign Affairs, 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference', February 29, 2012, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t910855.shtml (accessed December 23, 2016).

moderate its jurisdictional claim to align with legal provisions as per UNCLOS. However, on the contrary, the SCS has seen progressive Chinese assertiveness regarding its jurisdictional claims with reclamation of land, construction of military facilities and enforcement of its rights through use of maritime militia.

Just prior to the decision of UNCLOS arbitration proceedings initiated by the Philippines, the Chinese interlocutor at the Shangri-La Dialogue 2016 had argued that China's ambiguity over nine-dash line was a good thing for all the parties involved.¹⁶ The decision of The Hague Arbitration Tribunal in July 2016 has disallowed Chinese historic claims.¹⁷ The arbitration proceedings were boycotted by China and the decision has not been accepted by it. China, in addition, has also persuaded the Philippines to set aside the arbitration award.¹⁸

Previous Incidents with USN over Surveillance in EEZ

USN ships have been regularly conducting Freedom of Navigation Patrols (FONOPS) in order to exercise their rights of freedom of navigation. China has always protested these surveillance sorties in accordance with their proclaimed interpretation of jurisdictional rights and coastal state rights over military surveillance within EEZ. Prior to this incident, there have been at least six incidents of interaction between Chinese and American vessels in the international waters of the SCS.¹⁹ In March 2009, USN ships *Impeccable* and *Victorious* were harassed by Chinese oceanographic vessels in international waters off Hainan Island. In June 2009, a Chinese submarine fouled the towed array sonar of US warship *John McCain*. US warship *Cowpens* nearly collided with one of the escorts of the Chinese aircraft carrier *Liaoning* in December 2013.

However, all these incidents happened within the EEZ claimed by China.²⁰ There exists differing interpretation about jurisdictional rights of coastal state within EEZ. Some countries including the US consider the EEZ like the high seas when it comes to foreign militaries conducting surveillance and do not consider

¹⁶ Chun Han Wong, 'Nine-Dash Line's Ambiguity a Good Thing, Argues Chinese Military Academic', *WSJ*, June 5, 2016, at <http://blogs.wsj.com/chinarealtime/2016/06/05/nine-dash-lines-ambiguity-a-good-thing-argues-chinese-military-academic/> (accessed December 28, 2016).

¹⁷ 'PCA Press Release: The South China Sea Arbitration (The Republic of the Philippines vs. The People's Republic of China) PCA-CPA', at <https://pca-cpa.org/en/news/pca-press-release-the-south-china-sea-arbitration-the-republic-of-the-philippines-v-the-peoples-republic-of-china/> (accessed December 28, 2016).

¹⁸ Alexis Romero and Edith Regalado, 'Rody Ready to Set aside Ruling on Sea Dispute', *Philstar.com*, December 18, 2016, at <http://www.philstar.com/headlines/2016/12/18/1654564/rody-ready-set-aside-ruling-sea-dispute> (accessed December 28, 2016).

¹⁹ 'Shifting Waters: China's New Passive Assertiveness in Asian Maritime Security', Lowy Institute, at https://www.lowyinstitute.org/publications/shifting-waters-china%E2%80%99s-new-passive-assertiveness-asian-maritime-security#_ednref44 (accessed December 28, 2016).

²⁰ Ronald O'Rourke, 'Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress', (DTIC Document, 2015), at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA624220> (accessed December 27, 2016).

requirement of specific permission from the coastal state. China has long taken the position that it has the right to restrict foreign military activities and surveillance within its EEZ. China argues that the coastal state permission must be obtained for a foreign military to conduct surveillance activities within the EEZ. China had justified its action against USN assets in accordance with its restrictive interpretation of UNCLOS provisions.²¹

Creeping Jurisdictional Assertions through Ambiguity

The Chinese official stance towards the extant incident of seizure of USN UUV has been extraordinarily ambiguous. As pointed out earlier, the MND statement of December 18 expressed routine dismay at continued military surveillance by the US with the retrieval being explained as removal of navigational hazards along with the casual assertion about the incident occurring in the Chinese waters with no further details or possessive implications.²² The Chinese Foreign Ministry also used generic remarks over continued US military surveillance and maintained the safety-of-navigation explanation. The Foreign Ministry spokesperson told reporters that 'the Chinese side is firmly opposed to the frequent appearance of US military aircraft and vessels *in waters facing China* for close-in reconnaissance and military surveys. We require the US side to stop such activities [emphasis added]'.²³ Some commentators asserted Chinese maritime rights or claims over the area in which the UUV was seized.²⁴ This assertion was confirmed by the Chinese MND in its statement on December 20, 2016 which noted that the UUV was captured in its waters.²⁵

As the USN UUV was seized 50 NM northwest of Subic Bay, the USN vessel was outside THE Philippines territorial water but within its EEZ. The area is also clearly outside the Chinese claim of nine dash-line. The core question then is on what basis China is claiming that the UUV was captured in Chinese waters? It could only be possible if China considers that the disputed Scarborough Shoal has EEZ of 200 NM which will place Chinese EEZ within 50 nautical miles from the coast of Philippines. The UNCLOS Arbitral Tribunal has ruled that the Scarborough Shoal is a rock that entitles its sovereign jurisdiction to only a 12 NM territorial sea and is not entitled for 200 NM EEZ.

²¹ Peter Dutton, *Military Activities in the EEZ: A US-China Dialogue on Security and International Law in the Maritime Commons* (Newport, R.I.: China Maritime Studies Institute, US Naval War College, 2010), pp. 20-21.

²² 'China to Hand over Underwater Drone to US in Appropriate Manner', n. 3.

²³ People Republic of China, Ministry of Foreign Affairs, 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference', December 19, 2016, at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1425479.shtml (accessed December 28, 2016).

²⁴ Hua Yiwen, 'Underwater Drone Just a Sample of US Military Action against China', *People's Daily Online*, December 19, 2016, at <http://en.people.cn/n3/2016/1219/c98649-9156644.html> (accessed December 21, 2016).

²⁵ 'China Hands over Underwater Drone to US', n. 4.

The extant assertion of Chinese MND that the UUV capture happened in Chinese waters brings the focus back on strategic ambiguity of China about its maritime claims. Rather than using ambiguity for accommodation or negotiation, China has been strengthening its jurisdictional claims which can be seen through its reclamation efforts to convert erstwhile low tide elevations — viz, Mischief reef, SubiReef and Ferry Cross Reef, into man-made habitable islands. These reclamation efforts in addition to bolstering its military capability in the SCS also strengthen its case for claiming UNCLOS entitled EEZ up to 200 NM since the reclaimed features could be shown as capable of sustaining human habitation. It is pertinent to mention that all other previous incidents/dispute over fishing rights, resources, reclamation of reefs and rocks, and incidents against surveillance had remained within the ambiguous nine-dash line.²⁶ The phrase ‘waters facing China’ and the assertion of jurisdictional claim over waters beyond the nine-dash line has been used by the Chinese officials for the first time.

Some commentators have argued that since the capture of the UUV had no legal basis, it could be an act of political signalling.²⁷ In addition, since the UUV was returned without much delay, the act of seizure may have lacked institutional approval at the highest level.²⁸ However, these explanations fail to take into account latent assertion of jurisdictional claim in the official statements post incident.

The Chinese approach, so far, clearly indicates its intent of progressive attempt to strengthen its ‘creeping’ jurisdiction which has been termed by some observers as ‘salami slicing strategy’²⁹ or ‘cabbage strategy’³⁰. The strategy is being pursued through small but persistent enhancement of territorial jurisdiction claims along with creation of new facts on ground. The incident of UUV capture and related claims about the incident’s occurrence in Chinese waters fits in to the established pattern of incremental actions of creeping jurisdiction to change the status quo in its favour through *fait accompli*.

²⁶ All incidents in the South China Sea have been charted in an excellent interactive map created by Maritime Awareness Project. ‘Interactive Map: Maritime Awareness Project’, at <http://maritimeawarenessproject.org/interactive-map/> (accessed December 28, 2016).

²⁷ Martin Pengelly, ‘Donald Trump Accuses China of “Unpresidential” Act over US Navy Drone’, *The Guardian*, December 18, 2016, at <https://www.theguardian.com/us-news/2016/dec/17/donald-trump-china-unpresidential-act-us-navy-drone> (accessed December 28, 2016).

²⁸ ‘The Implications of China’s Seizure of a US Navy Drone: Maritime Awareness Project’, December 21, 2016, at <http://maritimeawarenessproject.org/2016/12/21/the-implications-of-chinas-seizure-of-a-u-s-navy-drone/> (accessed December 28, 2016).

²⁹ ‘Salami Slicing in the South China Sea’, *Foreign Policy*, August 3, 2012, at <https://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/> (accessed December 28, 2016).

³⁰ Brahma Chellaney, ‘Creeping China’, *Project Syndicate*, November 28, 2013, at <https://www.project-syndicate.org/commentary/brama-chellaney-picks-apart-china-s-cabbage-strategy-for-securing-hegemony-in-east-asia> (accessed December 28, 2016).

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