

DIPLOMATIC ACADEMY OF VIETNAM



THE SOUTH CHINA SEA: COOPERATION FOR REGIONAL SECURITY AND DEVELOPMENT

Proceedings of the International Workshop,
co-organized by the Diplomatic Academy of Vietnam
and the Vietnam Lawyers Association,
26 - 27 November 2009, Hanoi, Vietnam

Edited by TRAN TRUONG THUY

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Editorial Assistants: **Nguyen Thuy Minh** and **Le Thuy Trang**

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OPENING SPEECH¹

Amb.Prof. Duong Van Quang

President of the Diplomatic Academy of Vietnam

Distinguished Guests,
Ladies and Gentlemen,

On behalf of the Diplomatic Academy of Vietnam and the Vietnamese Lawyers' Association, co - organizers of this workshop, I would like to express our welcome and sincere thank to all of you who are here for the international workshop on "The South China Sea: Cooperation for Regional Security and Development", the first of its kind, held in Ha Noi, Vietnam.

Distinguished Guests,

From time immemorial, the South China Sea has taken on special economic and strategic importance as the area is the site of many very important sea lanes and endowed with diversified and rich maritime resources. Nowadays with integration and globalization, its importance has gone beyond the region and has drawn the attention of many nations amidst the tendency toward peace, cooperation and development existing as the mainstream of international relations. Realizing the tendency and being aware of the complexity of the situation in the South China Sea, the parties concerned have, in the main, striven for peace, stability and cooperation in the region. As a result, the last decade and more witnessed certain progress in their cooperative efforts to reduce tension and look for a peaceful solution to the disputes in the South China Sea. In this connection, mention can be made of the 1992 ASEAN Declaration on the South China Sea, the 2002 ASEAN-China Declaration of Conduct of Parties in the South China Sea, the first step toward a code of conduct in the South China Sea, and the 2005 Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea between China, Vietnam and the Philippines.

It is noteworthy, however, that sovereignty and territorial disputes in the South China Sea have not been reduced. Quite the contrary, recent developments, especially assertion of sovereignty together with unilateral actions to gain effective control and disputes over energy and other natural resources have further complicated the situation.

Against such a background, the parties concerned should act together and find

¹Translated version

effective measures to mitigate adverse impacts of the situation in order to maintain a stable and peaceful environment, ensure the freedom of navigation, protect the environment and natural resources as well as to organize search and rescue for fishermen in the South China Sea. In other words, it has become more imperative than ever before to strengthen cooperation, to look for ways to resolve the disputes and deal with challenges in order to maintain peace and stability in the South China Sea.

Distinguished Guests,

Greater cooperation for security, stability and development in the South China Sea needs the devotion, intellectualism and responsibility of scholars inside and outside the region. The presence at this workshop of many leading researchers on the South China Sea, and many well-known and objective scholars has testified to our concern over the future of the South China Sea. I believe that at this workshop we are all ready to share information about our in-depth studies on the South China Sea, contributing not only to improving understanding of the problem among scholars but also to raising the awareness of policymakers and the public about problems in the area, hence intensifying efforts by regional countries for peace and stability in the South China Sea in the interests of the parties concerned and those of peace, security and development in the whole region.

With those in mind, the Diplomatic Academy of Vietnam in cooperation with the Vietnamese Lawyers' Association has organized this first-ever workshop under the theme "The South China Sea: Cooperation for Regional Security and Development". This is a purely scientific forum with the following set objectives

To develop a network of researchers on the South China Sea to share views, approaches, results of their studies from different perspectives of legal and political sciences and international relations etc;

To share our assessments and analysis of the implications of recent developments in the South China Sea on regional peace and security,

At a higher level, to make recommendations and put forward proposals for cooperation mechanism in functional areas and possible solution to the disputes,

Distinguished Guests,

The situation in the South China Sea will unfold with complexity and looms large as a threat to peace and stability in the area. Furthermore, we all accept the fact that final solution to the regional disputes cannot be worked out overnight. Therefore, all initiatives or actions for peace and stability in the South China Sea deserve our welcome and respect. I believe that policy makers and public opinion are looking forward, with great anticipation, to scientific, objective and realistic ideas put forth at this workshop. I also hope that these ideas will provide food for thought to governments of countries

concerned in the search for possible solution to existing problems.

The workshop will center around three main areas:

- The importance of the South China Sea to regional peace and security, the South China Sea in the strategies of countries concerned;
- The origin and developments of the ongoing disputes from the perspectives of law, politics and international relations; implications of recent developments in the South China Sea on regional peace and security;
- The efficiency of existing regional mechanism to reduce tension and promote cooperation, the sharing of information on effective cooperation mechanism and practical measures to build confidence and mechanism to settle disputes among parties concerned.

The discussion should be straightforward, objective, constructive and forward-looking.

On that note, I wish to declare open the workshop “The South China Sea: Cooperation for Regional Security and Development”.

I would like to wish you the best of health and may our workshop produce the results desired.

Thank you for your attention.



PART I:

**GLOBAL SIGNIFICANCE OF
THE SOUTH CHINA SEA IN THE CONTEXT OF
THE CHANGING INTERNATIONAL ENVIRONMENT**



Dr. Mark J. Valencia, Maritime Policy Analyst, Kaneohe, Hawaii, USA:
WHITHER THE SOUTH CHINA SEA DISPUTES?

INTERNATIONAL WORKSHOP ON “SOUTH CHINA SEA: COOPERATION FOR SECURITY DEVELOPMENT”

Maj. Gen (rtd) Vinod Saighal

“ Quand la Chine s’éveillera, le monde tremblera ”

The famous saying in French, attributed to Napoleon reads: “Quand la Chine s’éveillera, le monde tremblera”: when China will wake up, the world will tremble. In the decade plus since the models for China’s growth, reproduced below, were first unveiled the giant strides that China has made has evoked not only the admiration of the world, it has caused considerable anxiety as well in China’s immediate neighbourhood.

Introductory Remarks

Toward the end of the last century, around the turn of the millennium, this writer had delivered two talks, which were futuristic in nature. One of them was the ‘*Resurgence of Russia in the 21st Century*’. It was a time when Russia was nearly on its knees after the Yeltsin years. The national debt of Russia was \$175 billion. The scientists were leaving the country in droves; many of them were grabbed by China. There was talk of default in the payments due. The military was demoralized and Chechnya was in flames. Mr. Putin had just taken over. Oil was at 13 dollars a barrel. So when the talk on the ‘*Resurgence of Russia*’ was delivered, it evoked a lot of interest about the extent of the resurgence that could take place. The talk was repeated in a university in the United States.

The second talk was on ‘*Dealing with China in the 21st Century*’. At the start of

Major General Vinod Saighal retired from the Indian Army in 1995 from the post of Director General Military Training. Before that he had several active command assignments, including the command of an independent armoured formation and mountain and desert divisions. An officer from the cavalry he has held assignments with UN peacekeeping forces as well as tenures in the Middle East. He has served as the country’s Military Attache in France and BENELUX. He has a wide range of interests and speaks several languages including French and Persian. Currently he is the Executive Director of Eco Monitors Society (EMS), a non-governmental organization concerned with demography and ecology. After retirement, he founded the Movement for Restoration of Good Government (MRGG). He has published articles on a vast range of subjects in some of the leading national dailies and periodicals. He has lectured extensively in India and abroad on several burning issues of the day. Vinod Saighal was invited to join the ‘Institutional Advisory Board’ of USFSS (US Federation of Scientists and Scholars) in 2000. He is the author of the internationally acclaimed book ‘*Third Millennium Equipoise*’. Additionally, he has authored *Restructuring South Asian Security, Restructuring Pakistan and Dealing with Global Terrorism: The Way Forward*. His latest book is *Global Security Paradoxes – 2000-2020*.

the talk three terms were borrowed from astronomy and astrophysics to define the three models for the growth of China in the 21st century. The first model was the ‘steady state expansion model’. The second was the ‘dynamic expansion or the explosive expansion model’. The third was the ‘implosion model’. The prognosis relating to India was slightly off the mark when comparing the two countries to the extent that the economic condition of India is now much better than what had been projected at that time.

Being the first presentation in the first session of the conclave it becomes a conscious decision to concentrate on China; as the country being the most significant regional power, its policy towards its neighbours in the resolution of the South China Sea Dispute would set the tone for future developments in the South China Sea as well as for peace and prosperity in the region for the coming decades.

Models of China’s Pursuit for Power

(Excerpted from the chapter on China from the book “Restructuring South Asian Security”, published in New Delhi in 2000. The talk had been delivered several years earlier. Hence many of the formulations have been overtaken by events not anticipated when the talk was delivered).

For the purposes of this discussion three models have been taken to examine China’s probable development in the new century: to wit, Steady State Expansion Model; Explosive Expansion Model; and Implosion Model. Diagrammatically these are represented in the following manner:



Fig-1

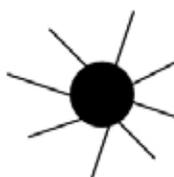


Fig-2

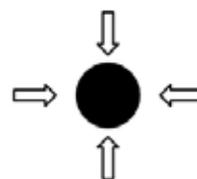


Fig-3

An explanation for each of the models is given below.

Figure – 1: Steady State Expansion Model

According to this model - denoted by concentric circles - China expands its influence in the next century in ever expanding circles. Going outwards from the core,

the first circle denotes the spread of Chinese *influence* to regions contiguous to China i.e. the Asia-Pacific region, North and South Korea, Taiwan, Japan, the Islands under dispute (notably Spratley Islands), Mongolia, Russia, South East Asia, South Asia and West Asia. The second circle denotes the spread of China's geo-political power to the whole of Asia and Australia. The outer and last circle represents the spread of Chinese geo-political *influence* to include the whole world minus North and South America.

The words 'influence' and 'power' have been put in parenthesis. The difference between the two needs to be understood in the context in which they are used here. Influence means that China's sensibilities would weigh heavily in any major foreign policy decision taken by its neighbours in Asia; whereas power implies that China would have developed the military capability to project that power in the region regardless of any intimidation on that score by USA. Russia would, in all probability, remain outside the ambit of such projections because of its retaliatory nuclear might.

India may not be able to challenge China, even in South Asia, if India's military disparity with its bigger neighbour in the conventional as well as the nuclear field remains vastly inferior, as at present. The tragic part, however, is that the military disparity, if not checked, will continue to grow to a level where India becomes marginalised in its own region as well. In the years ahead China's military might would be in a position to challenge that of the USA, while Indian defence planners will continue to defend their inadequacy by maintaining - as they have been doing religiously since the 1970s - that China remains ten years away from becoming a real military threat to this country.

Figure-2: Dynamic Expansion (Explosion) Model

This model depicts uncontrolled or runaway growth as distinct from the steady state expansion depicted in the previous model. It could in some ways be compared to what happened in Indonesia. The point at which the country explodes, in the Indonesian fashion, would be difficult to determine. It could happen in twenty years or after fifty years. There are several factors, which could propel the country in the direction indicated in the model. Some of the factors are tabulated below:

- The extent of consolidation of power by Jiang Zemin; and his longevity.

- Flowing from the first point the smoothness, or otherwise, of the succession to President Jiang Zemin when he leaves the world stage. It would be worth recalling here that had Deng Xiaoping not succeeded the great leader Mao and the so-called Gang of Four gained ascendancy in the post-Mao struggle the history of China, and just possibly the world, would have been different. It would also not be out of place to recall here the manner of fall of Mikhail Gorbachev and the break up of USSR.

- American attempts to force the pace of change of modernization and

democratization in China; a pace that prevents the Chinese leaders from being able to control the fallout from such rapid change. It would arguably be the quest of American geo-political strategy to engineer the breakup of China (and India as well) so that no credible challenge would remain to American dominance of the globe in the 21st Century, and beyond. And should America succeed in its endeavour then the turn of the European Union would assuredly come thereafter.

- The great economic disparity that already exists between China's provinces on the South Western coast (and now Hong Kong) and remainder China, notably the interior regions.

- Incomes disparities and growing unemployment due to the rapid changes in economic policy.

- The emergence of 'sleaze' as an increasingly effective weapon of war - both internally and externally. (Grand reversal of economic warfare patterns by China. China now uses this weapon subtly, and not so subtly, to influence economic policies towards China in the West, especially USA.

Figure – 3: Implosion Model

The Implosion Model differs from the earlier model in Fig.2 in that under this model China collapses under the weight of its own size. Such a collapse, in the case of China, would be built up from growing internal unrest as well as pressure from outside tending to compress the nation from all directions. At this juncture, it is difficult to visualize such compression - the other term for it being containment - taking place with the collapse of the old USSR and the relative military insignificance of India. Additionally, China has reached a stage of military and economic growth that allows it to be capable of resisting American pressure. (Ambivalent attitude of Hong Kong's population should be kept in mind. Only surface integration of distinctly pro-Chinese elements has taken place. It is not inconceivable that in the run up to the handing back of the Crown Colony the British would have created a strong anti-Chinese bureaucracy that would resist change after the departure of the colonial power i.e. the pattern perfected on the subcontinent).

China as the Region's Colossus

The Nature of Colossi. After slumber and subjugation of several centuries China is again becoming the great country that it was throughout most of its history. It already looms large on the horizon of its Asian neighbours. In the coming decades it will assume the shape of a colossus, especially if it pursues the Dynamic Expansion Model as it seems to be doing by present indications. When that happens it will begin to exhibit the 'nature' of a colossus. What exactly is the nature of a colossus? The nature of a colossus

is that it begins to develop an appetite for aggrandizement. By making this statement it is not the intention here to attribute any malign intent to China's leadership. The discussion is on historical phenomenon. They closely resemble natural phenomenon. Throughout history its colossi have, almost without exception, manifested this urge. Kingdoms that became large grew into empires. Empires, after consolidation, started becoming larger and larger through a process of conquest till they assumed gigantic proportions i.e. they had become fit enough to burst. The nineteenth and twentieth centuries were no exception. The British Empire grew so large that ultimately it had to give way. The Soviet Empire is a more recent case from our century. The lone superpower is already showing strains; the bursting point may not be that far off unless the USA takes stock of where it is headed and follows up with urgent – and drastic - remedial measures. This time around, the difference would be that when the explosion occurs it could possibly destroy much of the world as well. It is the reality of nuclear weapons and weapons of mass destruction.

China no doubt is a permanent member of the UN Security Council with veto rights. In the second half of the 20th Century when the country was in the process of growing to its natural size it needed the veto right to protect its vital interests against the two superpowers of that time as it could have been thwarted by either of them in its quest for occupying its rightful place in the world. This is no longer the case. One of the erstwhile superpowers is now itself in a vulnerable state. The remaining superpower is no longer in a position to dictate terms to China. China has come a long way, a very long way indeed. It is an unquestioned global power at the close of the opening decade of the new century.

After this brief recapitulation of facts that would generally be well known, a simple question is addressed: “As a world power is China going to play a benign role or will it flex its muscles as it goes along”? It could take the latter course going by its past history. Why should that be the case?

Several millennia ago Chanakya in his Arthashastra had written: “It is the nature of power to assert itself”. The United States of America has been the world power for less than half a century; the degree of assertion that it is exercising on the globe is self-evident. China has been a great power for thousands of years. There is hardly any parallel to it in the entire world. The assertion of power comes to it naturally. It is almost programmed into its psyche.

Military Asymmetry

China's expanding military capabilities would automatically be a matter of growing concern to its neighbours in Asia, if not the world in general. A few unmistakable indicators are tabulated below:

- China's military expenditure is growing at over ten percent per year as per some

Western estimates.

- China's official defence budget excludes nuclear weapons development, R&D and soldiers pensions. Nor does it include sale proceeds from armaments. These other expenditures were estimated at five billion dollars between 1991 and 1995. They would have increased substantially since then.

- China's rapid reaction force which stood at fifteen thousand in 1988 has since expanded to more than two hundred thousand.

- The naval expansion under way is fairly awesome from a regional and Asian standpoint.

- The acquisition of SU-27s and other aerial platforms has been well documented and is not being listed.

In addition to what has been tabulated above note has to be taken of the aspects enumerated below:

- Without any conceivable threat to its territory - now, or in the foreseeable future, China's military expenditure is increasing exponentially. It goes beyond the needs of a military operation across its borders by another country or for any confrontation with its southern neighbours - individually, or collectively.

- China will soon project power by its sheer size well beyond the Continent of Asia. (USA, Russia, the European Union, the Koreas, Japan, South East Asia, West Asia and even Australia are learning to take into account Chinese sensibilities in their foreign policy projections).

- The Chinese often go to great lengths to underplay their capabilities. They keep saying at every opportunity, "we will never seek hegemony". This has to be seen in the light of Sun Tzu's famous saying "never let out your real intentions. Lull your adversaries by all possible means. Hide your capabilities".

- China was not powerful militarily in the 1970s. Yet, it did not hesitate to launch a massive invasion of its (then) fraternal comrade Vietnam. "Just to teach it a lesson", it was said in some circles.

- Seizure of "Mischief Reef" from a friendly South East Asian country in 1995 has given it a forward perch in that region.

- Myanmar and a few other countries are firmly under Chinese influence. China has exploitation rights over sixty percent of Kazakhstan's oil reserves, edging out US oil companies, Amoco and Texaco.

- China has made known its intent to commit a sizeable naval presence in the Indian Ocean. It is constructing ports capable of berthing Chinese submarines and warships in several South Asian countries.

The tabulation above is hardly exhaustive. It is nevertheless fairly indicative of the direction in which China is headed. The military build up has started causing concern to countries at one remove from the South China Sea (SCS), namely Australia and India among others. The anxiety that the build up could cause to its immediate neighbours in the SCS would be far greater.

A fair portion of the geopolitical space in the 21st century could be occupied by India and China. Their relations are characterized by alternating dialectics of rivalry and cooperation, the current status resting largely on the pace of their economic growth. The rapidly expanding economies of China and India could sustain world demand well into the future. An arms race between these two Asian neighbours as well as the increase in armaments that might be forced on its SCS neighbours owing to the alarming asymmetry would be devastating in the long-term for the stability of the region and Asia, if not the world. Therefore, the onus is fairly on China as the strongest Asian power to cut back on its massive militarization programme to reassure its immediate neighbours, in the first instance; because should the asymmetry remain, the imbalance would hardly be conducive to a status quo that might be the first step to settling the SCS disputes.

The Environmental Imperative

“The dangers that we face from eco-destruction dwarf the mere problems of national security”. The statement was made long ago by someone who is an unknown quantity outside India. Since then global warming, extinction of species, depletion of fisheries stocks, melting of polar ice caps and the receding of glaciers in Tibet, the roof of the world, leave no scope for doubting that the world of tomorrow might not bear very much resemblance to that of today, especially in the coastal regions and archipelagoes around the world. Well before 2050, perhaps by 2020, the futility of military structures and naval presence on the Paracels and the Spratleys might come home to all the disputants.

Since there would hardly be any disagreement among the SCS countries that global warming and ecological decline around the world might become greater threats to survival than minor territorial disputes between neighbours it would be in the fitness of things to take urgent measures to resolve the SCS dispute at the earliest, before the madness of militarizing barren pieces of rock goes any further.

Resolution Modes

Elementary first steps that might help in the resolution of the contentious SCS issues are listed below:

- Declaration of the Paracel and Spratley group of islands in the South China Sea as a marine ecology park;
- Pledge to halt further occupation, construction activity, militarization or stationing of naval ships in the Spratleys as well as the Paracels;

- Gradual dismantling of existing military structures by a given date (say 31 December 2012) and further declaration of the SCS as a Zone of Peace.

- A common approach to exploitation of natural resources in the areas under dispute. A Resource Exploitation Commission of countries contiguous to the disputed islands should be empowered to undertake exploitation on behalf of all parties and proceeds to be shared on a pro rata or any other basis decided by the Commission and ratified by the concerned countries;

- All further exploitation to cease till the Commission has completed its work and obtained ratification.

Concluding Remarks

In the closing decade of the last century many analysts had started writing about the shift away of the center of gravity from Europe to Asia. It did not take long for the change to take place. Today, nobody doubts that Asia is the economic giant of the world. This situation is likely to continue for the best part of the 21st century, if not beyond. Moreover, Asia is also the playground – more appropriately, battleground – for the geopolitical sweepstakes of the coming decades. Japan and the Tiger economies were the forerunners of wealth creation in Asia. The emphasis here is on wealth creation through industrialization, globalization and market competition. Wealth has also been created in some parts of the Middle East and now Central Asia due to the hydrocarbon reserves located in those countries. Whether these run out in a few years, or a few decades, or last longer than presently anticipated, is a question of considerable debate. What is not being debated, however, is the near-certain rise of China and India as the new economic giants of the century. In concert with the two biggest countries, ASEAN, Japan, South Korea, Taiwan and hopefully at some stage North Korea as well can become the harbingers of the decades or even the century of prosperity for the enlarged East Asia region. A beginning toward this end can be made with the settlement of the South China Sea disputes.

In the end it remains for the speaker to thank the Vietnamese hosts for planning and holding such an ambitious conclave.

SOUTH CHINA SEA: JUST WAITING FOR THE BREEZE?

Prof. Geoffrey Till

Corbett Centre, Kings College, London

Maritime Security Programme, RSIS, Singapore

The South China Sea issue is clearly an international problem. We are accustomed to think of ‘problems’ in engineering terms; they have solutions, provided only that we have the wit, time and patience to find out what they are. But some international problems seem to be more intractable than this. The Berlin problem during the Cold War was arguably one such. This really was an issue that seemed beyond solution, and, indeed, it was a problem that was never solved as such. Instead there was, with the collapse of the Soviet Union and the end of the Cold War, a seismic shift in the whole international context which meant that the wall came down making the problem of Berlin completely irrelevant. In such circumstances all statesmen on both sides of the argument could do, was to manage and contain the Berlin problem as much as they could, rather than try to solve it. Their aim was to ensure that the problem would not too badly affect the general situation - until something came up to change the terms of the issue. This was a matter, as the Russians used to say, of ‘sitting on the shore and waiting for the breeze.’ So they built the Berlin wall; for the West this seemed a crisis, but in fact it wasn’t – in effect it ended the Berlin problem as a crisis, leaving it merely as an irresolvable international problem which, for the next 30 years, both East and West showed they could live with.

Perhaps, then, the same philosophy should be applied to the apparently equally intractable problem of jurisdiction over the South China Sea and its rocks and islands? Perhaps the sensible and modest aim should be merely to wait for better times – the breeze- and in the meantime to concentrate on containing the effects of the dispute as much as possible. This seems to be the philosophy behind Track 2 negotiations which

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aim at talking through the issues in workshops like this in order to improve general understanding, at the 2002 agreement by all parties, not to resort to the use of force as a means of hoping to resolve the issue and by proposals for the joint exploration of the potential mineral resources of the area, which temporarily put questions of jurisdiction aside.

But there are several reasons which suggest that such a policy, however well intentioned, might turn out to be over sanguine and that something more radical may be required as well.

THE GROWING IMPORTANCE OF ENERGY

One of the main reasons for the fact that the South China Sea is so intractable is its energy potential. The whole world is engaged in an anxious search for the future energy resources that just might be found below the waters of the South China Sea. The point is that these resources, assuming they exist, are increasingly important and this will inevitably put growing pressure on the current situation.

THE GROWING SYMBOLIC VALUE OF MARITIME JURISDICTION

Jurisdiction over islands is peculiarly sensitive because it symbolizes the authority and the reputation of claimant states, both domestically and internationally. Because islands are necessarily remote from the centres of government, they are seen as general ‘performance indicators’ of a regime’s capacity to rule effectively. This is why the dispute over the Falkland islands was so important to the governments of both Argentina and the UK; what was at stake was not simply a matter of jurisdiction over distant islands, but the reputation, even the survival as it turned out, of the two conflicting regimes. This is partly because in the modern media age, the people at large cannot be excluded from such complex issues – and they often seem to be more nationalistic than their governments.

It is generally hard to contest the fact that, quite unlike the Europe of the late 1950s, the Asia-Pacific region is one in which two partially competing trends may be discerned. The one is an increasing recognition of the need for a cooperative approach to common problems that is partly based on a lively appreciation of the costs of doing otherwise and partly on recognition of the consequences of increasing levels of economic interdependence. But alongside this, the growing sense of national pride that is natural for the ‘rising’ powers of the area. At a time when India and China, Cambodia and Thailand still clash over disputed borders¹, and when MM Lee’s suggestion that South-

¹ ‘Clash of the Asian giants’, *The Straits Times*, 7 Nov 2009; ‘Cambodian Thai ties sink over Thaksin’, *The Straits times* 7 Nov 2009. Significantly the latter dispute has resulted in Thailand’s tearing up of an 8 year old memorandum of understanding for the joint development of a disputed sea area which has never been exploited.

east Asia needs the United States to ‘balance’ China sparks furious debate amongst that country’s citizens². It is hard to deny that old-fashioned nationalism remains strong in the area, not least at the popular level. But what has undoubtedly grown is the capacity of these now more active and powerful states to take actions which have significant impact on the international environment. For both these reasons, the main parties to the South China Sea dispute are getting both more cooperative and more competitive at the same time and the latter of course, makes it more and more difficult to resolve the situation.

THE LAW IS NOT STANDING STILL

Far from resolving disputes over maritime jurisdiction in itself, the United Nations Convention on the Law of the Sea [UNCLOS] merely provides a means by which jurisdiction might be first claimed by disputants and, if they all agree to submit otherwise irresolvable disputes to external arbitration by which such disputes might be concluded. As Malaysia and Singapore have shown by their agreement to abide by the results of external arbitration of their maritime jurisdictional disputes, this is a possible way of ending the South China Sea jurisdictional issue once and for all. But so far, none of the disputants have demonstrated willingness in this way to subordinate national interests to the cause of establishing greater regional harmony over the issue.

Worse still, the law is, so to speak, not standing still. UNCLOS also provided for a system by which states may assert rights over the ‘natural prolongation’ of their continental shelf out to a cut-off point of up to 350 nautical miles from their coasts. This is likely to be a technically difficult and complex process³ which leads to three further difficulties. Firstly, identifying cut-off points depends partly on positions on the straight base-lines from which the 200-350 mile arcs may need to be measured, but these are already the subject of acrimonious dispute. Secondly, the data required is complex and very liable to diverse interpretation. Thirdly, the process depends on claimant states providing detailed oceanographic information about the sea bottom in areas that are possibly claimed by others. In such cases, attempts to gather such information might in itself become controversial, rather in the manner of the recent unpleasantness between China and the United States over the Impeccable incident⁴.

² Interestingly, after Singapore’s Minister Mentor Lee Kuan Yew’s suggestion that the Asia-Pacific needed the United States to ‘balance’ a resurgent China, there was a furious response from that country’s citizens. ‘Why Chinese netizens are upset’, *The Straits Times* 5 Nov 2009 and “Balance” gets lost in translation *The Straits Times* 6 Nov 2009. But see also Li Daguang, ‘US Factor in East Asia: More Pros than Cons’ originally in *China’s Global Times*, translated in *The Straits Times* 6 Nov 2009.

³ Clive Schofield and I Made Andi Arsana provide a detailed and authoritative review of these in their ‘Beyond the Limits: Outer Continental Shelf Opportunities and challenges in East and Southeast Asia’, *Contemporary Southeast Asia*, Vol 31, No 1, April 2009. This material is the presented to the UN Commission on the Limits of the Continental Shelf, which is not a dispute resolution body.

⁴ Michael Perkinson, ‘Collision Course: China and US make waves in South China Sea’, *Jane’s Intelligence Review* May 2009. ‘China navy criticizes dispatch of US destroyers: state media’, AFP electronic report accessed in <http://www.spacewar.com/reports> 16 Mar 2009.

For both reasons, some suggest that cooperative or at least coordinated research and submission of data to the United Nations Commission on the Limits of the Continental Shelf would be advantageous⁵ but so far there seems little sign of that. China, indeed, has not yet submitted such a claim, but has reacted angrily to both Malaysia and Vietnam which have.

These potential difficulties have grown in the recent past because, although rights to prolonged continental shelf rights are held to be ‘legally inherent,’ there still existed a practical ‘deadline’ of 13 May 2009 for the submission of claims [or at least ‘preliminary information’] for states that were party to the Convention before 13 May 1999. It was for that reason that Malaysia and Vietnam submitted the claims they did, claims which if accepted would seriously impact on China’s own claims to the islands and rocks within that area of arguably ‘prolonged continental shelf’.

THIS IS A DRAMA WITH AN INCREASING CAST

The South China Sea dispute is already more complex than the Berlin crisis was, because there are so many more disputants with views to be considered. In effect, and although there were differences in emphasis between allies, there were just two sides to the West Berlin dispute. There are, however, three claimants to the Paracels and six to the Spratly islands and/or their surrounding waters. The legal status of one of the claimants, Taiwan, further clouds the issue of course.

Worse, non-state actors are increasingly involved and this complicates the matter still further. Fishermen desperate to hunt out dwindling stocks have often been thought involved in the inadvertent but possibly deliberate escalation of various aspects of the overall dispute, raising its temperature and putting pressure on governments to support, even intervene to protect, their nationals. Moreover, oil companies have also become increasingly involved in exploration of the oil-bearing potential of the South China Sea and this in turn has sucked in further external interests. Recently for example, Scot Marciel, a deputy US assistant secretary of state responsible for Asia, complained before the Senate Foreign Relations Committee about China’s alleged threats to the economic interests of US oil companies working with Vietnamese partners. Although the United States does not take sides on the dispute itself he said, “We object to any effort to intimidate US companies... We have raised our concerns with China directly... Sovereignty disputes between nations should not be addressed by attempting to pressure companies that are not party to the dispute.”⁶

The reported rise in incidents of piracy in various parts of the South China Sea could, if unchecked, have the same unfortunate centripetal effects effect if it spreads

⁵ Schofield and Arsana, op cit, p 35.

⁶ ‘US ‘Concerned’ on China-Vietnam sea tensions’ on <http://www.energy-daily.com/reports> accessed 16 July 09.

into areas of dispute.⁷

Moreover, by-standers such as Japan, the United States and most countries in Southeast Asia while not claimants in the dispute, do have interests at stake, not least free navigation. As such they may be expected to take a close interest in how the dispute is handled, if not in a preferred set of outcomes. The United States, for example, has not been slow to urge a the peaceful conduct of the dispute and a series of clear warnings that the outcome must not interfere with free navigation. The increasing salience of the South China Sea as an area by which much of the maritime trade of Eastern Asia passes, gives the dispute a strategic significance that is likely to increase the stake of outsiders in this dispute still further.

GROWING NAVAL POWER

Finally, the Chinese seizure of the Paracels in 1974, Fiery Cross reef in 1988 and Mischief Reef in 1995 all show that in their naval forces, states have a method by which they can redefine the situation in a manner decisive enough to establish a de facto presence. Against this background the steady growth of the naval and air power of most of the claimants must be regarded with at least with a degree of concern. The increasing strength of Chinese forces in the area, especially since the completion of its base near Sanya on Hainan, and its oft-reported aspirations for the development of an aircraft carrier capacity could well be seen as the most striking local example of the acquisition of potentially decisive naval forces of this sort. But there are others, such as the establishment of Vietnam's 'Region 2 naval forces' responsible for protecting Vietnamese sovereignty over its southern continental shelf⁸. The fact that this is a dispute involving one great power and a number of small and medium ones complicates the issue still further. In a world in which the weak can sometimes bully the strong, this is no tidily symmetric situation like Berlin was.

WHAT IS TO BE DONE?

If the situation is indeed deteriorating as this survey suggests, in Lenin's words, what is to be done? There are of course a plethora of additional suggestions about how the dispute can be contained and managed – and gradually made less intractable.

One of the most persuasive must surely be greater candour on the part of all claimants, about exactly what it is they are claiming. China's infamous 'u-shaped line' is particularly corrosive from this point of view, since no-one can be sure whether China is claiming the whole of the water space within the line or merely the rocks, islands and associated water areas within the line⁹. Clarity here might relieve the minds

⁷ 'Piracy down in Malacca Strait but up in S. China Sea', *The Straits Times* 17 July 2009.

⁸ 'New naval forces established to protect continental shelf' accessed electronically on 12 Oct 2009 at <http://english.vietnamnet.vn/politics/2009/08/866285>.

⁹ Michael Richardson, 'Beijing has much to do to clarify its boundary claims', *The Straits Times* 18 May 2009.

of some of the other claimants. It is not clear why China does not do this, especially as its attitude to, and conduct of, the dispute is often taken as evidence of the ‘China threat theory’ which it so often deplors¹⁰.

Rather in the same spirit, the 2002 agreement urges parties to the dispute, in addition to abjuring the use of force, to refrain from acts that might worsen it. All too often, this seems an injunction more honoured in the breach than in the observance. China’s announcement that Sansha city in Hainan would govern the Paracel and Spratly islands, high profile political visits to disputed islands, the tabling of assertive jurisdictional claims, the Philippine Republic Act 9522 to incorporate the Kalayaan Island Group and so on, seem hardly likely to act to promote harmonious relations and so not in the spirit of the 2002 agreement.

Another possibility might be the exploration of new types of functional cooperation, in areas of common interest such as agreed strategies on counter-piracy, search and rescue, the mitigation of risks to offshore installations or the exploration of establishing protocols to counter environmental pollution in the area¹¹. None of these apparently common-sensical accommodations would be easy however. The devil lives in the details. The local reluctance to enter into collective SAR arrangements for example might well derive from a fear that these could allow other countries to enter one’s territorial sea¹².

In addition, it might be worth exploring more radical solutions as a means of breaking the log-jam or at least identifying more clearly what some of the current problems are. One such might be an agreement to submit all the bundle of claims and counter-claims to some external authority for resolution with an advance undertaking to abide by the consequences. This was the way in which Argentina and Chile largely settled the Beagle channel dispute between them, or Malaysia and Singapore the Pedra Branca issue. Another, much more radical, suggestion might be a watered down version of the Antarctic ‘solution’ basically declaring the area as a no-go area for naval, fishing and oil-exploration vessels for the next couple of decades¹³ ... Radical certainly, but much less so than descending into conflict over the issue!

In the current circumstances none of these really radical solutions seems at all

¹⁰ Wu Shicun, ‘Commentary: A Regional Perspective on South China Sea Passage Security’ in Shicun Wu and Keyuan Zou (eds), *Maritime Security in the South China Sea* (Farnham, Surrey: Ashgate Publishing, 2009) p 103.

¹¹ Various proposals have already been made to do this. See Zhang Jie, ‘Commentary: Search and Rescue in South China Sea and Regional Cooperation’ and Zhang Xiangjun ‘Regional Cooperation for marine Pollution Contingency Response in the South China Sea’, both in Shicun Wu and Keyuan Zou, *op cit*.

¹² Sam Bateman, ‘Good order at Sea in the South China Sea’ in Shicun Wu and Keyuan Zou’, *op cit*, p 21.

¹³ There would be significant long-term environmental benefits to such a policy – not least the replenishment of near-exhausted fish stocks. Moreover none of the explorations so far conducted would seem to suggest that the oil resources of the area are globally significant.

likely, but perhaps we need not yet despair of the effect of anything else – and that is because of one critical difference between the Berlin crisis and South China Sea dispute which has not so far been mentioned. This is that relations between the Berlin disputants was generally bad everywhere else and in a whole number of other ways too; this is not the case in the South China Sea, where international relations are generally improving as regional trade increases. Although this is a fundamental difference, it is still true that making progress on the dispute, rather than sitting on the shore and waiting for the breeze, would materially improve the international atmosphere still further.

WHITHER THE SOUTH CHINA SEA DISPUTES?¹

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The political environment in the South China Sea seems to have come a long way from the 1980's and 1990's when it was a locus of confrontation and conflict. Indeed, the China-Vietnam clash of 1988 in which about 70 Vietnamese died, and China's 1995 occupation and building of structures on the Philippines-claimed Mischief Reef seem like relics of a previous era. Conflict has given way to co-operation in which China, Vietnam and the Philippines have undertaken co-operative seismic surveys in an agreed area. But are these advances fundamental and durable – or fragile and temporary? This brief examines recent developments in this context and suggests steps forward.

In 2002, ASEAN and China signed a Declaration on Conduct in which they

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¹ This is an updated and expanded version of Mark J. Valencia, Whither the South China Sea disputes, Maritime Institute of Malaysia Newsletter.

promised “to resolve their territorial and jurisdictional disputes by peaceful means without resorting to the threat or use of force” and “to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability”. And China, Vietnam and the Philippines have agreed on a web of bilateral codes of conduct. All claimants have also agreed to move towards a more formal and legally-binding multilateral Code of Conduct --- but its realization remains out of reach and the declaration has been violated numerous times by several parties thereto². Indeed, the down-side is that no progress has been made for seven years. The “soft” nature of the declaration which enabled its acceptance in the first place – it is not a legally binding document – makes it difficult even to raise the issue, let alone exert pressure on fellow signatories to move towards implementation. Moreover China has now made a proposal which has deadlocked the process --- that there be two prior meetings before an ASEAN –China meeting – one among the four ASEAN claimants (Brunei, Malaysia, the Philippines and Vietnam), and one between all of ASEAN³. China remains opposed to internationalization or regionalization of the dispute and would like to prevent or weaken ASEAN solidarity on these issues and continue to address them on a bilateral basis. ASEAN has opposed China’s proposal as it wishes to speak as one and all at once. During Thailand’s chairmanship of ASEAN, the issue was not a priority.⁴ But when Vietnam assumes the chair in January, the disputes and a multilateral approach could be raised. The issues will be on the agenda for the ASEAN summit meeting of April and October 2010 in Hanoi.

Despite this backsliding, the region– at least at sea – had moved to a lower level of securitization⁵. The reasons included China’s ‘charm offensive’ toward ASEAN, the lack of discovery of significant petroleum deposits, and self-restraint of nationalist tendencies. Perhaps most important was the distraction of the United States with the Middle East and the “war on terror”, and thus a damping of China-U.S. competition in Southeast Asia and the South China Sea. To this rather eclectic mix one should add the expansion and strengthening of ASEAN and its growing unity in its approach to China. But these factors are proving neither fundamental nor durable and the apparent stability is fragile. Indeed, US attention is returning to China and the South China Sea and the result has been a series of incidents with China including that involving the U.S. Impeccable⁶.

² *Asia Times*, 26 March 2009; DPA, “Vietnam criticizes Chinese fishing bans in the South China Sea”, *Monsters and Critics*, 18 May 2009; “Philippines seeks to improve Spratly structures”, *Reuter*, 20 May 2009.

³ China is searching for new ASEAN strategies, *The Nation*, Opinion, 19 October 2009.

⁴ Stephanie Ho, “Beijing: South China Sea territorial disputes not on ASEAN agenda”, *VOA News*, 21 October 2009.

⁵ Ralf Emmers, personal communication.

⁶ Mark J. Valencia, “Not an impeccable argument”, Napsnet, *Policy Forum Online*, 9-026A, 1 April 2009. The U.S. does not take a position on the sovereignty claims but does insist on a rather broad right of freedom of navigation. During the Clinton administration it also stated that it would like to see the disputes resolved peacefully and in accordance with international law.

Some analysts view the recent rash of China-US freedom of navigation incidents as reflecting a more assertive stance by Beijing in keeping with its naval modernization and drive for oil in the South China Sea⁷. They point to its web of electronic and physical infrastructure extending into the Spratlys and its acquisition of naval and air assets that would enable its domination of the South China Sea. Others argue that China is simply trying to defend itself by protecting vital sealanes against a US-Japan-India encirclement and containment. So far the US response to these incidents has been relatively mild. But this could dangerously embolden China. Indeed there are rumors that China intends to build an airport and seaport on Mischief Reef⁸. Darkening the horizon are calls by US ‘proxy diplomats’ like Senator James Webb for the U.S. to do more to balance China in the region.⁹ It did not help Vietnam-China relations that he was visiting Vietnam when he made this statement.

Thus fear is still racing hope.¹⁰ One trend is toward a post modern world moving away from the Westphalian nation state system. This construct would downplay sovereignty and focus on common security and common prosperity and be evidenced by codes of conduct, sharing of resources, and cooperation to protect the environment. This is the hope.

But the fundamental conflicts over islands, maritime space and resources have not been resolved. In 2007 several international incidents in quick succession re-energized the sovereignty disputes over the Spratly islets and reefs and recast a spotlight on the issues. These incidents included the early March visit by then Malaysian Prime Minister Abdullah Badawi to disputed Swallow Reef and the signing of the Philippines Baseline Bill by President Gloria Arroyo--which included the Spratlys in a “regime of islands.” The Philippine claim was vehemently protested by Vietnam, China, Taiwan and Malaysia.¹¹ Earlier, in February 2007, then Taiwan President Chen Shui-bian’s visit to Taiping Dao drew protests from China, Malaysia, the Philippines, and Vietnam. On a more positive note China and Vietnam vowed to resolve their South China Sea differences through peaceful provisional arrangements.¹² But such words have become repetitive and perfunctory, and the proof will be in the doing.

The fear is that increasing competition for energy and fish will exacerbate these conflicts and refuel nationalism in the South China Sea. Pressure is building as China and others successfully expand their exploration for deep-sea oil and gas fields as well as for gas clathrates.¹³ China, Taiwan, the Philippines and Vietnam have enacted

⁷ Micah Springut, “Managing China’s growing assertiveness in the South China Sea”, *World Politics Review*, 27 July 2009.

⁸ “China making move in Spratlys”, *guampdn.com*, 15 July 2009.

⁹ Matt Steinglas, “In Vietnam”, Webb says US must ‘balance’ China, *VOA News*, 19 August 2009.

¹⁰ I attribute the phrase to former CINCPAC Admiral Larson who used it in this context.

¹¹ “Vietnam asks for restraint in East Sea islands”, *Thanh Nien News*, 8 February 2009; Dave-Dizon, “China hits out at RP baselines bill on Spratly claims”, 18 February 2009.

¹² “China, Vietnam hold talks on South China Sea issue”, *Xinhuanet.com*, 13 August 2009.

¹³ *Asia Times*, supra n. 2.

domestic laws that incorporate the islands into the nation's territory and the national psyche and they have thus become symbolic of the nation and the legitimacy of the government. For these governments the islands must be defended at 'all costs'. China has banned fishing in parts of the South China Sea and even sent a fisheries patrol vessel to protect its fisheries resources in its claimed island EEZs.¹⁴ China has also objected to the Philippines drilling in the Reed Bank area which may contain 3.4 trillion cubic feet of gas and 450 million barrels of oil. This trend is also fueled by fear of the unknown – that some unknown resource will be foregone or lost through compromise or relinquishment of claims --- what some call the 'Alaska syndrome.'

Further complicating the situation are claims to an "extended continental shelf" by Vietnam and Malaysia and official objections thereto by China and the Philippines. China's objection was based in part on its 'nine-dashed line' historic claim to the South China Sea which means in a legal sense China seems to be moving backward rather than forward. Ironically, by claiming an extended shelf, Malaysia and Vietnam have undermined their own potential claims to some of the Spratly features as islands capable of generating EEZs and a continental shelf.¹⁵ Baselines that do not appear to conform to the 1982 UNCLOS are another problem that will eventually need to be resolved especially if claims to full zones from the islands are dropped in favor of claims from the respective mainlands. Highly questionable are Malaysia's baseline off Sabah, Vietnam's baseline off its southern coast, and China's closing lines around the Paracels. In sum, there is obviously a "collision of assumptions"¹⁶ and resultant actions that support both negative and positive trends. This makes the situation ambiguous, difficult to resolve, and probably unpredictable.

China's intent remains uncertain. It recently growled at Vietnam regarding Vietnam's plan to build a pipeline from British Petroleum gas discoveries 230 miles offshore on its claimed continental shelf. The new fields to be connected are near fields that already produce gas which is moved onshore through an existing pipeline. In its rant, China readily slipped back into its legally dubious historic claim to most of the South China Sea and the nationalist rhetoric that accompanies it. China's Foreign Ministry spokesperson Qin Gang said "any unilateral action taken by any other country in these waters constitutes infringement into China's sovereignty, territorial rights and jurisdiction". Moreover, according to Qin, Vietnam's action "goes against the important consensus reached by the leaders of the two countries on the maritime issue."¹⁷ The two had made significant progress regarding their overlapping claims in the Gulf of Tonkin and it was hoped that the creative solution employed there would

¹⁴ "China defends Spratlys sea patrol", APF, 16 March 2009.

¹⁵ Sam Bateman and Clive Schofield, "Outer Shelf claims in the South China Sea: new dimension to old disputes", RSIS.C65-2009, 1 July 2009.

¹⁶ Geoffrey Till, personal communication.

¹⁷ "China reiterates sovereignty over islands in South China Sea", www.xinhuanet.com, 3 February 2007; "Taiwan followed suit. MOFA reaffirms sovereignty over Spratly's in South China Sea", 4 February, www.etaiwannews.com, 2 Weds, 2009.

have a positive spin off effect on their disputes in the South China Sea. However, China/Vietnam relations remain troubled. Moreover, Vietnamese nationalists allege that the Vietnamese leadership has been subservient to China on maritime boundary issues and relatively rare anti-China protests have been held in Vietnam.¹⁸

Further, even the joint surveys between China, Vietnam and the Philippines were only made possible by what some have said was a “sell out” on the part of the Philippines. Presumably, higher political purposes motivated the Philippines to agree to these joint surveys on parts of its legal continental shelf that China and Vietnam do not even claim. But in so doing it gave legitimacy to China and Vietnam’s legally dubious claims to that part of the South China Sea. In any case the agreement expired in July 2008 and has not been renewed due to domestic politics in the Philippines. The Philippines is considering whether to extend it or to grant a concession in the area to a US company.¹⁹ The latter would certainly raise objections by China and Vietnam.

Another pesky problem that cannot be ignored indefinitely is Taiwan’s claims in the area and its occupation of Itu Aba, at 0.5 kilometers long, the largest of the Spratly Islands. Indeed, its recent construction of a military airfield there is bound to increase tension. Although then President Chen Shui-bian’s 2 February 2009 visit to the feature contributed to this tension, his declaration of a ‘Spratly Initiative’ which puts environmental protection ahead of development may be an important conceptual step in the right direction.

So where does all this leave the imbroglio? As Malaysia’s late Tan Sri Noordin Sopiee --- one of Asia’s leading intellectuals --- used to say: “make peace while there is peace.”²⁰ What this means for the South China Sea is that while tension is reduced – for whatever reasons – a gossamer web of co-operative commitments and functional arrangements should be negotiated and cemented. This would not only be in the claimants interests vis a vis China but in China’s interest as well. It would be a logical extension of its accession to the ASEAN Treaty of Amity and Co-operation and firm up the legitimacy of its presence in the South China Sea.

What does this mean in practice? There are several concrete steps that can be taken. The claimants could implement an early warning system “based on existing mechanisms to prevent occurrence/escalation of conflicts” as agreed in their March ‘blueprint for peace.’²¹ They could formalize a code of conduct for the South China Sea and adhere to it. They could dispense with nationalist rhetoric and legally unsupportable areal and

¹⁸ Nga Pham, Vietnam paper banned over China, *BBCNEWS*, 15 April 2009.

¹⁹ Euan Paulo C. Anonuevo, Govt mulls fate of Sampaguita find, *Manila Times*, 12 October 2009; FM: Philippine gov’t willing to pursue joint marine exploration in South china Sea, *Xinhua*, 23 December 2008.

²⁰ Personal communication.

²¹ *Asia Times*, *supra*, n. 2.

baseline claims. They could build a web of functional co-operative arrangements in marine environmental protection, marine scientific research, navigational safety and search and rescue. The Pratas Island Reef National Marine Park recently declared by Taiwan could serve as a model for co-operative establishment of similar parks in the Spratlys proper. None of these arrangements would threaten existing positions and they can all contain a clause that affirms that such arrangements are non-prejudicial to sovereignty and jurisdictional claims.

The basic lesson is clear – slow and steady process will win the race for hope over fear. Patience and perseverance are necessary ingredients. The process must be a step-by-step building of functional co-operative arrangements that will eventually result in a web too politically costly to undue.

As for a grand solution to the South China Sea disputes, this will be a long time in coming --- if ever. But the alternative – a festering sore covered by a scab that can be picked every time relations deteriorate or extra regional powers wish to do so --- should be a nightmare no regional state wants to repeat. As Noordin said “The time to make peace is when there is peace.” That time is now. But the window of opportunity is closing.

PART II:

**REGIONAL SIGNIFICANCE
OF THE SOUTH CHINA SEA IN THE CONTEXT OF
THE CHANGING INTERNATIONAL ENVIRONMENT**



MARITIME JURISDICTION AND MARITIME SECURITY COOPERATION IN SOUTH CHINA SEA

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1.

Southeast Asia is distinctively maritime in nature. It has a vast span of water with the South China Sea extending over 1800 miles from Sumatra to Taiwan linking the Indian and the Pacific Oceans. And the Straits of Malacca, Lombok, and Sunda are of strategic importance to the region and the world.

Shipping routes are the life-lines of East Asian economies. Being mostly export-oriented and resource-deficient, East Asian countries are heavily dependent on seaborne trade. As the South China Sea provides shipping routes connecting Northeast Asia with Southeast Asia and the Middle East, the freedom of navigation in the South China Sea is of crucial importance to East Asian seaborne trade and sustainable development.

There exist maritime jurisdictional disputes in the South China sea, which mainly embrace three dimensions: islands' sovereignty disputes; the delimitation disputes on EEZs (exclusive economic zone) and continental shelves; and freedom of navigation versus the extents of jurisdiction over territorial seas, international straits, archipelagic waters, and EEZs.

These disputes are of two different kinds of disputes. The islands' sovereignty disputes are issues left over by history; and the delimitation disputes on EEZs and continental shelves as well as the navigation issues are due to different interpretation and implementation of the relevant articles in the LOS Convention (UN Convention on the Law of the Sea).

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Regarding the EEZ and continental shelf delimitation, the LOS Convention stipulates that the delimitation “shall be effected by agreement on the basis of international law...in order to achieve an equitable solution.” This is a principled stipulation, and differences exist on its implementation. Here a big hurdle exists regarding the relation between EEZ and continental shelf claims of Southeast Asian littoral states and China’s claims of “historic waters” and “historic title” in the South China Sea. The LOS Convention stipulates that coastal states are entitled to have EEZs and continental shelves, and also mentions in several articles the factor of historic title which should be considered in the jurisdictional delimitation. China regards the nine-dashed line as the outer line of its historic title in the South China Sea. How to interpret China’s historic title in the South China Sea, and how to make a balance between EEZ and continental shelf claims and historic title is an issue facing us.

Regarding the navigation issues, the LOS Convention establishes three regimes, namely ‘innocent passage’ through territorial waters, ‘transit passage’ through international straits, and ‘archipelagic sea-lanes passage’ through archipelagoes. Different navigational rights apply depending on the different regimes. As to the navigation in EEZs, the LOS Convention provides that freedom of navigation applies to EEZs; but under the LOS convention, coastal states have sovereign rights over EEZ resources, and EEZs fall into coastal states’ spheres of jurisdiction. As the LOS Convention only offers general rules and principles and is ambiguous on many issues, differences in its interpretation and implementation are prevalent in the world community.

The existing jurisdictional disputes have affected regional peace and security, have affected the political relationship and stability among regional countries, and have affected regional economic development and marine resources exploitation.

2.

Navigation security in South China Sea is an important component of Asia security. Without addressing navigation security issues, regional security cannot be guaranteed. As there exists the potential to eliminate all high seas if some islands such as Thitu Island, Itu Aba Island, Spratly Island, and Scarborough Reef are given full effect of having 200 nm EEZs. A navigation code of conduct in EEZs is thus much needed.

The “Impeccable Incident” in March 2009 between China and the US in the South China Sea constitutes the most serious friction between China and the United States since the collision of their military aircraft near Hainan Island in April 2001. Like the previous one, this incident shows the two countries’ different understandings and implementation of the LOS convention – particularly the Convention’s provisions on coastal states’ rights in their EEZs. In attempting to justify the US conduct in the South China Sea, Chairman of the Joint Chiefs of Staff Admiral Michael Mullen said

that though the USNS Impeccable was in China's EEZ, the United States has the right to enter this area. But in fact, the Impeccable's activities did contravene the LOS convention, as the Convention affords China jurisdiction over relevant activities in the EEZ and prohibits actions that are not for peaceful purposes.

A substantial conflict between the right of coastal states to control adjacent maritime areas and the right of maritime states to enjoy the freedom of navigation has endured for much of the history of the law of the sea, and East Asia is an area where the reconciliation of these two rights has caused controversy. East Asian countries need to establish an agreed definition of navigational rights to be applied in practice so as to guarantee freedom of navigation and regional SLOC security.

Freedom of navigation and safety of navigation in the South China Sea is in the interests of China, the US, Japan, South Korea and other regional countries. The guarantee of freedom of navigation in the South China Sea is the major concern of extra-regional powers. Countries like the US and Japan are much concerned about free and safe access through the sea-lanes and air corridors there. Free passage through the sea-lanes is vital to the US for movement of its warships between the Pacific and Indian oceans. A former State Department spokesman James P. Rubin said, "While we take no position on the legal merits of competing claims to sovereignty in the area, maintaining freedom of navigation is a fundamental interest of the United States. Unhindered navigation by all ships and aircraft in the South China Sea is essential for peace and prosperity of the entire Asia Pacific region, including the United States."

China has repeatedly said it respects freedom of navigation through the South China Sea's crucial shipping lanes, and has assured regional countries that it would not take steps to impede freedom of navigation through contested areas of the South China Sea. In fact, China has never interfered in foreign vessels navigating in the area and will not do so in the future. There has been nothing to suggest that China would obstruct freedom of navigation. The problem is that since there exist different jurisdictional areas, different navigation regimes should be applied in the South China Sea.

3.

Regarding islands sovereignty and maritime delimitation disputes, usually there are three approaches to achieve a fair and equitable solution:

Firstly, solution through negotiations and mutual compromise among related parties. China prefers mostly this approach. One recent positive event is the exchange of the bilateral agreement between China and Vietnam on June 30, 2004 on the territorial sea, EEZ, and continental shelf delimitation in the Beibu Gulf (Tonkin Gulf) and the bilateral agreement on fishery cooperation in the Beibu Gulf after the two agreements had been approved respectively by their parliaments. The Sino-Vietnamese disputes in the Beibu Gulf lasted for more than 30 years. The bilateral talks on the Gulf had been

held intermittently since August 1974, and had produced no results until the leaders of the two countries decided in 1999 to solve the disputes by the end of 2000, and the agreement was signed on December 25, 2000.

Secondly, solution through the adjudication by the International Court of Justice (ICJ) and the arbitration or mediation of a third-party. Arbitration handles disputes in the form of adjudication, which is similar to judicature, but arbitration is voluntary jurisdiction. Related countries are free to select the arbitrator(s). According to international experiences, arbitration is the most desirable approach in the third-party involvement.

Asian countries are not accustomed to accept third-party assistance for the disputes' settlement, but changes have taken place in recent years. The rule by ICJ in December 2002 on the ownership of Sipadan and Ligatan Islands (Malaysia/ Indonesia) in the Celebes Sea and the rule by ICJ in May 2008 on sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore) are something of a landmark.

As to the South China Sea, in my view, related parties might consider the acceptance of arbitration by arbitral tribunal provided in the Convention's Annex VII when the conditions of settlement through negotiation are not matured for a long period of time and when the disputes procrastinate indefinitely. China issued a declaration on August 25, 2006 not to accept any procedures provided for in Section 2 (compulsory procedures entailing binding decisions) of Part XV (settlement of disputes) of the LOS Convention. The Declaration states, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."

The above declaration indicates that China would settle disputes mainly through consultation and negotiation, but in my view, the above declaration does not indicate the non-existence of the possibility of settling disputes by arbitration. Article 287/3-287/5 (Choice of Procedure) of the Convention make the arbitral tribunal have compulsory jurisdiction over the disputes on the explanation and application of the Convention by the signatories. In fact, no matter what attitude a signatory takes towards Article 287, at least it has to accept the jurisdiction by the arbitral tribunal.

Thirdly, shelving the disputes for a period and working for joint development among relevant parties in the disputed areas. Though this is not the permanent solution to the problem, but only an expedient measure in the transitional period towards the final equitable settlement, it is a practical and realistic approach, and the preferred alternative to no action. Joint development can be initiated both before the final delimitation and after the delimitation agreement when resources stride across two sides. All parties could reap the benefits from the resources.

Faced with maritime jurisdictional disputes, regional countries have tried to seek for transitional settlement. Indonesia and Australia reached the agreement on cooperative development in the Timor Gap in 1989 after 10 years of tough negotiations, but its experiences have not been well spread and its follow-up effects are limited. This agreement is worth detailed study.

China has worked to seek such temporary solutions with relevant countries in line with this idea, but so far has made no substantial achievements. A recent encouraging development is the trilateral joint maritime seismic working agreement on cooperative exploration in the South China Sea reached among the oil companies of China, the Philippines, and Vietnam signed in Manila on March 14, 2005, which offers good prospects for starting joint development. After this agreement, China has encouraged Malaysia and Brunei to participate in the joint survey. The problem is that as the Philippines has not yet completed its domestic legal procedures; the joint seismic survey among the three signatories has not yet achieved any substantial progress.

As the jurisdictional disputes in South China Sea are so complicated, joint development is a wise and feasible approach at present. The framework and modality of joint development is an issue to be discussed. I suggest that we might first agree to have an overall framework for joint development in the whole South China Sea; indicating the willingness of all parties concerned and the basic principles to be pursued as did in the Declaration on the Code of Conduct on the South China Sea. Then we might have various forms of joint development, including bilateral, trilateral, quadrilateral, or quinquilateral levels depending on the different overlapping areas. For example, in the Vanguard area, the disputes are only between China and Vietnam. Thus a bilateral cooperation meets the needs.

4.

With the increasing political and economic interdependence in East Asia, various security cooperative approaches have developed in Track-I and Track-II levels. Dialogues and visits between regional leaders have increased, several constructive strategic partnerships have been established, and new momentum has emerged in military relationship among regional countries. However, on the whole, these security dialogues are scattered and fragmentary with limited effects, and have not formed a regional organic and efficient mechanism. So far East Asia has no security mechanism in the true sense, and has no well-defined and established rules.

The few existing Track-II maritime security dialogues in East Asia such as the Western Pacific Naval Symposium are without avail in the prevention of conflicts. And though CSCAP (Council for Security Cooperation in Asia Pacific) has a Maritime Security Working Group, it remains as a low-level research group, and is not efficient.

As compared with Europe, East Asia lags far behind in maritime jurisdiction. There are in Europe 42 maritime boundary agreements dealing with territorial sea, EEZ and continental shelf delimitation, the majority of which were signed in the 70s and 80s of the 20th century. Apart from negotiated settlement, they approached ICJ (the International Court of Justice) and accepted international arbitration for the settlement. Examples are the ICJ judgment on North Sea continental shelf in 1969; and the Court of Arbitration's decision on the continental shelf delimitation between UK and France in 1977 and 1978. As to the navigation issues, no serious contention has occurred in Europe. It appears that mutual confidence and political will of leaders are of significance in managing maritime jurisdictional security. Moreover, the formation of EU (European Union) has more or less dimmed the boundary issues.

The situation requires that maritime jurisdictional security in Southeast Asia should be put on the regional security agenda now, and the promotion of mutual trust and the enhancing of political will among regional leaders for the disputes' settlement are much needed.

As the solutions are no easy tasks and time-consuming, strenuous efforts should be devoted to establishing mechanisms for conflict prevention.

To my mind, conflict prevention measures to be taken into consideration include: the signing of INCSEA (incidents at sea agreement) or a Code of Conduct between and among regional navies to prevent the situation from being out of control; the setting-up of the East Asian Maritime Security Forum with the participation of regional and extra-regional scholars and experts which will be held annually; and the formation of the East Asian Community (EAC) for political, economic, and security cooperation, and the inclusion of regional maritime security within the framework of EAC.

MEASURES FOR MAINTENANCE OF PEACE, STABILITY AND ENHANCEMENT OF COOPERATION ON THE SOUTH CHINA SEA ¹

Dr. Tran Cong Truc

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I. THE SOUTH CHINA SEA DISPUTE

At present, in the South China Sea , there are two major types of disputes:

- Territorial disputes over the Paracels and Spratlys.

- Disputes over sea boundaries and overlapping continental shelves among countries having opposite or adjacent coasts.

These two types of disputes were formed at different times, with different contents and levels, and taking place in different geographical places.

1. Territorial dispute

The territorial dispute over the Paracels involves Vietnam and China. This dispute arose at the beginning of the 20th century, starting from the brief visit by Commander-in-Chief Ly Chuan to some islands and a short landing on Woody island (in 1909). The archipelago was under the control and management of France, whose troops were positioning in solid garrisons, with facilities in service of the French management, who exercised, on behalf of Vietnam, sovereignty over the Paracels and Spratlys dating back at least to the 17th century. In 1946, taking advantage of the disarmament of the Japanese troops, the Chinese government sent troops to occupy the eastern part of the Paracels. Later China had to retreat because Kuomintang was driven out of the mainland to Taiwan. In 1956, taking advantage of the French withdrawal from Indochina under the Geneva Agreement, and the Vietnamese government's oversight to take over the Paracels, the People's Republic of China sent troops to reoccupy the eastern part of the Paracels. In 1974, upon learning that the Sai Gon government's

¹ Translated version

troops were on the verge of collapse and the fact that American expeditionary force was forced to leave South Vietnam, using the tacit approval of the American on *laissez-fairism*, the People's Republic of China sent troops to the western part of the Paracels to seize Sai Gon-held islands. Vietnam, as the state having sovereignty over the Paracels, opposed and publicly protested against each and every move by China. It is "the first State in history to occupy and exercising sovereignty, the occupation exercise are real, peaceful, and in conformity with international law and practices" (1). Ever since China has made feverish efforts to consolidate and build the Paracels into a vital military base, a springboard for its southward movement.

Territorial disputes over the Spratlys:

a. There have been disputes between Vietnam and China since the 1930s, beginning in 1932 when a Chinese envoy to France in Paris sent a diplomatic note to the French Ministry of Foreign Affairs, asserting that "Nansha islands are China's southern most piece of territory". In 1946, the People's Republic of China, in the name of disarming Japanese troops, sent its Pacific ship to occupy Itu Aba Island. The 1956 saw the re-occupation of Taiwan over this island. In 1988, troops from the People's Republic of China moved to occupy 6 cay features west of the Spratlys and made every attempt to upgrade these places into military bases. In 1995, one more feature, namely the Mischief Reef, which locating east of the Spratlys, was taken over. China has so far seized 7 features of the Spratly Islands. As a result, the total number of islands and reefs occupied by China (including Taiwan) is 8.

b. There have also been disputes between Vietnam and the Philippines since Filipino President Quirino declared sovereignty over the Spratly Islands because of their proximity to the Philippines. From 1971 to 1973, Filipino troops occupied 5 islands; from 1977 to 1978, they gained 2 more islands. In 1979, the Philippines announced a decree signed on 11-6-1979 by President Marcos to claim sovereignty over the Spratly archipelago, except Pattle Island, and renamed it Kalayaan. In 1980, the Philippines extended their occupation to Commodore Reef, another island in the South.

c. There have also been disputes between Vietnam and Malaysia, starting when the Malaysian Embassy in Sai Gon sent a diplomatic note to the Ministry of Foreign Affairs of the Sai Gon government to enquire whether the Spratlys Islands of the Republic of Morac Songhrati Meads belonged to the Republic of Vietnam or the Republic of Vietnam had any claim over it. On the 20, April 1971, the Sai Gon government replied that the Spratlys was under Vietnam's territorial sovereignty and that any encroachment on the Islands was a violation of international law. In December 1979, the Malaysian government published a map indicating that a part in the South of the Spratlys belonged to Malaysia, including Amboyna Cay and Barque Canada Reef which were under Vietnamese control. From 1983-1984, Malaysia troops gained

control of 3 features in the South of the Spratlys, namely Swallow Reef, Mariveles Reef and Ardasia Reef. In 1988, two more reefs, Enrica and Investigator Reefs, were occupied, totalling the number of Malaysian-occupied features to 5.

Legal evidences and stances offered by the parties to defend their position are varied, and can be briefly summarised as follows:

- Territorial claim based on the discipline of first discovery (China)
- Territorial claim based on the discipline of effective occupation (Vietnam)
- Territorial claim based on the discipline of territorial proximity (The Philippines, Malaysia)

2. Dispute over sea boundaries and continental shelves

This kind of disputes arose against the context of international geo-political and geo-economic changes. 36% of the world's sea area has fallen under coastal states' sovereignty, sovereignty rights and jurisdiction since the adoption of the United Nations Convention on the Law of the Sea in 1982. As a result, there have been some 416 sea boundary-related disputes, 15 of which are in South East Asia. Negotiations to delimit sea boundaries and continental shelves between Vietnam and other countries around the South China Sea have been and will be carried out in the following zones:

- Boundaries between Exclusive Economic Zones and Continental shelves inside and outside the Beibu Gulf involving Vietnam and China, where the opposite coastlines are under 400 sea miles from each other.

- Boundaries between Exclusive Economic Zones and Continental shelves south to the South China Sea, involving Vietnam, Malaysia, the Philippines, Brunei and Indonesia.

- Boundaries between sea areas and Continental shelves involving Vietnam, Malaysia, Thailand and Cambodia.

- Maritime boundaries of sea areas in the Paracels and Spratlys.

So far, the concerned parties have been able to reach:

- Agreement on Maritime boundary in the BeiBu Gulf between Vietnam and China, signed on 25th December 2000.

- Agreement on Continental shelf boundary between Vietnam and Indonesia south of the South China Sea, signed on 23rd June 2003.

- Agreement on Exclusive Economic Zone and Continental Shelf boundaries in the Gulf of Thailand between Vietnam and Thailand, signed on 9th August 1997.

- Agreements on Temporary Measures for Joint-Development in Over-lapping Areas, signed between Vietnam and Malaysia on 5th June 1992.

- Agreement on “Historical Waters” between Vietnam and Cambodia, signed on 7th July 1982.

The remaining task of demarcating maritime boundaries and overlapping continental shelves among concerned states is tough and complicated. This may result from the following factors:

- Coastal States have made different claims over maritime zones and continental shelves in the South China Sea, due to either their non-compliance with the related provisions of the United Nations Convention on the Law of the Sea; or their subjective, inaccurate or even wrong interpretation and application of the criteria in the Convention in order to benefit their negotiations to demarcate maritime zones and continental shelves.

- There exist two groups of islands in the South China Sea, which are objects of complicated sovereignty disputes as well as conflicting viewpoints on the validity of their maritime zones and continental shelves.

II. SOLUTION TO DISPUTES ON THE SOUTH CHINA SEA

1. To end the complicated disputes which potentially trigger tensions and conflicts, harming the regional and international peace, security and stability, I recommend that the concerned parties should:

First, reach an agreement on the interpretation and application of provisions to demarcate maritime zones and continental shelves under the coastal states’ sovereignty, sovereignty rights and jurisdiction. For example, there needs an agreement on the drawing of baselines of coastal states, offshore islands, archipelago states, and non-state archipelagos; or on the legal status of islands in projecting maritime zones and continental shelves...

Second, agree to define the maritime zones and overlapping continental shelves of coastal states in accordance with the United Nations 1982 Convention on the Law

of the Sea.

Third, agree on criteria to define maritime zones and continental shelves of the Paracels and Spratlys as of offshore archipelagos, not archipelago states. The islands are small, inhabitable and have no economic life etc.

Fourth, agree on legal rules and international practices applied to sovereignty claims over the Paracels and Spratlys.

Fifth, any claim that are not compatible with the agreed criteria must be considered invalid. Concerned states should withdraw such claims in the spirit of respecting for international law and practices, for peace, security, stability and development in the region and the world.

2. In international practices, many countries have set examples of willingness when negotiating sea boundaries. Kindly allow me to give a vivid example:

In the negotiation to demarcate boundaries in the Beibu Gulf, despite its claim that according to the Convention signed between France and the Ching Dynasty (1887), there already existed a boundary in the gulf, namely the 108003'13" meridian eastern (2), Vietnam, on its free will, withdrew the claim. It was because after doing more researches, Vietnam found out that boundary had been established only for the sovereignty over coastal islands. Vietnam, thus, agreed to renegotiate with China to demarcate the Beibu Gulf on the basis of international law and practices, and taking into account the situation of the gulf, with an aim towards a fair and acceptable measure for the two countries. As a result, on December 25th 2000 in Beijing, the two countries officially signed the Sino-Vietnamese Agreement on Demarcation of Territorial Waters, Exclusive Economic Zone and Continental Shelf, which ended the 27-year-long negotiation with three rounds of talks: in 1974, from 1977-1987, and from 1992-2000.

The Sino-Vietnamese Joint Communiqué signed on 25th December 2000 stressed that “the signing of the “Treaty on Vietnam-China Land Border”, the “Agreement on Demarcation of Territorial Waters, Exclusive Economic Zone and Continental Shelf between the Socialist Republic of Vietnam and the People’s Republic of China” and the “Agreement on Fisheries Cooperation in the Beibu Gulf” is of great historical significance, and will give added impetus to good neighbourliness and comprehensive cooperation between the two countries in the 21st century”. It can be said that together with the relentless effort to solve other disputes with its neighbours, the signing of these agreements represented a new step forward in building an environment of peace, stability and cooperation between Vietnam and other regional countries, making active contribution to enhancing peace and stability in the region and the world. The Agreement on Demarcation of the Beibu Gulf has also contributed to the application and development of international law on maritime demarcation between countries

with opposite or adjacent coastlines, the role of islands, reefs, the issue of border river mouths with different features of the seabed riverbed, the issue of the gulf mouths, of international straits, the value of maps in boundary treaties...

We believe that the concerned parties in the South China Sea can bring into fuller play the so far achievements by withdrawing unreasonable and groundless unilateral territorial claims, such as the claim based on the 9-dotted lines map drawn by a Chinese citizen enclosing 80% of the South China Sea. Then we will be able to find a common denominator to form a legal basis for all possible forums aimed at resolving territorial disputes in the future. It is not easy to carry out those recommendations; therefore, practical measures and roadmaps should be adopted.

The motto “First the easy steps, then the difficult ones” can be applied in the current situation. Therefore, in my view, we should temporarily put aside the territorial dispute over the Paracels and Spratlys and maintain the status quo on these islands. Each habited island has the surrounding 12-sea-mile area, the reefs have the surrounding 3-sea-mile area for management and defence in conformity with regulations on internal waters and maritime zones of the two occupying sides. Beyond the sea area of the islands and reefs, the concerned parties will agree on maritime boundary and continental shelf in accordance with the criteria of the 1982 United Nations Convention on the Law of the Sea to identify overlapping areas, thus, demarcating the maritime boundary and continental shelf. With pending final resolutions by the concerned parties, temporary “joint development” can be considered.

It is essential to set up an appropriate mechanism to follow the above roadmap:

Apart from official and non-official bilateral and multilateral negotiation forums established by the concerned parties, it is a good idea to make use of the regional and international organisations such as: the United Nations, ASEAN, ASEAN+1, ASEAN+2, ... and form ad-hoc committees and sub-committees when necessary to directly carry out studies and propose measures for acceptance or consultation. These organisations should have clear operation regulations, certain responsibilities as well as mandatory authority, provided for the dispute parties, and regional and international organisations after negotiations.

Distinguished guests,

In today’s forum, as a researcher in the law of the sea, I do hope that those present today as well as other Vietnamese and foreign colleagues will further discuss the issue to find a common and practical solution, contributing to the resolution of complicated disputes in the South China Sea.

We have all seen the cost that humanity had to pay for the conflicts caused by

Part II: Regional Significance of the South China Sea

unreasonable and unjust interests of some forces in history. Therefore, we need to take prompt actions for a world of civilisation, peace, stability, cooperation and development.

Thank you very much for your attention.

(1) White paper of the Socialist Republic of Vietnam “the Paracels and Spratlys, the inviolable territory of the Socialist Republic Vietnam”

(2) The claim of the government of Vietnam over the system of the basic lines in order to measure the width of Vietnam’s maritime zone, made on 12th November 1982.

THE APPLICATION OF ARTICLE 121(3) OF THE LAW OF THE SEA CONVENTION TO THE FIVE SELECTED DISPUTED ISLANDS IN THE SOUTH CHINA SEA

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INTRODUCTION

The South China Sea, located in south of mainland China and Taiwan, west of the Philippines, north west of Sabah (Malaysia), Sarawak (Malaysia) and Brunei, north of Indonesia, north east of the Malay peninsula (Malaysia) and Singapore, and east of Vietnam, is the largest marginal sea in the world. It is a part of the Pacific Ocean, encompassing an area from Singapore to the Strait of Taiwan of around 3.5 million km². The South China Sea has a wide continental shelf to the south, runoff from several large rivers, and a deep basin over 3,000 meter deep. It is subject to physical forcing of the alternating southeastern Asian monsoons, typhoons, strong internal waves, El Niño and Southern Oscillation and sensitive to climate change because of its location. Hundreds of islands, reefs, shoals, sands, or rocks, collectively known as the Pratas, Paracel, Macclesfield Bank, and Spratly archipelagos, are situated respectively in the northern, western, central, and southern parts of the South China Sea.

Yann-huei Song received his undergraduate degree from National Chengchi University, Taipei, Taiwan, a Master's degree in Political Science from Indiana State University, Indiana, USA, a LL.M. degree from the University of California School of Law (Boalt Hall), Berkeley, California, USA, a doctoral degree in International Relations from Kent State University, Kent, Ohio, USA, and a JSD degree from the University of California School of Law. Following graduation from Kent State University, Dr. Song taught at Department of Political Science, Indiana State University as Assistant Professor in 1988. He then returned to his country and taught as an Associate Professor at Institute of Maritime Law, National Taiwan Ocean University, Keelung, Taiwan in 1990. Currently, Dr. Song is a research fellow at the Institute of European and American Studies, Academia Sinica, Nankang, Taipei, Taiwan, and Adjunct professor at National Taiwan Ocean University. He is also Distinguished Professor, Graduate Institute of International Politics, and Dean, Office of International Affairs, National Chung Hsing University, Taichung, Taiwan. Dr. Song's research interests are in the fields of International Law of the Sea, International Fisheries Law, International Environmental Law, National Ocean Policy Study, Naval Arms Control and Maritime Security. He has published articles in journals such as *Political Geography Quarterly*, *Asian Survey*, *Marine Policy*, *Chinese Yearbook of International Law and Affairs*, *Issues and Studies*, *The American Asian Review*, *Ocean Development and International Law*, *EurAmerica*, *Ecology Law Review*, *the International Journal of Coastal and Marine Law*, *The Indonesian Quarterly* and others.

Within the sea, there are five islands, namely Yongxing Dao/Dao Phu Lam (Woody Island)¹, Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island)², Taiping Dao/Dao Ba Binh/Ligaw Island (Itu Aba, Taiping Island)³, Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef)⁴, and Nanwei Dao/Dao Troung Sa/Lagos (Spratly Island)⁵, that are subject to competing claims of sovereignty by China, Malaysia, the Philippines, Taiwan, and Vietnam. While these islands have no permanent human habitation, no supply of natural fresh water (perhaps with the exception of Itu Aba), and no economic life of their own at present, they all have runway and military or coastal guard personnel stationed there. One of the interesting legal questions that can be raised is about the right of these islands to claim a 200 nautical mile exclusive economic zone (EEZ) and continental shelf based on the existing international law. Article 121, paragraph 3 of the United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS)⁶ provides that “[rocks] which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” Should Yongxing Dao/Dao Phu Lam (Woody Island) be considered “rock”? Does it have the capacity to sustain human habitation or economic life of its own? Does it have the right to claim a 200 nautical mile of EEZ or continental shelf? These questions also go to the other four disputed islands that are situated in the Spratly archipelago in the southern part of the South China Sea.

The purpose of this paper is to examine the interpretation and possible application of Article 121, in particular its third paragraph, to the five selected disputed islands. Following this introductory section, a brief summary of the development of the “Regime of Islands” at the Third United Nations Conference on the Law of the Sea

¹ For information about the island, visit Wikipedia, the free encyclopedia at: <http://en.wikipedia.org/wiki/Yongxing>

² For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/thitu_Island

³ For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Itu_Aba_Island

⁴ For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Swallow_Reef

⁵ For information about the island, visit Wikipedia, the free encyclopedia at: [http://en.wikipedia.org/wiki/Spratly_Island_\(proper\)](http://en.wikipedia.org/wiki/Spratly_Island_(proper))

⁶ The convention, adopted April 30, 1982, opened for signature December 10, 1982, and entered into force on November 16, 1994. As of November 4, 2009, the convention had 159 parties. For a historical perspective of the convention, visit the web site of the United Nations at: http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective. For chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, visit http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm For the text of the convention with annexed and the agreement to implement Part XI of the convention, visit http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

(hereafter referred to as UNCLOS III)⁷ will be given in Section II, focusing in particular on those proposals made by the participating delegations to amend or delete entirely Article 121(3) of UNCLOS. In Section III, the views of the law of the sea experts on interpretation and application of Article 121(3) will be examined. In Section IV, several selected examples of state practices with regard to the application or interpretation of Article 121(3) are discussed. This is to be followed by discussing the interpretation and possible application of Article 121(3) to the five disputed islands in Section V. The last section will end the paper by providing several suggestions for possible amendment of Article 121 or policy measures to help deal with the confusion found in Article 121(3).

THE CONSIDERATION OF THE “REGIME OF ISLANDS” AT UNCLOS III

Before UNCLOS III (1973-1982) was held, a number of statements, suggestions, or proposals relating to the issues of establishing a legal regime of islands had already been made or submitted by the delegations that attended the meetings of Sub-Committee II of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (abbreviated and known as the Sea-Bed Committee) between March 1971 and November 1973. These statements, suggestions, or proposals constituted the preliminary groundwork for the work of UNCLOS III on the specific question of the regime of islands.⁸

Being considered “main trends” in the development of a legal regime of islands in the early 1970s, these statements, suggestions, or proposals indicated that: (1) the definition of an island as given in Article 10, paragraph 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone should be retained; (2) the same criteria applicable for the delimitations of the territorial sea and the continental shelf of continental land masses should also be applied to islands; (3) islands, in the same

⁷ The Third United Nations Conference on the Law of the Sea was held between 1973 and 1982 with 11 sessions in total that took place in New York, Caracas, Geneva, and Montego Bay. The first session of UNCLOS III was held in New York, 3-15 December 1973, which was devoted to procedural matters such as the election of officers and the adoption of the rules of procedure. The second session was held in Caracas, 20 June – 29 August 1974; the third session in Geneva, 17 March – 9 May 1975; the fourth session in New York, 15 March – 7 May 1976; the fifth session in New York, 2 August – 17 September 1976; the seventh session in Geneva, 28 March – 19 May 1978 and resumed seventh session in New York, 21 August – 15 September 1978; the eighth session in Geneva, 19 March – 27 April 1979; and resumed eighth session in New York in New York, 19 July – 24 August 1979; the ninth session in New York, 3 March – 4 April 1980; and resumed ninth session in Geneva, 28 July – 29 August 1980; the tenth session in New York, 9 March – 16 April 1981 and resumed tenth session in Geneva, 3-28 August 1981; the eleventh session in New York, 8 March – 30 April 1982; resumed session in New York, 22 and 24 September 1982; and final session in Montego Bay, Jamaica, 6-10 December 1982. For more information about UNCLOS III, visit the web site of the United Nations at: <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>

⁸ For details about these statements, suggestions, or proposals, see *The Law of the Sea, Regime of Islands, Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, Office for Ocean Affairs and the Law of the Sea, United Nations, New York, 1988, pp. 6-21.

manner as continental land masses, should also generate an EEZ or patrimonial sea of their own; and (4) for the purpose of determining the relevant maritime spaces of islands, a series of criteria should be taken into account, including such as the population, geomorphological structure and configuration, and the capacity requirements in particular concerning habitation and economic life.⁹

UNCLOS III started in 1973. While ten sessions had been held during UNCLOS III,¹⁰ most of the statements, suggestions, or proposals on the regime of islands were made during the second session of UNCLOS III in 1974.¹¹ Upon the conclusion of the sixth session of UNCLOS III in July 1977, the result of the work of the conference appeared in the Informal Composite Negotiating Text (ICNT), which was informal in character, served purely as a procedural device, and only provided a basis for negotiation without affecting the rights of any delegation to suggest revisions in the search for a consensus.¹² The question of the regime of islands was dealt with in Part VIII of the ICNT, which contained only one article, namely article 121.¹³

Between the seventh and final session of UNCLOS III, held in 1978 and 1982, respectively a number of suggestions and amendments in relation to the regime of islands had been submitted. Several states, including Japan,¹⁴ Greece,¹⁵ France,¹⁶ Venezuela,¹⁷ the United Kingdom,¹⁸ Brazil,¹⁹ Portugal,²⁰ Iran,²¹ Ecuador,²² and Australia,²³ proposed

⁹ Paragraph 23, *ibid.*, p. 21.

¹⁰ *Supra* note 7.

¹¹ For details about the statements, suggestions, or proposals presented during the second session (20 June – 29 August 1974), see *The Law of the Sea, Regime of Islands, Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea*, (New York: United Nations Publication, 1988), Sales No. E.87.V.II., pp. 23-81.

¹² Document A/CONF.62/WP.10/Add.1, see *Official Records of the Third United Nations Convention on the Law of the Sea*, Vol. VIII (United Nations Publication, Sales No. E.78. v.4).

¹³ The article reads:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territories.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

¹⁴ *Supra* note 8, p. 89 and p. 105.

¹⁵ *Supra* note 8, p. 90 and p. 105.

¹⁶ *Supra* note 8, p. 91 and p. 95.

¹⁷ *Supra* note 8, p. 97 and p. 103.

¹⁸ *Supra* note 8, p. 105.

¹⁹ *Supra* note 8, p. 107.

²⁰ *Supra* note 8, p. 107.

²¹ *Supra* note 8, p. 108.

²² *Supra* note 8, p. 108.

²³ *Supra* note 8, p. 108.

or gave their support for the deletion of article 121, paragraph 3. At the same time, a number of states expressed their opposition against the proposal to amend or delete article 121 (3), which include Ireland,²⁴ Dominica Republic,²⁵ Singapore,²⁶ Germany,²⁷ U.S.S.R.,²⁸ Algeria,²⁹ Korea,³⁰ Denmark,³¹ Mongolia,³² Turkey,³³ and Colombia.³⁴

Japan gave three reasons to support her position on the deletion of paragraph 3 of article 121. First, “it was not right to make distinction between islands according to their size or according to whether or not they were habitable.” Second, the 1958 Convention on the Continental Shelf made no distinction between habitable and uninhabitable islands. Third, many states which declared a 200-nautical-mile EEZ did not make such a distinction either.³⁵ France supported the Japanese proposal to delete article 121, paragraph 3, but without providing further explanation. The United Kingdom also proposed that article 121, paragraph 3 should be deleted because there was no basis in international law to discriminate between different forms of territory for the purposes of maritime zone and such discrimination would conflict with the rights of states in respect of their territories.³⁶ Brazil gave her support to the British proposal on the ground that there was no logical explanation for paragraph 3 of article 121.³⁷ However, Korea had difficulty in supporting the deletion of 121(3) because it undermined the delicate balance achieved through the long process of negotiations on the regime of islands.³⁸ U.S.S.R. was also opposed to the amendments to article 121 because they would destroy the compromise reached at the previous meetings.³⁹ Romania, the key country in the process of drafting article 121 at UNCLOS III, submitted a proposal to amend article 121 by adding a new paragraph 4, which read as follows: “[u]nhabited islets should not have any effect on the maritime spaces belonging to the main coasts

²⁴ Supra note 8, p. 91.

²⁵ Supra note 8, p. 98.

²⁶ Supra note 8, p. 105.

²⁷ Supra note 8, p. 106.

²⁸ Supra note 8, p. 106.

²⁹ Supra note 8, p. 107.

³⁰ Supra note 8, p. 107.

³¹ Supra note 8, p. 107.

³² Supra note 8, p. 108.

³³ Supra note 8, p. 109.

³⁴ Supra note 8, p. 109.

³⁵ Supra note 8, p. 90.

³⁶ Supra note 8, p. 105.

³⁷ Supra note 8, p. 107.

³⁸ Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVI (United Nations Publication, Sales No. E.84.V.2), summary records of meeting, plenary meeting, 171st Meeting, Para. 4.

³⁹ Ibid., summary records of meetings, plenary meetings, 170th meeting, para. 27.

of the States concerned.”⁴⁰

Despite the efforts made by some delegations at UNCLOS III, the regime of islands was dealt with in Part VIII of UNCLOS, which follows exactly the language of the previous draft as appeared in Part VIII of the ICNT. On April 30, 1982, the Convention was adopted. The United States was the only Western industrialized country to vote against the final treaty. Venezuela, Turkey and Israel also voted no. The U.S.S.R. and most Soviet bloc countries abstained, as did a few highly industrialized Western nations. Most of the West, including France and Japan, joined the Third World and voted yes. Altogether, 130 nations voted to adopt the treaty and open it for signature. The Convention was opened for signature on December 10, 1982 in Montego Bay, Jamaica. It is worth noting that upon signature of the Convention, Iran placed on the records its understanding in relation to certain provisions of UNCLOS. The main objective for the Iranian submission was to avoid eventual future interpretation of a number of articles of the Convention in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations of the Islamic Republic of Iran. One of the understandings is related to Article 121 (3), in which Iran stated that

Islets situated in enclosed and semi-enclosed seas which potentially can sustain human habitation or economic life of their own but, due to climatic conditions, resources restriction or other limitations, have not yet been put to development, fall within the provisions of paragraph 2 of Article 121 concerning “Regime of islands”, and have, therefore, full effect in boundary delimitation of various maritime zones of the interested coastal States.⁴¹

Article 121 of UNCLOS is concerned with the legal regime of islands. The Convention also contains the codification of the then existing customary rules of international law, which include the rights and obligations of the coastal and third states in the territorial sea, contiguous zone, EEZ, and the high seas. But the three paragraphs under Article 121 of UNCLOS do not completely have customary international law properties. Article 121 paragraph 1 and 2 stipulate the definition and regulations that regard islands as having territorial sea and contiguous zones. These two paragraphs should be considered customary law because of the observation of state practice after the adoption of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, in which most nations accepted being bound by these regulations. Thus even non-parties to UNCLOS are bound by Article 121 paragraphs 1 and 2. However, given that paragraph 3 of Article 121 has not evolved into a rule of customary international law, its application is restricted to the parties of UNCLOS. The main reasons for the

⁴⁰ Supra note 8, p. 104.

⁴¹ For the declarations made on signature by Iran, see Declarations and Statements, UNCLOS, in the web site of Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran%20Upon%20signature (Accessed on August 1, 2009)

paragraph not becoming a rule of customary international law are: (1) the lack of state practice; and (2) the lack of *opinio juris*.⁴² While Article 121(3) is not considered a rule of customary international law, it is considered general international law applicable to the entire continental shelf regime. Because the continental shelf regime is also an inherent part of the regime of EEZ, Article 121(3) is binding on states that are not parties to UNCLOS with respect to the EEZ and continental shelf regimes.⁴³ In the *Jan Mayes* case (*Denmark v. Norway*), Judge Evensen, in his separate concurring declaration, explicitly affirmed the status of Article 121(3) as part of general international law.⁴⁴

OPINIONS OF THE SELECTED INTERNATIONAL LEGAL SCHOLARS REGARDING THE INTERPRETATION OF ARTICLE 121(3)

Jon M. Van Dyke and Robert A. Brooks have explained that Article 121 of UNCLOS should be interpreted according to Article 31 of the 1969 Vienna Convention on the Law of Treaties, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁵ Because the purposes for establishing coastal EEZs cannot justify claims to EEZs around uninhabited islands situated far away from their coasts, Van Dyke and Brooks have argued that it is not

⁴² R.R. Churchill and A.V. Lowe, *The Law of the Sea*, third edition (Manchester: Manchester University Press, 1999), p. 164.; Jonathan I. Charney, “Note and Comment: Rocks That Cannot Sustain Human Habitation,” *American Journal of International Law*, Vol. 93, 1999, p. 872.

⁴³ Jonathan I. Charney, *ibid*, p. 872.

⁴⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, the International Court of Justice, 1993, Declaration of Judge Evensen, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=8911a2102b58edce17272a12ca8ea521&case=78&code=gjm&p3=4>, p. 84 (Accessed on August 4, 2009)

⁴⁵ The 1969 Vienna Convention on the Law of Treaties, done at Vienna on May 23, 1969, entered into force on January 27, 1980, United Nations, Treaty series, Vol. 1155, p. 331, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Article 31 of the Convention provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

consistent with the main purpose for adopting UNCLOS for remote rocks or reefs to generate extended maritime zones. Accordingly, only if stable communities of people live on the island and use the surrounding ocean areas, can islands generate ocean space, such as an EEZ or a continental shelf.⁴⁶ Van Dyke has argued that from the perspective of history, if a rock or reef cannot sustain human habitation permanently for 50 people, then it cannot claim an EEZ or a continental shelf.⁴⁷ Other international legal scholars such as Ely,⁴⁸ Pardo,⁴⁹ Gidel⁵⁰ and Hodgson⁵¹ hold similar views.

Jonathan I. Charney adopted a broader interpretation towards the issue of whether rocks can enjoy rights to EEZs or continental shelves under Article 121(3). Charney held that rocks or reefs are a kind of island, and if they are not, then there is no need for Article 121(3) to be included in Part VIII of UNCLOS. In addition, because Article 121 (3) uses the word “or” between “human habitation” and “economic life of their own”, it is only necessary to prove that an island or rock can sustain human habitation OR economic activity of its own to be able to claim an EEZ or continental shelf.⁵²

After examining the travaux préparatoires of the UNCLOS III, Charney argued that the habitation referred to in the article does not need to be of a permanent nature, and economic activity does not need to be capable of sustaining a human being throughout the year.⁵³ In addition, the economic activity referred to in Article 121 (3) can also include industry or exploitation of the living or mineral resources found in the

⁴⁶ See Jon M. Van Dyke and Robert A. Brooks, “Uninhabited Islands: their Impact on the Ownership of the Oceans’ Resources,” *Ocean Development and International Law*, Vol. 12, 1983, p. 286.

⁴⁷ Jon Van Dyke and Dale Bennett, “Islands and the Delimitation of Ocean Space in the South China Sea,” *Ocean Yearbook*, Vol. 10, 1993, p. 79.

⁴⁸ Ely stated that “If an island is too small or insignificant to have attracted its owner’s national resources, in terms of population and investments, it is too small to serve as a baseline.” Northcut Ely, “Seabed Boundaries Between Coastal States: The effect to be Given Islets as ‘Special Circumstances,’” 6 *Int’l Law* 219 (1972), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

⁴⁹ Ambassador Pardo argued that the “equity and reasonableness” that justify the allocation of ocean resources to a coastal state simply do not apply where “no population exists.” Arvid Pardo, “An International Regime for the Deep Sea-Bed: Developing Law or Developing Anarchy?” 5 *Tex. Int’l L.F.* 205 (1970), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

⁵⁰ Gidel tried to define “habitability” more precisely than others had by stating that to be an “island” a land formation had to have “natural conditions” that permitted “stable residence of organized groups of human beings.” B. Gidel, 3 *Le droit international public de la mer* 684 (1934), cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46, p. 287.

⁵¹ Hodgson stated specifically that he felt the word “rocks” in Article 121(3) should be defined in terms of whether a land formation is habitable. Robert D. Hodgson, “Islands, Normal and Special Circumstances,” in *Law of the Sea: The Emerging Regime of the Oceans*, edited by John King Gaimble and Pontecorve (1973) and Robert D. Hodgson and Robert W. Smith, “The Informal Single Negotiation Text (Committee II): A Geographical Perspective,” *Ocean Development and International Law*, Vol. 3, 1976, p. 225, cited in Jon M. Van Dyke and Robert A. Brooks, *supra* note 46.

⁵² Charney, *supra* note 42, p. 868.

⁵³ *Ibid.*

territorial sea of the island or rock in question.⁵⁴ Moreover, Charney was of the opinion that this economic activity can be a future condition, based on future technological advances. Profits from ocean minerals could support the equipment and staff necessary to extract the resource and to import energy, food and water for a long period of time. Under these circumstances, can a rock claim an EEZ or a continental shelf according to Article 121(3) of UNCLOS?⁵⁵

Charney suggested that a feature would not be subject to Article 121(3) if it were found to have mineral resources, such as oil or gas, or other resources of value such as newly harvestable fishery species, or even a location for a profitable business (such as casino), whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources. Given the compatibility of the French, English, Spanish and Arabic texts of Article 121(3) as well as the ambiguity of the Russian text and the clarity of the Chinese text, Charney held that Article 121(3) of UNCLOS should be interpreted as permitting the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.⁵⁶ Charney concluded that changes in circumstances may help those features (reefs or rocks) that are subject to the application of Article 121 (3) to obtain the legal status of island and the right to claim EEZs and continental shelves.⁵⁷

Barbara Kwiatkowska and Alfred H.A. Soons observed that an increasing number of ocean law and policy commentators held the view that a lighthouse or other aid to navigation built on an island gives the island an “economic life of its own” due to its value to shipping.⁵⁸ When discussing the issue of when a rock is uninhabitable, E.D. Brown suggests,

The absence of sweet water might provide such a test; but what if supplies reach the rock from the mainland or a desalination plant is installed? . . . [m]ust the rock be able to produce the minimum necessities of life independent of outside supplies before it can be regarded as habitable? Would the presence of a lighthouse keeper, supplied from without, provide evidence of habitability?⁵⁹

⁵⁴ Ibid., p. 869.

⁵⁵ Ibid., p. 870.

⁵⁶ Ibid., p. 871.

⁵⁷ Ibid., p. 876.

⁵⁸ Barbara Kwiatkowska and Alfred H.A. Soons, “Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human habitation or Economic Life of Their Own,” *Netherlands Yearbook of International Law*, Vol. 21, 1999, pp. 167-168, cited in Robert Beckman and Clive Schofield, “Moving Beyond Disputes Over Islands Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait,” *Ocean Development and International Law*, Vol. 40, 2009, p. 10.

⁵⁹ E.D. Brown, *The International Law of the Sea: Volume 1: Introductory Manual* (Aldershot, England and Vermont, USA: Dartmouth Publishing Company, 1994), p. 150.

Accordingly, Brown commented that “. . . Article 121(3) in its present form appears to be a perfect recipe for confusion and conflict.”⁶⁰

Barry Hart Dubner cites the following activities in support of the argument that rocks may have an economic life of their own and therefore in accordance with Article 121(3) can generate EEZs and continental shelves: using military forces; occupying and fortifying the rocks where possible; creating structures and markers; creating scientific research stations of sorts; enacting statutes; incorporating the rocks into nearby provinces; publicizing maps showing their respective claims and releasing “historical documents” to back up the territorial claims; allowing tourists and journalists to visit the rocks; granting concessions to oil companies; arresting fishermen; and creating a “tourist resort” complete with hotel and airstrip.⁶¹

Alex G. Gude Elferink, a senior research associate at the Netherlands Institute of the Law of the Sea, indicates that only islands of a very small size qualify as a rock under Article 121(3) of UNCLOS. While some small island may qualify as such a rock because of their size, they may still be able to sustain human habitation or economic life of their own. In addition, the available arguments indicate that the threshold that has to be met with regard to sustaining human habitation or having economic life of their own is “rather low and almost certainly is lower than the most far-reaching requirement, a stable community.” Accordingly, it is not necessary to meet both the requirements of human habitation and economic life at the same time, which indicates that “even if the former criterion is only met by the presence of a stable community, economic life of a rock without a stable community would result in it having an EEZ and continental shelf.”⁶²

Roger O’Keefe argues that the loose drafting of the regime of islands in UNCLOS may confound the aspirations of many NIEO-inspired delegates at UNCLOS III, because the compromise text of Article 121 allows the appropriation by individual countries of vast swathes of the “common heritage of mankind.” By citing the writings of several international legal scholars, O’Keefe indicates that

[u]nless an unwritten requirement of “natural capacity” were to be imported, Article 121(3) seems to countenance the grant of maritime zones to almost any skerrick of land that is still high and dry when the tides is in. If a country is willing to spend enough money, most islands and even some rocks would be able to support at least token habitation in today’s high-tech world.”⁶³

⁶⁰ Ibid, p. 151.

⁶¹ Barry Hart Dubner, “The Spratly ‘Rocks’ Dispute – A ‘Rockapelago’ Defies Norms of International Law,” *Temple International and Comparative Law Journal*, Fall 1995, pp. 304-305.

⁶² Alex G. Oude Elferink, “The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts,” *Ocean Development and International Law*, Vol. 32, 2001, p. 174.

⁶³ Roger O’Keefe, “Palm-Fringed Benefits: Island Dependencies in the New Law of the Sea,” *International and Comparative Law Quarterly*, Vol. 45, April 1996, p. 412.

Jonathan L. Hafetz argues that marine conservation can constitute an economic use within the meaning of Article 121(3) because it can bring net economic benefits and sustainable development through devices such as the establishment of marine and coastal protected areas (MACPAs or MPAs). He gives the following example in support of the argument:

... a State that establishes a marine park or protected area around a pristine coral reef should not be penalized by being forced to forego the expansion of its maritime jurisdiction that it would likely have gained from pursuing a more traditional form of economic development. Instead such States should be given an incentive to preserve the marine environment where such preservation is also economically beneficial and thus consistent with the “economic life” criterion of Article 121(3).⁶⁴

Hafetz is of the opinion that a proposal to establish a marine preserve around a small island can represent an economically beneficial use of the natural resource. The measures taken by the states, which own the small islands, to protect their surrounding marine environment can yield economic benefits in various forms, including increased fishing stocks, tourist spending, products from coral reefs, and health benefits from reduced pollution. Hafetz indicates that such measures can and should satisfy the “economic life of their own” requirement of Article 121(3), therefore enabling a “rock” to achieve the formal legal status of an “island,” and thereby potentially extending a coastal state’s continental shelf and EEZ rights. In addition, Hafetz holds that his interpretation of Article 121(3) is consistent with the text of UNCLOS, the objectives and aims of the Convention, subsequent developments in international law, and the public policy of preserving the marine environment where it is economically beneficial to do so.⁶⁵

SELECTED EXAMPLES OF STATES PRACTICES

The most often cited disputes arising from the legal status of an island and its right to claim a 200-nautical-mile EEZ or a continental shelf is the dispute between the United Kingdom and its neighboring countries over the legal status of Rockall, which is situated in the North Atlantic Ocean, 160 kilometres from the north-west coast of Scotland and is claimed as English territory. In 1976 the United Kingdom passed the Fisheries Limits Act, drawing a 200-nautical-mile maritime zone extending from its baseline as its exclusive fishing zone. Subsequently, the United Kingdom’s maritime maps showed a 200-nautical-mile maritime zone surrounding Rockall,⁶⁶ which led to objections being raised by Ireland, Iceland and Denmark. Ireland considered the United Kingdom’s actions to be in violation of Article 121(3) of UNCLOS, which stated that

⁶⁴ Jonathan L. Hafetz, “Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention,” *American University International Law Review*, 2000, pp. 626-627.

⁶⁵ *Ibid.*, p. 627.

⁶⁶ Clive Symmons, *The Maritime Zones of Islands In International Law* (The Hague: Martinus Nijhoff, 1979), p.261.

rocks without human habitation or economic life of their own were not entitled to an EEZ or a continental shelf.⁶⁷ In 1997, the United Kingdom gave up its claim to a 200-nautical mile EEZ for Rockall when it acceded to UNCLOS.⁶⁸

French claims of a 200-nautical-mile EEZ for Clipperton Island in the Eastern Pacific Ocean and the application and interpretation of Article 121 (3) UNCLOS are also closely related to the issues studied in this paper. Clipperton Island was named after the English pirate John Clipperton when he escaped to the island to hide. In 1858, France claimed the island. In 1897, Mexico occupied and claimed the island. Subsequently the two countries submitted the dispute to an arbitrator who ruled in favor to France in 1931.⁶⁹ In 1979 France proclaimed 200-nautical-mile EEZs around all its islands, including Clipperton Island. This island is an uninhabited coral atoll situated 1,120 kilometers from Mexico and has an area of 6 square kilometers. The only economic activity is tuna fishing in its adjacent waters.⁷⁰ In 2009, France submitted the preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles of France's Clipperton to the Secretary-General of the United Nations, in which a map shows not only a 200-nautical-mile EEZ surrounding Clipperton, but also two areas of outer continental shelf.⁷¹

Another potential dispute can be found in Brazil's claim of an EEZ and a continental shelf for Saint Peter and Paul Rocks, which are made up of 12 small volcanic rocks situated in the South Atlantic Ocean, about 950 kilometers north east of Natal in Pernambuco State, Brazil. The tallest is Southwest Rock, 22.5 meters above the water. Saint Peter and Paul Rocks are distributed in an area at sea that is over 350 meters from north to south, and 200 meters from east to west, with a total size of approximately 10,000 square meters.⁷² A lighthouse was built on Northwest Rock in 1930, with a height of six meters. Twenty meters to the south of the lighthouse is a simple shelter for army personnel and researchers. Could these rocks generate an EEZ or a continental shelf according to Article 121 of UNCLOS?

On May 17, 2004, Brazil made a submission through the UN Secretary-General to CLCS in accordance with Article 76, paragraph 8 of UNCLOS, regarding the proposed outer limits of Brazil's continental shelf and its claim of a continental shelf for the

⁶⁷ Ibid., p. 126.

⁶⁸ Robin Churchill, "United Kingdom accession to the UN Convention on the Law of the Sea," *International Journal of Marine and Coastal Law*, Vol. 13, 1998, pp. 271-273.

⁶⁹ See Background on Clipperton Island, *The CIA World Fact Book*, available at: <http://www.cia.gov/cia/publications/factbook/geos/ip.html>

⁷⁰ Ibid.

⁷¹ For the preliminary information, visit

http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/fra2009infos_preliminaires_clipperton.pdf

⁷² See http://en.wikipedia.org/wiki/St_Paul's_Rocks

Saint Peter and Paul Rocks.⁷³ There are three figures contained in Brazil's Executive Summary of the submission, which show a 200-nautical-mile EEZ and the outer limit of continental shelf surrounding Saint Peter and Paul archipelago.⁷⁴ No third party notifications had ever been sent to the Secretariat of the United Nations in response to or challenge Brazil's claim for a 200-nautical-mile EEZ and continental shelf for Saint Peter and Paul Rocks in accordance with Article 121(3) of UNCLOS. On August 25, 2004, the United States sent a notification regarding Brazil's submission, which highlighted the issues of sediment thickness and the Vitoria-Trindade feature. The United States asked CLCS to examine Brazil's sediment thickness data carefully and to take a cautious approach with regard to Vitoria-Trindade Feature. There was no mentioning at all about the legal status of Saint Peter and Paul Rocks.⁷⁵ In April 2007, CLCS adopted the "Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Brazil on 17 May 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles" by a vote of 15 to 2, with no abstentions.⁷⁶

Australia claims a 200-nautical-mile EEZ for Heard Island and the McDonald Islands, which are a volcanic group of barren Antarctic islands located in the Southern Ocean, about two-thirds of the way from Madagascar to Antarctica. There is no permanent human habitation and no indigenous economic activity on these islands. But the Australian government allows limited fishing in the surrounding waters.⁷⁷ On 15 November 2004, Australia made a submission to CLCS, which contained the information on the proposed outer limits of the continental shelf of Australia beyond 200-nautical-miles from the baselines from which the breadth of the territorial sea is measured. The claim included the areas of Australia's continental shelf beyond 200-nautical-mile in the Kerguelen Plateau Region, which extended seaward from the

⁷³ For the Brazilian submission, visit the web site of the UN at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm

⁷⁴ For the figures, see Executive Summary of the submission by Brazil, 17 May 2004, pp. 6-8. For Figure 1 – Chart of the outer limit of the Continental Shelf, visit the web site of the UN at: http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_outer_limit.pdf; for Figure 2 – Chart of lines and limits, visit http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_lines_limits.pdf; for Figure 3 – Map with the fixed points at a distance no greater than 60M from each other, visit http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/brafix_points.pdf (Accessed on August 5, 2009).

⁷⁵ United States of America: Notification regarding the submission made by Brazil to the Commission of the Limits of the Continental Shelf, CLCS.02.2004. LOS/USA, 9 September 2004, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_lo_usatext.pdf (Accessed on August 5, 2009)

⁷⁶ See CLCS/54, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of work in the Commission – Nineteenth session, New York, 5 March – 13 April 2007, p. 6, para. 22.

⁷⁷ For information about the islands, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Heard_Island_and_McDonald_Islands (Accessed on August 4, 2009)

baselines of Heard Island and McDonald Islands.⁷⁸

In April 2008, CLCS adopted its recommendations that confirmed the location of the outer limit of Australia's continental shelf in nine distinct marine regions and Australia's entitlement to large areas of shelf beyond 200 nautical miles.⁷⁹ Communications were sent to the Secretary-General of the United Nations by eight countries,⁸⁰ asking CLCS not to take any action with regard to the part of Australia's submission that related to the continental shelf appurtenant to Antarctica in the area covered by the Antarctic Treaty of 1959.⁸¹ But no third party notifications had ever been sent by any countries to challenge Australia's claim to a 200-nautical-mile EEZ and continental shelf for the islands that have no permanent human habitation or economic life of their own, such as Heard Island and the McDonald Islands, in accordance with Article 121(3). However, it is worth noting that in the "Volga" case (Russian Federation v. Australia), Judge Budislav Vukas of the International Tribunal for the Law of the Sea dissociated himself from all statements or conclusions in the judgment of the case which are based on Australia's claim to a 200-nautical-mile EEZ around Heard Island and the McDonald Islands.⁸² Judge Vukas was of the opinion that Heard Island and the McDonald Islands have no right to generate a 200-nautical-mile EEZ in accordance with Article 121(3) of UNCLOS. In his final remarks in the declaration, Judge Vukas wrote:

. . . the establishment of exclusive economic zones around rocks and other small islands serves no useful purpose and that it is contrary to international law.

It is interesting to note that Ambassador Arvid Pardo – the main architect of the contemporary law of the sea – warned the international community of the danger of such a development back in 1971. In the United Nations Seabed Committee he stated:

If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean

⁷⁸ See Executive Summary of the submission by Australia, November 15, 2004, p. 12, available at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm (Accessed on August 6, 2009)

⁷⁹ For summary of the recommendations of CLCS in regard to Australia's submission, visit http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf (Accessed on August 6, 2008)

⁸⁰ They are: the United States, Russian Federation, Japan, Democratic Republic of Timor-Leste, France, the Netherlands, Germany, and India.

⁸¹ For the communications delivered by the eight countries in response to Australia's submission, visit: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm (Accessed on August 6, 2009)

⁸² The "Volga" Case (Russian Federation v. Australia), Prompt Release, Judgment, December 23, 2002, Declaration of Vice-President Vukas, ITLOS Reports 2002, available at: http://www.itlos.org/start2_en.html (Accessed on August 6, 2009)

space beyond national jurisdiction would be gravely impaired.⁸³

The annexed map showing Australia's exclusive economic zone around Heard Island and the McDonald Islands . . . confirms that Ambassador Pardo's fear has been borne out.⁸⁴

In November 2008, Japan made a submission to the CLCS, which contains the information on the proposed outer limits of the continental shelf of Japan beyond 200-nautical-miles from the baselines from which the breadth of the territorial sea is measured in seven distinct areas.⁸⁵ Japan's claim in the Southern Kyushu-Palau Region extends southwards from the insular feature Okinotorishima, which consists of "two eroding protrusions no larger than king-size beds"⁸⁶ and clearly have no permanent human habitation or economic life of their own.⁸⁷ As noted earlier, the Japanese claim was challenged in the third party notifications sent to the Secretary-General of the United Nations by China and the Republic of Korea in February 2009 respectively. By citing Article 121(3) of UNCLOS, China and the Republic of Korea argued that Okinotorishima is not entitled to any continental shelf extending to or beyond 200 nautical miles from the baselines because it is a rock.⁸⁸

The last selected example of state practices is concerned about the legal status of Snake Island (or Serpents Island) that is situated in the north-western part of the Black Sea, approximately 20 nautical miles to the east of the Danube delta. The island is above water at high tide, has a surface area of approximately 0.17 square kilometers, and belongs to Ukraine.⁸⁹ The status of Snake Island was important for delimitation of continental shelf and exclusive economic zones between Ukraine and Romania. If Snake Island were recognized as an island, but not a rock, Article 121, paragraph 2 of UNCLOS should be applied, which would give Ukraine the right to claim a 200-nautical-mile EEZ and a continental shelf around Snake Island. On the other hand, if Snake Island were not an island, but a rock, then in accordance with Article 121, paragraphs 2 and 3 of the UNCLOS, it does not have the right to draw a 200-nautical-mile EEZ and a continental shelf, but only a 12-nautical-mile territorial sea.

⁸³ UN Sea-Bed Committee, Doc. A/AC.138/SR.57, p. 167.

⁸⁴ Declaration of Vice-President Vukas, op cit., para. 10.

⁸⁵ They are: the Southern Kyushu-Palau Ridge Region, the Minami-Io To Island Region, the Minami-Tori Shima Island Region, the Mogi Seamount Region, the Ogasawara Plateau Region, the Southern Oki-Daito Ridge Region, and the Shikoku Basin Region.

⁸⁶ Jon Van Dyke, "Speck in the Ocean Meets Law of the Sea," Letter to the Editor, The New York Times, January 21, 1988, p. A26

⁸⁷ For Japan's submission to the CLCS, visit the UN website at: http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (Accessed on July 27, 2009).

⁸⁸ For China's and Korea's reaction to Japan's submission, see supra notes 26 and 27

⁸⁹ For more information, visit Wikipedia, the free encyclopedia at: [http://en.wikipedia.org/wiki/Snake_Island_\(Black_Sea\)](http://en.wikipedia.org/wiki/Snake_Island_(Black_Sea))

On December 10, 1982, when signing the UNCLOS, Romania made a declaration, the relevant part of which reads as follows:

Romania states that according to the requirement of equity – as it results from articles 74 and 83 of the Convention on the Law of the Sea – the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces to the mainland coasts of the coastal States.⁹⁰

The declaration was confirmed upon Romania's ratification of the Convention on December 17, 1996.⁹¹ On 16 September 2004 the Romanian side brought a case against Ukraine to the International Court of Justice in the dispute concerning the maritime boundary between the two States in the Black Sea.⁹²

During the proceedings, the two parties disagreed as to the status of Snake Island and its role played in the delimitation of the continental shelf and EEZs in the Black Sea. Romania claimed that Snake Island is a rock incapable of sustaining human habitation or economic life of its own, and therefore should have no EEZ or continental shelf, as provided in Article (3) of the UNCLOS. According to Romania, Snake Island should be treated as a “rock” because: “it is a rocky formation in the geomorphologic sense; it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna.”⁹³ Romania claimed that “human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there do not support the development of economic activities.”⁹⁴ Romania added that “[t]he presence of some individuals, . . . because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained ‘human habitation’.”⁹⁵

Ukraine claimed that Snake Island is indisputably an “island” under Article 121, paragraph 2, of UNCLOS, rather than a “rock”. Ukraine contended that the evidence shows that Snake Island can readily sustain human habitation and that it is well established that it can have an economic life of its own. It was added that Snake Island has vegetation and a sufficient supply of fresh water, and that Snake Island “is an island with appropriate buildings and accommodation for an active population.”⁹⁶ Ukraine also argued that Article 121(3) is not relevant to the delimitation of EEZ and continental shelf between Romania and Ukraine because this paragraph is not concerned with

⁹⁰ For Romania's declaration, visit the web site of the United Nations at: http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (Accessed on August 7, 2009)

⁹¹ Ibid.

⁹² International Court of Justice, Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, February 3, 2009.

⁹³ Paragraph 180, *ibid.*

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid., para. 184.

questions of delimitation but is, rather, an entitlement provision “that has no practical application with respect to a maritime area that is, in any event, within the 200-mile limit of the exclusive economic zone and continental shelf of a mainland coast.”⁹⁷

On February 3, 2009, the court delivered its judgment, which divided the sea area of the Black Sea along a line which was between the claims of each country.⁹⁸ Disappointedly, the court did not consider the need to consider the issues concerning whether or not Snake Island is an island or a rock, and should paragraph 2, or paragraph 3 of Article 121 of UNCLOS should be applied.⁹⁹

THE APPLICATION AND INTERPRETATION OF ARTICLE 121(3) TO THE FIVE DISPUTED ISLANDS IN THE SOUTH CHINA SEA

Jonathan I. Charney considered the following existing disputes over ownership of islands in East Asia have the potential to give rise to the legal problem concerning the status of an island and its right to claim a 200-nautical-mile EEZ or a continental shelf, and therefore the possible application of Article 121 of UNCLOS and its interpretation: the Pratas Islands, the Paracel Islands, Scarborough Shoal and the Spratly Islands in the SCS, the Diaoyu-tai/Senkaku Islands, Danjo Gunto and certain of the Ryukyu Islands in the ECS, and the Dokdo/Takeshima (Liancourt Rocks) Islands in the Sea of Japan/East Sea.¹⁰⁰ In addition, there are other disputed offshore small islands or rocks in East Asia that have the same potential to give rise to the questions concerning the application and interpretation of Article 121(3) of UNCLOS such as Suyan (Socotra Rock), Bach Long Vi Island, and Pedra Branca/Batu Butuh. If any of these features are “rocks” that fail the tests of habitation and economic viability, they will not be entitled to their own 200-nautical-mile EEZ or continental shelf.

Commentators hold different views on the legal status of the said features. Michael Richardson, for example, suggests that of the Spratly Islands in the SCS, perhaps only Itu Aba (Taiping Dao) would meet the definition of being a natural island and therefore can claim a 200-nautical-mile EEZ or a continental shelf.¹⁰¹ Pan Shiyong argued that Nanwei Dao (Spratly Island in English, and Dao Truong Sa in Vietnamese), one of the islands in the Spratly archipelago in the SCS, will pass the tests contained in Article 121, paragraph 3, of UNCLOS, and therefore can have its own 200-nautical-mile EEZ and

⁹⁷ Ibid, paragraph 184.

⁹⁸ Ibid., para. 219.

⁹⁹ Ibid., para. 187.

¹⁰⁰ Jonathan I. Charney, *supra* note 42, p. 863.

¹⁰¹ Michael Richardson, *Energy & Geopolitics in the South China Sea: Implication for ASEAN & its Dialogue Partners*, April 2009, Discussion Forum, Institute of Southeast Asian Studies (ISEAS), Singapore, available in: <http://www.iseas.edu.sg/aseanstudiescentre/ascd2.htm> (Accessed on August 7, 2009)

a continental shelf.¹⁰² By citing the discussion in the writings of Jon M. van Dyke and Dale L. Bennett,¹⁰³ and Jeanette Greenfield,¹⁰⁴ Monique Chemillier-Gendreau stated that “most authors have tended to conclude that these islands [the Paracel and Spratly Islands] might well have a territorial sea but that they do not provide entitlement to an exclusive economic zone.”¹⁰⁵ Detailed information and further examination are needed to consider the legal status of these disputed offshore islands.

In this section, Yongxing Dao/Dao Phu Lam, Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island), Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef), Taiping Dao/Dao Ba Binh (Itu Aba, Taiping Island), and Nanwei Dao/Dao Troung Sa (Spratly Island), are selected for further discussion on the question concerning whether or not they can have their own 200-nautical-mile EEZ or a continental shelf. The positions held by the countries concerned on the status of the disputed offshore islands are also addressed.

Before proceeding to the analysis, it is important to take note of the following two points: (1) even if the selected disputed offshore islands can be considered as having passed the tests contained in Article 121(3) with regard to sustaining human habitation or having economic life of their own, and therefore can generate 200-nautical-mile EEZs and continental shelves, it would not necessarily for these islands to have a full effect on the maritime boundary delimitation between the countries concerned in the Sea of Japan, the ECS, the SCS, or in the Strait of Singapore; (2) as pointed out by Ian Townsend-Gault, a logical approach to maritime boundary delimitation in the SCS would be to ascertain the 200-nautical-mile limit from the continental land mass or archipelagic baselines of the littoral states, and then ask what impact, if any, the islands in the SCS have on such claims.¹⁰⁶ However, it is very difficult to start the process of maritime boundary delimitation before the sovereignty issues are resolved.

Yongxing Dao/Dao Phu Lam (Woody Island)¹⁰⁷

Woody Island is the largest in the Paracel archipelago in the SCS. It has been occupied by China since 1974, but also claimed by Vietnam and Taiwan. Its size is

¹⁰² Pan Shiyong, *The Petropolitics of the Nansha Islands – China’s Indisputable legal Case*, Economic Information & Agency, July 1996, p. 162.

¹⁰³ Jon M. van dyke and Dale L. Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, March 13, 1989, mimeographed paper, p. 41.

¹⁰⁴ Jeanette Greenfield, *China’s Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992), p. 164.

¹⁰⁵ Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (The Hague/London/Boston: Kluwer Law International, 2000), p. 25.

¹⁰⁶ Ian Townsend-Gault, “Preventive Diplomacy and Pro-Activity in the South China Sea,” *Contemporary Southeast Asia*, Volume 20, Number 2, August 1998, p. 179.

¹⁰⁷ For the information about the island, visit Wikipedia, the free encyclopedia at: <http://en.wikipedia.org/wiki/Yongxing>

2.1 square kilometers, with an artificial harbor, an airfield with a 2,350 meter runway, a bank, post office, small hospital, library, county-level administrative office, and a small number of governmental officials and residents (less than 1,000, but most of them are fishermen). There is a 2,500 tons supply ship (Qiong Sha 3) that sails from Wenchang Harbor of Hainan Province to Woody Island twice a month with supplies such as drinking water, vegetable, fruit, meat, generator, toilet paper, etc., and about 300 visitors per trip. The distance between Wenchang Harbor and Woody Island is approximately 180 nautical miles and takes about 15 hours one way.

China issued a declaration on May 15, 1996, declaring straight baselines along parts of its coast, which contains two sets of straight baseline systems. One set of the system encompasses the Paracel Islands, in the northern part of the SCS, with 28 basepoints.¹⁰⁸

The archipelagic straight baselines established around the Paracel Islands has been challenged as an violation of UNCLOS, which provides that only archipelagic states are entitled the right to establish such baselines.¹⁰⁹ The United States contends that regardless of whose sovereignty the Paracel Islands comes under, straight baselines cannot be drawn in this area.¹¹⁰ If the straight baselines cannot be established in the Paracel Islands, certainly China can employ the method of normal baselines for the purpose of measuring the breadth of the territorial sea for Woody Islands. Based on the aforementioned information about the island, it appears that Woody Island can pass the tests contained in Article 121(3) of UNCLOS and therefore can have its 200-nautical-mile EEZ and a continental shelf.

Zhongye Dao/Dao Thi Tu/Pagasa (Thitu Island)¹¹¹

Thitu Island, or Pagasa, or Zongye Dao in Chinese, and Dao Thi Tu in Vietnamese, is the second largest island, after Taipin Dao (Itu Aba), in the Spratly archipelago and is one of the nine islands occupied by the Philippines in the SCS. Its size is approximately 0.33 square kilometers and located about 480 kilometers west of Palawan. It has a 1.4 kilometers unconcretized airstrip (named Rancudo Airstrip) which serves both military and commercial air transportation needs. The Philippine Air Force regularly sends fighter jets from Palawan to make reconnaissance missions in Philippine-controlled regions in the Spratly archipelago. The presence of the airstrip in Thitu Island makes such reconnaissance missions easier. There is also a port, called Loneliness Bay.

¹⁰⁸ Limits in the Seas, No. 117, July 9, 1996, China: Straight Baseline Claims, The Geographer, Office of the Geographer, Bureau of Intelligence and Research, available at: <http://www.law.fsu.edu/library/collection/LimitsinSeas/ls117.pdf> (Accessed on August 10, 2009)

¹⁰⁹ See Articles 46 and 47 of UNCLOS.

¹¹⁰ Op.cit., p. 8.

¹¹¹ For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/thitu_Island

Around 30-50 Filipino soldiers are stationed on the island, together with about 300 civilian people at its height, and nowadays about 55. The Philippine navy vessel sails to Thitu Island once a month to supply the island's daily needs. The island has 20 houses, a community center, a clinic, an eight floor watch tower, desalination plant, several electricity generators, weather station, and mobile launch tower.¹¹²

The island is claimed by China, Vietnam, Taiwan, and the Philippines. In response to the visit of Taiwan's President Chen Shui Bian to the disputed Taiping Dao (Itu Aba) in the Spratly Islands by C-130 cargo plane in February 2008, the Philippines began to renovate Pagasa airstrip in March 2008,¹¹³ which was followed by the visit of Philippine Air Force Chief Lt Gen Pedrito S Cadungog in May 2008.¹¹⁴ He and his staff conducted an ocular inspection of the repair and sustained improvements of the Rancudo Airstrip and other minor facilities on the island. In addition, it was reported that the Philippines intended to develop Thitu Island into a tourist destination.¹¹⁵

Based on the aforementioned information, it appears that Thitu Island can sustain human habitation and an economic life of its own and therefore pass the tests contained in Article 121(3) of UNCLOS. Accordingly whichever country establishes sovereignty over the island can use it as a base point from which a 200-nautical-mile EEZ and a continental shelf are claimed.

Taiping Dao/Dao Ba Binh/Ligaw Island (Itu Aba, Taiping Island)¹¹⁶

Itu Aba (Taiping Dao in China, Dao Ba Binh in Vietnam, and Ligaw in the Philippines) is the largest of the Spratly Islands in the SCS, with a total land area of 0.49 square kilometer. Itu Aba, disputed by China, Taiwan, Vietnam, and the Philippines, is controlled by Taiwan. Administratively it is under the jurisdiction of Kaohsiung City. The distance from Taiwan to the island is about 1,600 kilometers. There is a 1,150 meters long runway completed late 2007. In February 2008, Taiwan's former president landed the island by air force C-130 cargo plane to inaugurate the beginning use of the

¹¹² "The Philippines Plans aggressively to occupy Huangyen Dao," Xinhuanet, March 3, 2009, available at: http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/world/2009-03/03/content_10933164.htm (in Chinese, assessed on July 26, 2009); see also John M. Glionna, "Squatters in paradise say it's job from hell," Los Angeles Times, July 26, 2009, available at: <http://www.latimes.com/news/nationworld/world/la-fg-paradise-prison26-2009jul26,0,3103335,full.story> (accessed on August 11, 2009)

¹¹³ Teresa Cerojano, "Philippines to Fortify Airstrip, Troop Quarters in Spratlys," The Irrawaddt, March 28, 2008, available at: http://www.irrawaddy.org/article.php?art_id=11154 (Assessed on August 11, 2009)

¹¹⁴ PAF Press and Broadcast Release, Public Information Office, Headquarters Philippine Air Force, May 1, 2008, p. 30.

¹¹⁵ "Spratly islands prepped to be Philippine tourist spot," eTurbonNews, April 5, 2008, <http://www.eturbonews.com/2012/spratly-islands-prepped-be-philippine-tourist>

¹¹⁶ For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Itu_Aba_Island

airstrip. At present, more than 200 coastal guard personnel and a number of soldiers from Taiwan's Navy and Air Force are stationed on the island. Taiwan's Navy and Coastal Guard send vessels regularly to the islands three to four times a year. Cargo vessels of private shipping companies also sail to Itu Aba once or two times a month to supply the island's daily needs. In 2007, the City Government of Kaohsiung, in accordance with Article 45 of Taiwan's Fisheries Law, promulgated the establishment of a sea turtle protected area in Itu Aba. In March 2008, it was proposed by the then presidential candidate May Ying-jeou in his ocean policy to establish a marine peace park in Itu Aba.

Itu Aba is the largest and the only island in the Spratly archipelago with fresh water, and has the capacity to sustain human habitation and economic life of its own. Accordingly, it can be established that it is an Article 121(2) island and thus can generate a 200-nautical-mile EEZ and a continental shelf.

Danwan Jiao/Celerio/Layang Layang/Dao Hoa Lau (Swallow Reef)¹¹⁷

Swallow Reef, known as Layang-Layang Island in Malaysia, Danwan Jiao in China, Celerio in the Philippines, and Da Hoa Lau in Vietnam, is an oceanic atoll of the Spratly Islands situated in the middle of the SCS, approximately 300 kilometers northwest of Kota Kinabalu, Sabah. It takes one hour flight from Kota Kinabalu. The total land area of Swallow Reef is approximately 0.1 square kilometer. In 1992, Malaysia began to develop the island into a scuba diving resort. At present, the island is divided into two sections – one is used by the Malaysian navy, and the other is a scuba dive resort. There is a navy base and a 1,000 meters runway on Swallow Reef.

The Layang Layang Island resort complex is made up of 6 blocks of tropical hardwood timber structure housing 86 well furnished guest rooms. All guest rooms are equipped with remote controlled air-conditioner, telephone, television with in-house videos & programmes from regional satellite broadcast, private hot/cold shower and toilet, 2 queen-sized beds and a private balcony. The reception block houses a lounge bar, reception counter, 150 seats restaurant and a fresh water swimming pool. International telephone & fax services are available. As all guests are on full board basis, meals are presented daily in either buffet setting or set menus with a main focus on Asian cuisine intersperse with international favourites. The island scuba diving resort can also cater to seminars, meetings, conferences and incentive group functions. There are adequate conference and banqueting facilities, with the ability to host up to 200 persons.¹¹⁸

The island, claimed by China, Vietnam, Taiwan, and Malaysia, is under

¹¹⁷ For information about the island, visit Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Swallow_Reef

¹¹⁸ For information about the resort, "Layang Layang Island: The Best Dives in Asia," available at: <http://www.avillionlayanglayang.com/faq.html>

Malaysia's control. The Malaysian soldiers are stationed on the island and a number of civilian people, including diving masters and assistants from foreign countries, who are employed to help run the scuba diving resort from March to September, which are considered the most suitable season for scuba diving activities there. Marius Gjetnes argued that Swallow Reef lacks capacity to sustain human habitation or economic life of its own, and therefore must be classified as an Article 121(3) rock.¹¹⁹ However, based on the selected interpretations that were provided in Section III of this paper, it seems that the scuba diving resort and the people working on the island can be used as proof of a sustainable human habitation and economic life of its own. Accordingly, it can be argued that Swallow Reef can have an EEZ and a continental shelf.

Nanwei Dao/Dao Truong Sa/Lagos (Spratly Island)¹²⁰

Spratly Island (proper), or Nanwei Dao in China, Dao Truong Sa in Vietnam, and Lagos in the Philippines, is one of the islands in the Spratly archipelago situated southwest of the SCS. It is the fourth largest Spratly islands and the largest among Vietnamese occupied Spratly islands. Its land size is approximately 0.15 square kilometer and has a 600 meter runway, radio launch tower, heliport, two wharves, and about 550 soldiers and civilian people. The island is claimed by China, Taiwan, Vietnam and the Philippines. In 2004, a tourist trip was arranged by the Vietnamese government to visit the Vietnamese-occupied Spratly islands, including Nanwei Dao. It was reported that Vietnam has a plan to develop the island into a tourist site.¹²¹

Based on the available data, it can be argued that Nanwei Dao can pass the tests contained in Article 121(3) and thus can generate a 200-nautical-mile EEZ and a continental shelf in accordance with Article 121(2) of UNCLOS.

Findings and suggestions

In order to answer as close as possible the question concerning whether or not the five disputed offshore features in the South China Sea are entitled to a 200-nautical-mile EEZ and a continental shelf under international law, relevant data has been collected and examined in accordance with the requirements provided for in Article 121, paragraph 3, of UNCLOS and other factors such as size, contiguity to the principal territory, and geological formation. As shown in Table 1, while the size of Yongxing Dao/Dao Phu Lam (the largest in the Paracel Islands), Taiping Dao/Dao Ba Binh/Itu Aba (the largest in the Spratly Islands), Zhongye Dao/Dao Thi tu/Pagasa/Thitu Island, and Nanwei Dao/Dao Truong Sa (Spratly Island) is smaller than 1 square kilometer, they all

¹¹⁹ Marius Gjetnes, *The Legal Regime of Islands in the South China Sea*, Masters Thesis of Law, Fall 2000, Department of Public and International Law, University of Oslo, p. 81.

¹²⁰ For the information about the island, visit Wikipedia, the free encyclopedia at: [http://en.wikipedia.org/wiki/Spratly_Island_\(proper\)](http://en.wikipedia.org/wiki/Spratly_Island_(proper))

¹²¹ For more information, visit http://www.fyjs.cn/bba/htm_data-169/0712/118466.html

have airstrips, soldiers, some with civilian residents, post office, clinic, bank, library, or community center, and the potential to be developed into marine economic tourist sites, and thus do not appear fall with Article 121(3). As far as Swallow Reef is concerned, while its size is less than 1 square kilometer, and the scuba diving resort on the island was developed as an a result of artificial construction works done by Malaysia since 1992, it seems that it could have its own 200-nautical-mile EEZ and a continental shelf because of the capability to sustain human habitation and economic life of its own.

CONCLUDING REMARKS

At UNCLOS III, a number of states proposed or gave their support for the entire deletion of Article 121, paragraph 3, of the draft law of the sea convention, that include Japan, Brazil, and France. The main reason for submitting the proposal or giving the support was the concern about the possible maritime space extended from their small uninhabitable offshore islands. As stated by ITLOS Judge Choon-ho Park, because of the geographical circumstances of islands throughout the world are different, ambiguities had to be allowed, in particular, in Article 121(3) of UNCLOS.¹²² Brazil, France, and Japan ratified UNCLOS on December 22, 1988, April 11, 1996, and June 20, 1996 respectively, and bear the treaty obligation to abide by all of the provisions of the convention, including Article 121(3). However, mainly because the article lacks precision and there exists no official or authoritative clarification of the article, state practices are not consistent. The submissions made to the Commission on the Limits of the Continental Shelf (CLCS) by Japan, Brazil, Australia, and France, and the recommendations adopted by the Commission to confirm the outer limit of the continental shelves of the states concerned have made it become more confusing with regard to the application and interpretation of Article 121(3). The decision made by the International Court of Justice in Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) in February 2009 not to consider the issue regarding whether or not Snake Island is an island or a rock also has left “some stones unturned”, borrowing the words of Judge Choon-ho Park.¹²³

If Japan, Brazil, and France, are able to claim a 200-nautical-mile EEZ and a continental shelf for the Okinotorishima, Sanit Peter and Paul Rocks, and Clipperton Island, respectively, it is difficulty to prevent other countries from not making similar claims. Judging from the recent developments in the Sea of Okhotsk, the Sea of Japan/East Sea, the ECS, the SCS, and the Strait of Singapore, it can be expected to see an increase of maritime disputes in the South China Sea and East Asian seas. Most, if not all, of these disputes will involve the application and interpretation of Article 121(3)

¹²² See ITLOS Judge Choon-ho Park’s paper entitled “The Changeable Legal Status of Islands and ‘Non-Islands’ in the Law of the Sea: Some Instances in the Asia-Pacific Region,” was included and published in *Bringing New Law to Ocean Waters*, edited by David D. Caron and Harry N. Scheiber (Leiden, Netherlands: Martinus Nijhoff Publishers, 2004), Ch. 21, pp. 490-491.

¹²³ *Ibid.*

of UNCLOS. The sovereignty issues will make it become more complex and difficult to manage the disputes. In particular, China's EEZ and continental shelf claim in the East China Sea and South China Sea will have great potential to influence maritime international relations in East Asia.

Since there exists no official or authoritative clarification with regard to the application and interpretation of Article 121, paragraph 3, of UNCLOS, and there are no institutional apparatus established for reviewing, monitoring, and supervising how well state parties observe their duties under the Convention, coastal states are exercising extensive powers to claim larger sea areas by applying or interpreting Article 121(3) in accordance with their national maritime interests. While there does exist the regular Meeting of the State Parties to the Law of the Sea Convention (SPLoS), it is geared toward administrative and financial matters. In addition, there is also an annual review of ocean issues and the law of the sea by the UN General Assembly, which relies on the report prepared by the Secretary-General of the United Nations as well as the recommendations of the Open-Ended Informal Consultative Process of Oceans and Law of the Sea. The General Assembly's annual review occasionally pays attention to national ocean policies and developments related to UNCLOS, but it does not perform the multitude of tasks carried out by the compliance bodies that are established to assist states to meet the letter and spirit of the Convention's wording.¹²⁴ Accordingly, Timo Koivurova suggested that "[i]f UNCLOS had provided an institutional apparatus similar to that of modern conventions, national ocean policies and laws probably would have developed more uniformly and have been more closely related to the wording and expectations of the UNCLOS".¹²⁵

It is hoped that this paper has successfully demonstrated the need to develop an agreeable objective test so as to remove all doubt as to which rocks would be affected by Article 121(3). In addition, before Article 121 is amended, the states in the South China Sea area might want to consider the possibility of establishing a special regional organ, such as an institutional ocean space institutions that were proposed by Malta in 1971,¹²⁶ or conclude a regional agreement, such as a Regional Code of Conduct in the SCS that is being discussed between China and the members of ASEAN, in which the application and interpretation of Article 121(3) is clarified. The coastal states in the region are also encouraged to deal with their maritime disputes by adopting the concept

¹²⁴ Timo Koivurova, "A Note on the European Union's Integrated Maritime Policy," *Ocean Development and International Law*, Vol. 40, 2009, p. 172.

¹²⁵ *Ibid.*

¹²⁶ In 1971, a draft ocean space treaty was submitted by Malta, in which it was proposed to establish the International Ocean Space Institutions. The institutions may accept from any state the transfer to their administration of reefs, sandbanks, or islands less than 10,000 permanent inhabitants. Reefs, sandbanks, or islands transferred to the administration of the Institutions shall be used by the Institutions only for international community purposes, such as scientific stations, nature parks or preserves, etc. *The Law of the Sea: Regime of Islands*, *Supra* note 8, pp. 7-8, para. 14(c).

of “common heritage of mankind” or by taking policy measures to preserve the marine environment through devices like the establishment of marine protected areas or marine peace park. Last but not least, as suggested by Judge Choon-ho Park 18 years ago, the coastal states neighboring the South China Sea can also learn from the Canadian and American wisdom in dealing with their disputes over the ownership of Machias Seal Island that is situated about 10 miles off the northeast coast of Maine, U.S.A.¹²⁷

¹²⁷ Judge Park wrote: “Both Canada and the United States claim the ownership of the famous bird sanctuary. Canada has run the lighthouse since 1832, and the United States traces its claims back to the time of the American Revolution. The American and Canadian bird-watching businesses share the trade by landing bird-watching tourists on the disputed island by turns and paying taxes to their respective governments. This is no settlement of the dispute. If the present generation is not wise enough to settle territorial disputes as Chinese leader Deng Xiao-ping wisely noted on the occasion of his visit to Tokyo in October 1978, we in East Asia can learn from the Canadian and American wisdom.” See Choon-ho Park, “Territorial Disputes Over Uninhabited Islands: The Case of South China Sea,” paper presented at the South China Sea Meeting held in Hong Kong, May 25-30, 1991, p. 6.

SOUTH CHINA SEA: PLATFORM FOR PROSPERITY OR ARENA FOR ALTERCATION?

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ABSTRACT

The South China Sea provides a critical passage to a significant volume of global seaborne trade and a lifeline for East Asian economies which depend on energy imports from the Middle East. The sea also features stunning mega biodiversity and rich fishing ground and is believed to contain prolific deposits of hydrocarbon energy resources. Parts of the sea and its islands and other maritime features are the subject of overlapping territorial claims by several nations in the region. Some claimants have defended their interests in a vigorous manner which have led to conflicts and have stoked tension in the sea. It is feared that if not managed and settled amicably, these claims may turn the sea into a flashpoint that will sour relations among countries in the region and threaten its prosperity and stability. This paper highlights the importance of the sea as a critical global trade waterway and a key energy sealane as a prelude to discussing the overlapping claims by several nations on parts of the sea. It warns against overzealous acts by nations to stake their claims that may pose a threat to security, stability and prosperity in the region and may invite the presence of outside powers keen to capitalize on such situation. It strongly advocates using trade and economic development as a common denominators to foster cooperation among the nations in the region as a way to cool off tension arising from their claims in the sea. The paper emphasizes that a common vision is needed for all sides to view the sea and its parts as belonging to no one but benefiting everyone.

Keywords: South China Sea, maritime trade, overlapping territorial claims

Nazery Khalid heads the Center of Maritime Economics and Industries at Maritime Institute of Malaysia (MIMA), a maritime policy think-tank. The thrust of his center's research is in the fields of ports, shipping, maritime trade, offshore energy and maritime ancillary services such as shipbuilding / ship repairing, ship financing and logistics services. Nazery is a regular speaker at many maritime events and has thus far spoken at over 70 seminars and conferences worldwide. He has also conducted workshops on ship financing and teaches maritime economics to MBA in Shipping Management students at a Malaysian university. To date, he has published over 140 articles (print and online), papers in refereed journals, op ed pieces and chapters in books, and has authored books on ship financing and multimodal transport in Malaysia, in addition to editing two conference proceedings. He has also undertaken several consultancy works relating to ports and shipping. Nazery holds a Bachelor of Arts degree in Business Administration from Ottawa University, Kansas, USA and an MBA from International Islamic University, Malaysia. He is currently pursuing his PhD in Management (by Research) at University Tun Abdul Razak, Malaysia.

Air yang tenang jangan disangka tiada buaya
Do not think still waters contain no crocodiles (Malay proverb)

STRATEGIC SEA, ESSENTIAL AREA

The importance of South China Sea (SCS) (Diagram 1) as a sea line of communication (SLOC)¹ is well documented. This great sea stretches from the west coast of Singapore in South East Asia all the way to Taiwan PRC in the Far East. It contains over 200 islands, many of which are submerged islets, rocks and reefs which are unsuitable for human habitation.² The sea is also said to host a stunning amount of biodiversity and marine resources, including huge sources of hydrocarbon energy, fisheries and 30% of the world's coral reefs.³ Providing the shortest route between the Pacific and Indian Oceans, SCS is a virtual maritime superhighway that acts as a conduit to facilitate trade between China and India and between East and South East Asia and the Middle East since ancient times to this day.

Diagram 1: Map of South China Sea



Source: <http://upload.wikimedia.org/wikipedia/commons/5/53/SouthChinaSea.png>

¹ The concept of sea lane of communication describes a sealane which facilitates significant volume of trade and is heavily used by merchant vessels. Such a sealane also has high strategic values from a military point of view, and contains chokepoints that can lead to its closure in the event of incidents such as collision, pollution and attack on ships.

² "South China Sea: Background" (March 2008). Retrieved October 23, 2009 from Energy Information Administration website: <http://74.125.153.132/search?q=cache:dzk497f64sMJ:www.eia.doe.gov/emeu/cabs/schina.html+south+china+sea+area&cd=3&hl=en&ct=clnk&gl=my>

³ "The South China Sea" (2009). Retrieved October 23, 2009 from WWW The South China Sea Virtual Library : <http://community.middlebury.edu/~scs/intro.html>

Straddling over one of the largest maritime areas after the five oceans, SCS acts as a conduit to East-West trade. It facilitates much of essential oil imports by resource-hungry countries in the Far East - namely China, Japan, Taiwan PRC and South Korea - from mainly the Middle East and increasingly from South America and Africa. They also import raw materials and commodities such as gas, coal and primary commodities from South Asia, South East Asia and Australia. All kinds of goods produced by these Asian economic powerhouses are also exported to their trading partners via this pivotal body of water. The sea also facilitates intra-regional trade of South East Asia (SEA), essentially a maritime region, and between SEA and East Asia. Further underlining its importance, it is estimated that SCS facilitates the movement of over half of the world's oil tanker traffic and over half of its merchant vessels (by tonnage) annually.⁴

The SCS expanse hosts one of the world's most vibrant economic regions and is home to several major maritime nations boasting significant shares of world merchant tonnage and port throughput. Along its coast are among some of the world's biggest and busiest container ports such as Singapore, Hong Kong and Kaohsiung ports. SCS borders countries such as China, Taiwan PRC, Thailand, Malaysia and Singapore, Indonesia, Brunei and Philippines; nations which contribute significantly to the global maritime trade.

The massive importance and calm appearance of SCS belies the simmering tension arising from overlapping territorial claims and counterclaims of areas and features of the sea by nations in the region. The long history of strife in the region has left a legacy of disputes and tension in the sea that can potentially threaten peace in the region. It unwittingly provides a stage for powerful nations to flex their muscles and display power projection. Analysts have expressed worries that the sea will one day become a battleground among military powers intend to exert their supremacy and protect their interests. On the basis of a recent announcement by a certain regional naval power to increase patrols in disputed areas in the sea to fortify its claims, there is some currency in those concerns.⁵

Such developments - coupled with unflinching positions taken by nations to protect their interests, the outright dismissal of the claims of others, and the distorted interpretation of international laws - gives rise to anxiety among less powerful claimant nations.⁶ If the tension is left to simmer, it could come to boiling point and pose a serious threat to stability in the sea and its surrounding areas. It could also lead to intervention of outside powers which are always sniffing out for any opportunity to establish a presence and play a role in this region.

⁴ Ibid.

⁵ "China to increase naval power" (2009, April 17). Retrieved October 26, 2009 from British Broadcasting Corporation Online : <http://news.bbc.co.uk/2/hi/8003515.stm>

⁶ Ibid. China was reported to describe the claims by other nations on oil-rich parts of the South China Sea where it also has interest as "unfounded territorial claims".

SOUTH CHINA SEA AS A TRADE SEA-LANE

The SCS occupies an area approximately 648,000 square miles⁷ and features some of the world's most strategic energy shipping routes that serve much of the maritime trade between East Asia and South Asia, Persian Gulf, Africa, Europe and the Americas. A glance at the map of the SCS region reveals why. The region's islands and peninsula are wedged between the Pacific Ocean to the east and the Indian Ocean to the west, while its north-south maritime path links Australia and New Zealand to the vibrant East Asian economic region. Due to the littoral nature of most nations in the SCS vicinity, much intra-regional trade depends on the shipping lanes in SCS, as does much of the trade between nations in the region and the rest of the world. Put it simply, maritime trade of the SCS region and many other economic regions with which it trades would not thrive without the safe passage provided by the shipping lanes of SCS.

Merchant shipping (by tonnage) in SCS mainly features the transportation of raw materials to East Asian countries, but the share of containerized cargo is fast increasing. The region contains some of the world's leading trading nations, including China, Taiwan PRC, Japan and South Korea which export all kinds of manufactured goods to the rest of the world and also import a variety of raw materials to feed their huge population and booming economy. The outsourcing phenomenon has generated intense manufacturing and assembly activities of a stunning range of products in the SCS region which offer lower costs of production compared to more economically advanced regions. This, coupled with the rapid industrialization of countries in the SCS region, has catalyzed the growth in container trade in the region to dizzying levels.

It is therefore not surprising that SCS figures prominently in the world maritime trade equation by way of the region's contribution to the world's merchant fleet (see Table 1). The impressive growth of the economies of the region has boosted the merchant fleet capacity of regional nations in their pursuit of expanding their trade volumes and to increase their national merchant shipping tonnage to support their growing trade.

⁷ Burgess, P. (2003). "The politics of the South China Sea : Territoriality and international law. Security Dialogue", 34(1). March 2003. Retrieved November 12, 2009 from : <http://www.southchinasea.org/docs/Burgess,%20Politics%20of%20the%20South%20China%20Sea-Territoriality%20and%20.pdf>

Table 1: Merchant fleet capacity of selected South China Sea nations 2008

Country	Total fleet capacity 2008 (mil. DWT)	Total as a percentage of world total (as of 1 Jan 2008)
China	84.882	8.18
Hong Kong SAR	33.424	3.22
Singapore	28.632	2.76
Taiwan PRC	26.150	2.52
Malaysia	11.167	1.08
Indonesia	7.258	0.70
Vietnam	4.586	0.44
Thailand	4.022	0.39
World Total	1,038.297	

Source: UNCTAD (2008)

The SCS region's commanding share of global merchant shipping underlines its importance as a major seaborne trade and shipping center. Where the center of gravity in maritime trade and merchant shipping was once in the west, it has now shifted to the east, partly as a result of the rapid industrialization and stunning economic growth of countries in the SCS region. Booming global trade prior to the current global recession, pro-business policies, rapid expansion of trade and maritime infrastructures, globalization and liberalization contributed to the explosive growth of seaborne trade in the SCS region and the littoral economies in the SCS region in the last decade.

The various phases of economic growth in the region – namely the growth of Japan and South Korea after World War II, the emergence of Singapore and Hong Kong as major trading shipping hubs, and the rise of the 'Asian tigers' such as Malaysia and Thailand – all coincided with the rapid growth of their shipping sectors and merchant tonnage to support their growing trades. The rise of China as an economic superpower has significantly spurred seaborne trade and the growth of the maritime sector in the SCS and its vicinity. Many nations in the SCS region have become increasingly aware of the need to attain self-sufficiency in shipping as a means to enhance their trade competitiveness. The developing nations among them are also mindful of the need to attract foreign direct investment (FDI) to boost economic growth, and to reduce their reliance on ships made at foreign shipyards and maritime services provided by foreign companies.

The SCS region forms a lion's share of the world demand for bulk items, and played a major part in pushing freight rates for bulk carriers to record highs in 2008.⁸

⁸ The Baltic Dry Index, the benchmark index that tracks the performance of the shipping bulk trade, touched an all-time high level of 11,793 points on 20 May 2008.

Shipment of dry bulk items namely coals and iron ore from Australia and Brazil, and grains heading to energy hungry, rapidly developing and populous East Asian nations, fueled the growth of bulk shipping prior to the global recession. Growing demand from the region's nations for dry bulk goods such as grains to feed their growing population, and break bulk items such as iron ore and coal to support their rapid industrialization and construction works, has resulted in the corresponding growth of tonnage in the bulk segment. Trade liberalization, growth of maritime and trade infrastructures, rising consumer demand and the trend of multinational companies (MNCs) to outsource their activities to many countries in this region have combined to catalyze the growth in container trade, throughput and shipping in the area. As for general cargo, huge demand from the SCS region for items such as refrigerated cargoes and specialized cargoes, and the increasing popularity of cruise in the SCS waters have contributed to the increase in tonnage of general cargo ships.

The ports and shipping sector in SCS has undergone rapid expansion as the volumes of bilateral trade of regional countries, intra-regional trade and the region's trade with its other economic regions continues to expand at an impressive rate. Several SCS region's countries have emerged among the world's leading maritime nations, thanks to their growing merchant fleet and port throughput, and their increasing trade volumes with their major trading partners. The number of ship calls in regional ports, many of which carry intra-regional trade, has increased substantially over the years.

Growing intra-regional trade and the promotion of trade and transport initiatives within the SCS region such as the Asia Pacific Economic Council (APEC), ASEAN Free Trade Area (AFTA) and Brunei-Indonesia-Malaysia-Philippines East Asia Growth Area (BIMP-EAGA) platform have had a significant impact on the growth of maritime trade and the development of maritime infrastructures in the region. Significant investments have been put into the maritime sector in the SCS region to facilitate the trade of its littoral nations; not surprising given the geographical features, trade composition and economic characteristics of the SCS region's nations'.

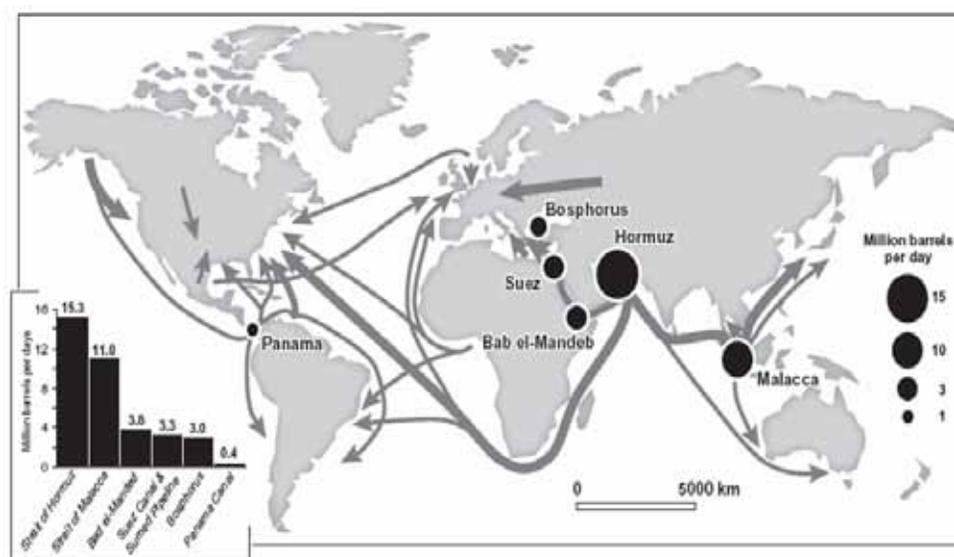
The tremendous growth of ports and shipping activities in the region over the years underlines the value of the maritime sector to the region's socio-economic well-being. Ports and shipping, and the maritime ancillary services, are recognized as essential facilitators of the region's trade, hence crucial to its economic prosperity and the wellbeing of its people. Although the growth in maritime trade and shipping sector in the SCS region was halted by the global credit crunch and economic downturn, there should be no doubt that trade volumes and demand for shipping trade will rebound once the financial markets recover and the world economy is back on track. With an estimated 80% of the world's trade being carried by seaborne transport,⁹ and the SCS region commanding a major slice of the global trade, the long term perspective for maritime trade and the shipping sector in the area should be promising.

⁹ UNCTAD (2008). *Review of Maritime Transport*. Geneva : UNCTAD. xiv.

SCS AS A KEY ENERGY SEA-LANE

Various literature reviewed suggest that a third of the world's oil trade passes through SCS.¹⁰ Diagram 2 highlights the importance of the Straits as a key energy route and chokepoint for the flow of crude oil between the Gulf and the economies in East Asia, which passes through SCS.

Diagram 2: World shipping routes of crude oil



Source: Straits, passages and chokepoints: A maritime geostrategy of petroleum distribution Retrieved 30 October 2009 from http://people.hofstra.edu/faculty/Jean-paul_Rodrigue/downloads/CGQ_strategicoil.pdf

The emergence of China as an economic power has resulted in huge demand for oil and gas to power its booming economic growth and to cater to growing ownership of passenger vehicles. The world's populous nation is already its second largest consumer of oil and the third largest net importer of the 'black gold' after the US and Japan.¹¹ Such is China's rapacious appetite for these goods that it has resorted to importing them from places as far away as Africa and Latin America to ensure adequate supply and to lessen its dependency on oil traditionally obtained from the Middle East. Due to this, East Asia has emerged as a key center for the unloading of crude oil, a fact reflected by the heavy tanker traffic in SCS.¹²

¹⁰ See Burgess (2003).

¹¹ "China energy profile" (October 13, 2009). Retrieved October 23, 2009 from Energy Information Administration : http://tonto.eia.doe.gov/country/country_energy_data.cfm?fips=CH

¹² According to UNCTAD, developing Southern and Eastern Asia accounts for 424.8 million tons of unloading of tanker cargo, which reflects the region's growing energy requirements and developing intra-regional South-South trade.

Although SCS is an energy rich sea, much of the region's energy needs come from imported sources, especially from Middle Eastern and African countries and energy resources-rich SCS nations such as Malaysia and Indonesia. An estimated 80% of the crude oil used by China, Japan, Korea and Taiwan passes through SCS.¹³ The SCS provides the main route for much of these oil imports, especially from the Gulf, to be transported to those countries. As the region's energy demands grow to match its growing population, industrialization and robust economic growth, its reliance on imported oil is set to increase. It is expected that demand for oil from East Asia will grow 2.7%, annually from 14.8 million barrels per day (mmbpd) to 29.8 mmbpd by 2030, with China accounting for half of this demand.¹⁴ This will further enhance the importance and strategic value of SCS as an energy sealane in facilitating the transportation of the region's energy needs.

AN UNWITTING CHESSBOARD FOR CHECKMATES

Where there was once one giant land mass in the region aeons ago, there are now continents and nations. With them came borders that restrict movements and multiple interests that put countries at loggerheads. Powerful nations of the day sought to conquer other nations to expand their territories and to gain access to natural resources and riches not available in their own countries.

The quest for territories and conflicts over boundaries are not exclusive to terra firma. Countries extend their border claims to the maritime realm as a means of power projection and to exert their superiority. Only conceptually the seas appear as an expanse unbroken by borders and checkpoints which figure prominently on land. Truth is, the seas provide an equally dramatic stage for nations to stake sovereign claims over areas, as does the land. In pursuit of their national interests, countries set aside goodwill and diplomacy, and even respect for the needs and concerns of others. It is sad to lament that the ancient saying 'the land divides but the sea unites' remains more of a romantic ideal than a statement of fact.

Few maritime areas in the world provide a potentially explosive backdrop for nations pursuing their maritime interests than the SCS. This sprawling maritime area is increasingly commanding keen international attention for being an unwitting chessboard in the contest of grandmasters. Its historical background and strategic, political and economic importance combine to attract the interest of many countries. Providing an extremely strategic location from an economic and military viewpoint,

¹³ "Country analysis brief: South China Sea" (2008). Retrieved November 17, 2009 from Energy Information Administration: http://www.eia.doe.gov/cabs/South_China_Sea/Background.html

¹⁴ "Oil gas resources and terminals in South China Sea" (May 9, 2006). In Oil & Gas Articles. Retrieved November 5, 2009 from: <http://www.oilgasarticles.com/articles/474/1/Oil-Gas-Resources-and-Shipping-Terminals-in-South-China-Sea/Page1.html>

and hosting a prolific amount of hydrocarbon energy riches, it is no wonder that parts of the SCS have become the subject of intense claims and counterclaims by a number of nations. There are also competing security priorities in the sea that contribute to the rising of the temperature there and threatening the balance of power in the region.¹⁵

Over the years, several events and territorial claims that underscore the tension in the SCS have occurred. Some resulted in full blown deadly affairs between navies, while some continue to simmer to the extent that many analysts fear that it would not be long before they come to a head. It is feared that the presence of warships in SCS by nations adamant to protect their interests will result in the militarization of the waters. This, combined with excessive claims, unflinching positions, aggressive military posturing, and long history of animosity among some of the claimants, makes for a potentially combustible cocktail that may trigger serious conflicts in the SCS.

The use of different names by different countries for SCS and its islands underscore the sharply divergent views, positions and interests in the sea. Although known worldwide by its English name, SCS is officially called Bien Dong (East Sea) in Vietnam, while the Philippines refers to the part of SCS in its territorial seas as Dagat Luzon (Luzon Sea). Even the islands in the SCS are known by different names by different nations. The disputed islands of Senkaku, so called by Japan, are known as Diaoyu to China.

Despite the fact that almost all the littoral nations in the SCS are parties to the United Nations Convention on the Law of the Sea (UNCLOS) 1982, they have not been able to use the convention to resolve ownership disputes in the sea. The guidelines outlined in UNCLOS regarding the status of islands, continental shelves, Exclusive Economic Zones (EEZ), enclosed seas, and territorial limits call for countries with overlapping claims over them to resolve their disputes based on good faith and negotiation.¹⁶ Sadly, this call is not always observed in among parties with territorial claims in SCS. Some have even resorted to taking actions that have resulted in casualties and have stoked tension in the sea.

Several military clashes involving nations claiming parts of the SCS in the waters

¹⁵ For a succinct analysis on the military interests in the South China Sea, see Rosenberg, D. (April 13, 2005), "Dire straits: Competing security priorities in the South China Sea. In Japan Focus". Retrieved November 12, 2009 from Japan Focus: <http://japanfocus.org/-David-Rosenberg/1773>

¹⁶ Article 279 (Obligation to settle disputes by peaceful means) in Part XV on Settlement of Disputes (Section 1 – General Provisions) of UNCLOS states that "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance of Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 3, paragraph 2, of the Charter". See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs (1983), *The Law of the Sea*, Hampshire, UK : Palgrave Macmillan, 129.

in the between the 1970s to the 1990s are listed in Table 2.¹⁷ They serve as a grim reminder of how vulnerable the sea is to quarrels that can undermine good relations among the region's nations and pose a serious threat to regional security and unity. Tension in the sea may be anathema to the smooth flow of international seaborne trade and socio-economic development in the region. Anything but a peaceful SCS is not desirable not only to the region's nations which depend heavily on the sea as a conduit to their trade and economic growth, but to the international community that depends on smooth passage of merchant ships to facilitate much of global trade.

¹⁷ Military clashes in South China Seas (2009). Retrieved November 3, 2009 from GlobalSecurity.org : <http://www.globalsecurity.org/military/world/war/spratly-clash.htm>

Table 2: Military clashes in the South China Sea in the 1970s-1990s

Date	Countries involved	Military action
1976	China, Vietnam	Chinese seized Paracel Islands from Vietnam
1988	China, Vietnam	Chinese and Vietnamese navies clashed at Johnson Reef in the Spratly Islands. Several Vietnamese boats were sunk and over 70 sailors killed.
1992	China, Vietnam	Vietnam accused China of drilling for oil in Vietnamese waters in the Gulf of Tonkin, and accused China of landing troops on Da Luc Reef. China seized almost 20 Vietnamese cargo ships transporting goods from Hong Kong from June - September
1994	China, Vietnam	China and Vietnam have naval confrontations within Vietnam's internationally recognized territorial waters over oil exploration blocks 133, 134, and 135. China claimed the area as part of its Wan Bei-21 (WAB-21) block.
1995	China, Philippines	China occupied Philippines-claimed Mischief Reef. Philippines military evicted the Chinese and destroyed Chinese markers.
1995	Taiwan, Vietnam	Taiwanese artillery fired on Vietnamese supply ship.
1996	China, Philippines	Three Chinese vessels engaged in a 90-minute gun battle with a Philippines Navy gunboat near Campones Island.
1997	China, Philippines	Philippines Navy ordered a Chinese speedboat and two fishing boats to leave Scarborough Shoal. Philippines fishermen removed Chinese markers and raise their flag. China sent three warships to survey Philippine-occupied Panata and Kota Islands
1998	China, Philippines	Philippines Navy arrested Chinese fishermen off Scarborough Shoal.
1998	Philippines, Vietnam	Vietnamese soldiers fired on a Philippines fishing boat near Tennent (Pigeon) Reef.

Source: Global Security, Retrieved November 3, 2009 from <http://www.globalsecurity.org/military/world/war/spratly-clash.htm>

There continues to exist several other situations – some even involving outside powers - that add to the tension in the SCS. They include:

- Ongoing disputes over Senkaku / Diaoyu islands between Japan and Taiwan PRC and the Philippines
- Ongoing dispute between Japan and Russia over Kurile Islands
- Interception of US spy plane on a reconnaissance mission over SCS by Chinese Air Force and forcing it to land on Hainan island
- Setting up of naval outposts and military installations on disputed islands and reefs which is seen as acts of provocation by claimants of these islands
- Insistence of certain claimant nation for ships from other nations to request permission from it before passing through areas in the SCS it deems to be its ‘territory’
- Saber-rattling between China and Taiwan PRC over pro-independence movement in the island which China regards as its territory, and the involvement of the US in the matter
- Dispute among Indonesia, China and Taiwan PRC over waters near the Natuna Islands
- Dispute among China, Taiwan PRC and the Philippines over the Malampaya and Camago gas fields and Scarborough Shoal
- Claims by Malaysia, Cambodia, Thailand and Vietnam over several areas in the Gulf of Thailand
- Claims by Singapore and Malaysia along the Strait of Johore and the Strait of Singapore

Serious concerns have been raised by analysts and observers that if these situations are not addressed, SCS could become a potential flashpoint. Pronouncements of commitment by claimants to resolve the territorial disputes in the sea have not allayed fears of the outbreak of conflict in the sea. Recent developments such as the move by the Philippines in February 2009 to declare parts of South China Sea as its territory,¹⁸ and the tense confrontation between five Chinese vessels and a US Navy

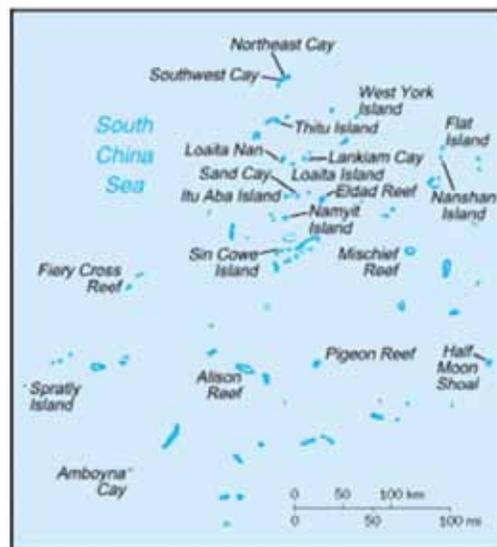
¹⁸ In 2009, the Philippines Government declared a bill 2009 claiming an area covering more than 50 islets, shoals, and reefs known by China as Nansha Islands and known by the Philippines as Kalayaan Island Group. The signing of the bill and the ensuing strong protestation by China presented a serious challenge for Manila and Beijing to adhere to the Declaration of the Conduct of Parties in the South China Sea signed by ASEAN and China in 2002.

ship, Impeccable¹⁹ in March 2009 provide a stark reminder of how edgy things can be in the sea.

SPRATLYS: ISLANDS OF INDIGNATION

Of the ongoing disputes in the SCS, none is as potentially explosive as the one over Spratlys Islands (Diagram 3). This archipelago hosts most of the islands in the SCS, also known as the South China Sea Islands. Despite the remoteness of its location and the largely uninhabitable features of its islands and reefs, Spratlys is a monumentally important area not only for its natural resources and biodiversity riches but for its location along one of the busiest shipping routes and its immense geo-political and geo-strategic value.

Diagram 3: Map of Spratlys Islands



Source : http://naijapinoy.files.wordpress.com/2008/03/300px-spratly_islands.png

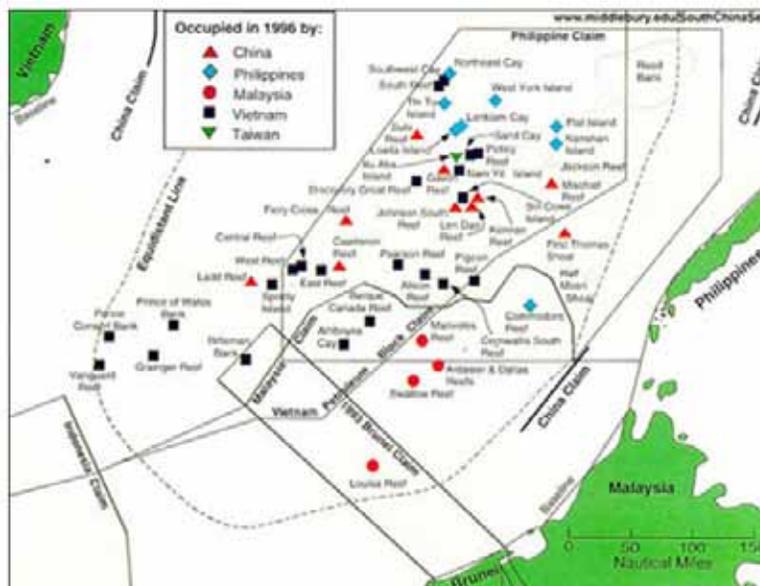
The cagey geo-strategic situation in this monumentally important maritime area requires the parties involved to exercise maximum restraint, diplomatic maturity, close cooperation and extreme care to avoid the already tense situation from coming to blows. It is a matter of concern that certain countries exert their claims in a sweeping and

¹⁹ Depending on whose reporting the story, the Impeccable either ‘provoked’ the incident or was ‘harassed’ by the Chinese vessel. See McDonald, M. (March 10, 2009). “US Navy provoked South China Sea incident, says China”. New York Times. Retrieved November 11, 2009 from New York times Online: <http://www.nytimes.com/2009/03/10/world/asia/10iht-navy.4.20740316.html> See also De Luce, D. (March 10, 2009). “Chinese ships ‘harassed’ USNS Impeccable in South China Sea?”. Agencie France-Press Retrieved November 11, 2009 from News.com.au : <http://www.news.com.au/story/0,27574,25164890-401,00.html>

vigorous manner, to the point of not hesitating to take unilateral military actions and even use deadly force and claiming entire areas that overlap with virtually the claims of all other countries in the region. It is also unsettling that certain claimants have a somewhat skewed interpretation of the United Nations Law of the Seas (UNCLOS) in staking their claims in the SCS and upholding their positions vis a vis their claims. It would not be in the interest of nations in the region, and in fact other nations which depend on peace and stability and freedom of navigation in the SCS region, for any types and levels of conflict to occur in these waters.

Diagram 4 shows the claims over the islands and reefs in the Spratlys by several countries. Some make their claims based on their respective EEZ, some on historical grounds which are arcane in nature, while others are propelled by their geo-strategic interests and their intention to lay claim on the rich hydrocarbon and fisheries riches in the areas.²⁰ Although the claims are largely made using legal arguments, they stand on various interpretations of UNCLOS which can appear doubtful and exaggerated at best and convoluted and erroneous at worst. All the same, they provide a concoction that could potentially brew into serious conflicts if not handled judiciously.

Diagram 4: Claimants of Spratlys Islands



Source: Retrieved 4 November 2009 from <http://www.pcij.org/blog/wp-content/uploads/2008/03/spratlys-claims.jpg>

²⁰ China, for example, believes that the Spratlys form an integral part of its sovereign territory based on discovery made during the Han Dynasty in 2BC. For further reading on this subject, see, among others, Jianming, S. (1996). "Territorial aspects of the South China Sea Island disputes". In Nordquist, M. H. & Moore, J.N. (eds.), *Security flashpoints : Oil, islands, sea access and military confrontation*, The Hague: Martinus Nijhoff Publishers, 1998. 139-218. See also Jianming, S. (2002). "China's sovereignty over the South China Sea Islands : A historical perspective". *Chinese Journal of International Law*, 2002(1), 94-157.

It is heartening to note the efforts of several to resolve disputes and overlapping territorial claims in the SCS in a peaceful and amicable manner. For example, Malaysia and Thailand have set up a Joint Development Authority (JDA) to jointly develop gas fields in an area in the Gulf of Thailand where both nations have interest. Malaysia and Singapore also settled their dispute over Pulau Batu Puteh or Pedra Branca, a cluster of maritime features bordering the Strait of Johore in Malaysia and Strait of Singapore, at the International Court of Justice (ICJ). ASEAN members have also engaged in confidence building measures via platforms such as the ASEAN Regional Forum and Shangri-La Dialogue involving Defense Ministers of member nations to promote peace, stability and prosperity in the region's seas. Indonesia hosted a series of unofficial conferences in the 1990s to discuss territorial disputes in the SCS with the objective of getting the parties involved to find amicable multilateral solutions to the issue. Member states of ASEAN and China have agreed to a set of conduct known as the Declaration on the Conduct of Parties in the South China Sea to ensure that disputes are settled through diplomatic channels and not escalate into armed conflicts.²¹

Despite the undoubtedly worrying situation arising from overlapping territorial claims and aggressive military posturing in the SCS, it is encouraging to note that several efforts have been made to strengthen ties among the parties and to lower tension among them. Even claimants who have in the past engaged in deadly confrontations in the sea have managed to engage in a diplomatic manner. For example, China has made good progress in its bilateral talks with Japan, South Korea and Vietnam on managing common fisheries resources in the SCS via joint fisheries management and conservation efforts.²² This is a step in the right direction to build confidence among the parties with interests in the sea that could act as a buffer against hostility among them. It provides a glimmer of hope that nations will exercise restraint in SCS and work towards peaceful solutions of long-standing problems among them arising from their claims and protecting their interests in the sea.

PROMOTING MARITIME TRADE AS A PILLAR FOR PROSPERITY IN SCS

Despite its stature as a pivotal maritime trade lane, the stark reality is the SCS faces a plethora of geo-strategic challenges that will test its ability to facilitate international trade in a safe, secure and smooth manner. The tension stoked among claimants may seriously undermine the free flow of international merchant shipping in the waters and may have an adverse implication on the socio-economic prosperity and stability in the region and beyond.

²¹ The declaration can be viewed at the ASEAN website at <http://www.aseansec.org/13163.htm>

²² Rosenberg, D. (June 30, 2005). Managing the resources of the China Seas: China's bilateral fisheries agreements with Japan, South Korea, and Vietnam. In Japan Focus. Retrieved November 12, 2009 from Japan Focus: <http://japanfocus.org/-David-Rosenberg/1789>

There is therefore a strong argument to focus on trade as a pillar on which to build and promote prosperity in SCS and its vicinity. This approach presents the best chance for nations involved in claiming territorial claims in the waters to come together and set aside their historical, political and strategic differences and work on a common platform. Given that nearly all the countries in the region depend on trade to boost their economic growth, they should direct their attention on enhancing trade among them and between them and their trading partners. Efforts should be spent on using SCS as a vector for economic growth instead of an avenue for altercation.

The growing economic interdependency among nations in the SCS area demands them to stay on their toes to reap the opportunities and overcome the challenges presented by the ever-changing tides in regional and global maritime trade. As trade barriers are dismantled and the business environment becomes more liberalized, SCS regional countries will no longer be able to retain the old way of thinking and operate in isolation. More than ever, they need to cooperate to enhance trade among them and to boost the attraction and competitiveness of the region to attract more trade and investments in the region.

The unmistakable trend of free trade agreements in the SCS region demands that previously closed doors are opened to enable greater trade and economic integration across the region. This will result in greater level of competition for the regional nation and among maritime industry players to attract and handle more trade. When seen in this context, it should dawn upon the parties which are at loggerheads in SCS of the need to work out, if not set aside, their differences and close ranks to achieve common objectives of attaining peace, prosperity and stability. SCS can be a conduit for prosperity instead of a lightning rod for instability, if the littoral nations so wish.

The establishment of regional initiatives such as AFTA and APEC, and the success of bilateral free trade agreements among the SCS region's nations stand testimony to the practicality and workability of achieving the lofty ideal of creating a peaceful and prosperous SCS area. There is no reason why nations which can work together to generate more trade and facilitate economic integration among them cannot resolve their disputes at sea in an equally amicable fashion.

To this end, it is posited that a 'maritime trade diplomacy' – not unlike the 'ping pong diplomacy' – be used as a charm offensive to get all the littoral nations of SCS to line up on the same side. When several American diplomats went to China in 1971 to play table tennis with their Chinese counterparts, it ushered a new age in US-Sino relations. Trivial as it may seem then, it did wonders to help thaw the ice that frosted over their relationship during the Cold War period.

What is required to ease the tension in SCS may not be as simplistic as a series of ping pong games. The situation and circumstances in the sea today is far more complex

and far different from then. But something of that magnitude is sorely needed to calm frayed nerves and open a new chapter in the relations of nations jockeying for position in SCS. They must first find a common platform to work together and rally behind a familiar, mutually agreeable cause as a prelude to creating peace and stability in the sea.

That common platform could well be trade – the elixir of the SCS region. Promoting trade is easily a common objective around which the nations along the sea can rally and work together to promote. By cooperating on the premise of enhancing trade in the region and among them, they will find a common denominator to direct their efforts on something productive rather than destructive, something that can unify them rather than split them apart.

To this end, nations in the SCS region could engage in capacity building measures to promote greater trade among them and facilitate the movement of more trade in SCS. This could include taking the following actions:

- Setting up a South China Sea Economic and Trade Cooperation Council to promote greater trade and economic cooperation among the SCS region
- Developing common strategies to enhance the capacity and competitiveness in areas such as ports, shipping and shipbuilding / ship repairing to cater to more trade, meet demand for maritime trade related services, and withstand more intense competition from other economic regions
- Sharing in providing infrastructures for navigation safety to ensure that merchant shipping can traverse the sea in the safest manner
- Putting in place anti pollution and environmental protection measures to face any eventuality of accidents that may pose a threat to the sea and its environment
- Conducting joint scientific exploration and research in areas of common interests, especially those rich with resources and biodiversity
- Conducting joint exploration to find hydrocarbon sources and setting up Joint Development Authorities in disputed areas which are rich in energy resources to commercialize them through a fair and equitable arrangement
- Entering into agreements to manage fisheries resources together, as done by China and Japan, and ensuring that the sea's riches are harnessed in a sustainable and environmentally friendly manner
- Abiding at all times the principles of international law and observing international

conventions and diplomatic norms to avoid conflicts and to find peaceful resolutions to conflicts

- Working together in a bilateral or multilateral manner to patrol the sea to deter piracy, smuggling and terrorism
- Promoting eco and marine tourism in suitable areas such as diving, cruise and sailing

Being at the forefront of seaborne trade, SCS can play a quintessential role as a trade sea-lane that not only caters to the need for safe and secure passageway for international shipping but meets the needs and interests facilitation, maritime industry players in the region must rise to the challenge to further develop their economies and to generate more trade in order to capitalize on their strategic location in the SCS region. Competition for trade and investment is heating up in today's increasingly borderless operating environment. It is therefore crucial for trade-dependent nations in the SCS region to continue building their capacity, invest in human capital and hone their competitiveness to facilitate greater regional trade volumes and to take advantage of the huge seaborne trade and shipping flows in SCS.

To face the new dynamics and realities of a more liberalized trade environment, it is essential that institutional support is put in place to facilitate efforts to enhance the SCS region's comparative advantage over other economic regions. This could be achieved on a platform of strong cooperation and coordination among nations and agencies in the SCS region in planning, implementing and monitoring of policies affecting trade and transport. A strong institutional platform provides a solid base on which cooperation in efforts to improve trade and trade transport performance can be carried out. This would go a long way towards averting confrontations and conflicts arising from geo-strategic interests.

The nexus between trade flows and investment linkages has helped enhance trade in the SCS region and boost economic ties among its nations and with their trading partners elsewhere. There exists a strong correlation between the performance of the region's increasingly outward looking economies and the global economy, as underlined by the increasing trade flows between the region and its trading partners. This is especially the case with regard to the trade and economic linkages between SCS region and more developed regions from which comes a big portion of FDI that helps fuel the development of the developing economies in the SCS area.

Given the forecast in greater trade volumes in the SCS region in the years ahead, the nations in the area should prepare to enhance their trade linkages with one another and with other economic regions. This is necessary as trade is poised to play an increasingly influential role in charting the region's economic prosperity and trade

flow in the future. No doubt that the SCS region's trade and economic fortunes and its maritime sector will be shaped by global developments as much regional ones, hence it is critical for nations critical that it pays close attention to the international dynamics, trends and issues that influence trade, economy and the maritime industry. To maintain its trade competitiveness and its stature as a maritime region of global standing, governments and industry players should work on enhancing the attraction of the region as a trade area and an FDI destination, and to enhance their competitiveness to handle more trade and to survive the onslaught of competition on a global scale.

Businesses, shippers, players in the maritime sector and other stakeholders in the SCS region which depends on trade should take advantage of the region's strategic location and dynamic economies, plus its trade-oriented outlook, to generate more trade and economic activities. There is ample evidence of increasing trade networks forming among the countries in the SCS region as a result of greater liberalization and dismantling of trade barriers in the area. Nations in the region should leverage on the location, socio-economic and political situation, and developments in the maritime sector to close ranks and trade more with one another in a fair manner for the benefit of all. This would not hurt efforts to develop close socio-economic ties within the region that could in turn lead to more trade and greater socio-economic prosperity in the region.

The maritime sector has played an instrumental role in galvanizing trade and economic growth in the SCs region. The growth of ports, shipping services, shipyards and other maritime ancillary has helped nations in the region to foster closer trade and economic ties with one another and with their trading partners elsewhere. Further investments into the maritime sector to procure assets, build infrastructures, expand capacity, develop human capital and enhance productivity and service levels will contribute to regional trade and economic growth. This will only be good for a region which generally advocates open trade and will enhance its standing as a business- and investment-friendly region and a major maritime trade area. It will also inculcate a sense of common objective among SCS nations to use the sea to attain socio-economic prosperity together instead of engaging each other in an adversarial manner.

In this respect, nations and maritime sector players in the SCS region must continuously strive to provide adequate infrastructures and adequate capacity and high level of services at the most competitive cost. In a region where the movement of goods, capital, investment and services, and the linkage among transport modes, are becoming more integrated, nations surrounding the SCS must reassess their priorities and adjust to new realities in the way they respond to a liberalized, integrated and more competitive regional economy.

In the face of growing complexity arising from the multitude of challenges and rapid developments in today's world, and amid the severe global economic downturn,

it is crucial that the region's nations cooperate and collaborate to generate more trade and foster stronger economic ties among them. The challenge is on for the maritime players in the SCS area, who are at the forefront of trade in the region, to capitalize on the region's strategic location, the open and outward looking trade policies of regional nations, the availability of good trade and transport infrastructures, the huge population and growing income per capita to translate these advantages into bigger trade volumes.

Amid increasing competition among nations to attract FDI and among ports to lure shipping lines and their cargo, countries which could not provide the spectrum of services needed to facilitate trade in a smooth and effective manner would be shunned by investors, and their ports would be bypassed by international shipping lines. It is therefore crucial that trade-dependent nations in SCS work hard at developing their trade facilitating infrastructures such as ports and services such as shipping to remain competitive and to handle greater volumes of trade.

Already, the region faces stiff competition from nations in other economic regions for FDI and could ill-afford to lose further grounds. Key to attracting FDI and more trade into the region is to have maritime infrastructures and trade facilitating services which are efficient and can host increasingly bigger merchant ships and handle big volumes of trade effectively. For nations in the region which depends heavily on maritime transportation to facilitate much of their international trade, it is essential to develop the maritime ancillary services to facilitate the handling growing trade volume and to enhance the attractiveness of SCS as a trading region and investment destination. These can be facilitated via bilateral or multilateral initiatives, or perhaps using platforms such as ASEAN and APEC. Close economic cooperation can forge a sense of regional belonging, which can act as a buffer that deters nations from treating each against hostility.

CONCLUSION: MANAGING CONFLICT, MAINTAINING PROSPERITY

Since time immemorial, SCS has provided the stage for maritime trade and movements of people that significantly shaped the socio-political, cultural, economic and strategic landscape in the regions surrounding it. Put it simply, SCS acts as a palette that provides the colors that help paint the picture of the littoral areas.

Being a sea that sits along a key trade lane and borders many countries featuring hundreds of millions of people along its coasts, the multifunctional role of the SCS as a strategic sealane, a facilitator of economic growth and a provider of resources and livelihood is paramount. On account of these, it is crucial to preserve safety, security and prosperity in the sea not only from an economic perspective but also from an environmental point of view. The sea cannot afford to be a theater of conflict that will threaten the economic interests of the littoral nations and the international community, nor can it be a platform for rapacious exploitation of its natural riches that will degrade

its environment. A full blown military confrontation in the sea would only result in the intervention by outside powers keen to capitalize on such situation in the name of creating ‘balance of power’ in the region.

It is therefore crucial that the conflicts arising from the overlapping claims in the sea settled in an amicable way. To this end, all diplomatic channels must be exhausted and nations must behave in such a manner that disputes do not become overblown to full scale conflicts. It would serve anyone’s interest to have a South China Sea that is wrought of conflict and is heavily militarized. This would hamper trade flow in its crucial shipping lanes and would cause adverse effect to the livelihood of people, not to mention of the threat that it would be to the vulnerable ecosystem of the sea. In the same token, other maritime security threats such as pollution, illegal fishing, piracy, smuggling and even terrorism must also be addressed and contained to ensure that the sea is meets the needs of its littoral states and is kept open and safe for international use.

While initiatives such as the establishment of Declaration on the Conduct of Parties in the South China Sea and collaboration among nations to manage fisheries resources are laudable, much more needs to be done to promote cooperation and understanding among littoral nations of the sea to ensure that conflicts are avoided and prosperity therein preserved. In this regard, trade and economic developments, dynamics and realities are powerful motivators for nations in the SCS, which share a common destiny and objective to enhance trade to attain socio-economic prosperity, to cooperate with one another rather than confront each other.

It should dawn upon the littoral nations of SCS, especially those who hold grudges over historical claims and past incidences, that the trade and economic interdependence among them is crucial for their economic wellbeing and survival. They simply must not let their differences and eagerness to win at all costs get the better of their judgment. In the waters of SCS lie their shared destiny. The onus is on them to use the mighty sea as a conduit for cooperation instead of an agent for adversary.

PART III:

**RECENT DEVELOPMENTS
IN THE SOUTH CHINA SEA – IMPLICATIONS
FOR PEACE, STABILITY AND COOPERATION
IN THE REGION**



Prof. Li Jinming, Institute of International Relations, Xiamen University, China:
“SOUTH CHINA SEA SECURITY ISSUE & REGIONAL COOPERATION”

RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA – IMPLICATIONS TO PEACE, STABILITY AND COOPERATION IN THE REGION

Gen. (rtd.) Daniel Schaeffer.

International Business Consultant

Former French Defense Attaché in Thailand, Vietnam and China

Ladies and gentlemen

Let me first thank the Academy of Diplomacy of Vietnam and the Lawyer Association of Vietnam for having invited me to speak on one question related to the South China Sea. That is: “Recent developments in the South China Sea – Implications to Peace, Stability and Cooperation in the Region”. This noble assembly already knows a lot of things about this very sensitive question which more often than not is poisoning the relations in the region in spite of some small hopes of peaceful behaviors all around.

What I am going to say is based upon my own researches, upon my own feelings and thoughts, independently from governments, institutions, think tanks, officials, anybody else. This is why I feel absolutely free to say what I am going to say and, therefore, will be expressed strictly under MY OWN PERSONAL RESPONSIBILITY.

Roughly speaking, even if on certain aspects there are positive signs that may give us hope of achieving genuine peace in the future, stability and cooperation in the region, for the time being the negative signs are dominant. One of the main reasons is that countries around the basin are not equal in strength, not only militarily, but also strategically, politically, economically and that there is one dominating power who, despite reassuring speeches and behaviors, is trying, through a multi-pronged strategy,

Graduated from the French Cadet school of Saint-Cyr in 1965, from the French Staff college / International relations – languages branch (Chinese) in 1982, and from the French National Institute of Foreign Languages and Civilizations in 1986 at the level of Master degree, General Daniel Schaeffer was an engineer officer in the first part of his carrier. In the second part he held different positions of responsibility related to the international military relations (operational logistics, military cooperation, crises management). In that frame, he served thrice as a defense attaché, in Thailand (1986-89), in Vietnam (1991-95) where he opened the office therefore becoming the first French defense attaché there, and in China (1997-2000). When he retired he decided to bring its expertise on Asia and in the international relations with the Asian countries to the service of the French companies. On that purpose, as of the 1st of July 2000, he settled himself as an international business consultant for China and South East Asia. In that frame he is involved in several activities: specific strategic studies; teaching in different high schools, institutes, universities; delivering lectures ; advising French companies wanting to enter the Vietnamese and Chinese markets.

to compel the other countries to come to terms and accept what she has already decided. Here I mean the superpower China.

Before coming to the core of the question, it appears necessary to remind briefly some elements of the past. Because we cannot explain or understand what is happening today in this part of the World if we ignore the legacy of the past and its influence on the present. However, I am not going to develop a detailed chronology of all the events that affected, and are still affecting, the situation in the area. I just want to set a few markers which are of importance in the present entanglement.

This constitutes my first departing point.

The second step is that I am not going to sum up all the works that have already been made by a lot of brilliant researchers. I would just like to emphasize one of the most remarkable contributions as far as international law is concerned. I am quoting here the rigorous study written in 1996 by Mrs Monique Chemillé-Gendreau and available today in English under the title: “Sovereignty over the Paracel and Spratly islands” at <http://hoangsa.org/tailieu>.

I. THE LEGACY FROM THE PAST

To fix a **1st marker**, I shall depart from the Cairo declaration dated 27 November 1943. After the meeting between Franklin Roosevelt, Winston Churchill and Chiang Kai-shek, it had been declared that “all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China”. No mention was made of the Paracel and the Spratly islands for the simple reason that, at the time, these islands were still under the French colonial administration exerting sovereignty over them on behalf of the Emperor of Annam.

As a matter of fact, as far as the Spratlys are concerned, we must remember that in 1930, on the 13th of April, the French Navy, on behalf of the French government and using all the procedures internationally recognized at that time, took officially possession of the Spratlys and declared French sovereignty over them. The French Navy reiterated the gesture in 1933 with an expedition identical to the one of 1930¹. From that time on, which we must emphasize here, France never officially abandoned, nor renounced its sovereignty over the Spratly islands. This, in these conditions, introduces a specific legal case. As Monique Chemillé-Gendreau clearly explains it in her work, France has not lost her rights over the Spratly islands since France has not yet made act of dereliction². That means France never pronounced any abandonment of sovereignty.

¹ French Ministry of Foreign affairs, “Notices and Communications”, Journal officiel de la République française, 26 juillet 1933: 7837

² Monique Chemillé-Gendreau, Sovereignty over the Paracels and the Spratly islands, <http://hoangsa.org/tailieu>, p.55

If actually, on the one hand, France discontinued, from 1954 on, administering the archipelago, on the other hand she has not officially renounced her *animus possidendi*. Thus, formally, France must be considered as not having lost its rights over the territory. This is a very important point to be stressed upon. The French unclear position over the Spratlys' status consequently and unfortunately opened the way to the present discord about the islands. This is a **2nd marker**.

As a **3rd marker**, I would like to start from the consequences of the Japanese defeat, in 1945, against the Allied forces which, in this part of the World were the Americans, the British and the Chinese nationalists of Chiang Kai-Shek.

At that time, not long before Japan was defeated and surrendered to the Allied, on August of the same year, the Japanese forces had, on March 1945, eliminated the whole French administration in Indochina, had destroyed its remaining military forces in Vietnam, and had settled a provisional Vietnamese government in Hanoi under emperor Bao Dai. So, for a very short while, Bao Dai's cabinet, under the supervision of the Japanese, resumed assuming the Vietnamese authority on the territory, including on the Paracels and the Spratlys, instead of the French, up to the moment the Japanese surrendered and were disarmed.

As far as the disarmament of the Japanese was concerned, it had been convened at the Potsdam conference, which took place in Summer 1945, that in the North of the 16th parallel, the Japanese would be disarmed by the Chinese, and in the South of the 16th parallel they would be by the British. It is the reason why the nationalist Chinese disarmed the Japanese on the Paracels and militarily occupied the Amphitrite group there, which is one part of the archipelago. This is a **4th marker**.

If, as of the 5th of October, and thanks to the British's help, France did not encounter any difficulty reoccupying the South of Vietnam, the Chinese of Chiang Kai-Shek opposed a stiff resistance to this come back in the North. That led to conversations between France and China and, on the 28th of February 1946, to the signature of the two French – Chinese treaties of Tchoung King. By the second treaty, China agreed to withdraw its forces from North Vietnam. This was actually completed by June 1946, except from the Paracels, on which the nationalist Chinese maintained some troops, on the Amphitrite group. This is a **5th marker** and the first military occupation by China in the South China Sea archipelagos.

Moreover, even if, on the 24th of August 1945, Chiang Kai-Shek had declared that China had “no territorial ambition in Vietnam”, the Chinese cheated a second time the Tchoung King treaty. They set foot in the Spratlys in December 1946 and occupied the most important island: Itu Aba. This is the **6th marker**.

In spite of the protests from the French administration at that time, and even in

spite of some French military actions, the Chinese did not evacuate the Paracels and the Itu Aba.

Since then Taiwan continues assuming this past and is still occupying Itu Aba. This situation leads us here to consider that Taiwan, as the Republic of China (ROC), is claiming exactly the same territories as the People's Republic of China in the South China Sea. And the ROC claims it all the more loudly that the nine dots line, which we are about to discuss, was originated from the nationalist party. Thus, we must consider that, in spite of separate expressions of claims from Beijing and Taipei on the South China Sea, both communist and nationalist entities are, on this present and specific situation, leading the same struggle on behalf of greater China. On this very occasion, Beijing considers the Taiwanese fight as a patriotic supportive struggle. It is the reason why the Taiwanese position will not be taken any more into account in the following presentation.

To come to the question of the nine dots line, we have to take notice that, simultaneously with the occupation of Itu Aba, the nationalist Chinese published, in 1947, in a private atlas, not an official one, the first map on which a plain line was surrounding almost all the South China Sea. It was not a dotted line as it should be pointed out. This line was merely leaving some narrow patches of territorial waters to the other bordering countries. But, since this line is not defined by any single coordinate it is absolutely inconsistent. Such an approximate marking make it fully invalid. This is one point among other ones.

Later the plain line evolved into an 11 dots line and, in the 1950s, into a nine dots line after the Chinese prime minister Zhou En Lai ordered to delete the two dots crossing the Gulf of Tonkin.

What is important to be stressed upon here is that, even if the nine dots line continues being printed on the Chinese maps, even if the Chinese always protest of what they claim to be their sovereign rights on the South China Sea inside this nine dots line, the Chinese governments, up to now, never produced any legal document formally stating the Chinese rights on the area determined by the 9 dots line. However sticking resolutely to this representation on the maps and in its discourses, China introduces a huge ambiguity and misleads the observers in their right interpretation of the very existence of such a line. As a matter of fact, all but a few observers of the conflicting situation in the South China Sea consider this demarcation as definitely indisputable. It makes everybody believe all over the World that this delineation is determining the Chinese genuine sovereign rights over the South China Sea. And the international press, by conveying such a belief without having checked that question carefully, shares its part of responsibility in disseminating such an ambiguity.

To justify the righteousness of keeping the nine dots line alive, the Chinese argue

that this line is running at equal distances between the coasts of the other adjacent states and the archipelagos that China is claiming. Such an argument is drawn from the fact that China abusively confers the baselines status to these archipelagos, either explicitly for the Paracels islands as we will explain later, or virtually as in the case of the Spratlys and in the specific case of the Macclesfield bank considered as Zhongsha qundao if we follow the Chinese concept. We will come back to this concept a little bit later. By doing this, China is acting contrarily to the UNCLOS convention which stipulates that the baselines regime is applicable to the Archipelagic States only³, not islands. We shall come back later on this question of baselines, real or fictive, around the South China Sea archipelagos.

To sum up, the persistence of this nine dots line is certainly a key element in the incessant poisoning of interregional relations around the basin. This is the **7th marker** and probably one of the most important ones.

As the **8th marker**, I chose the Treaty of peace with Japan, better known as the San Francisco treaty, which concluded the hostilities in the Far East, dated on the 8th of September 1951, and which, in its chapter II, Territory, article 2, paragraph f, stipulates that “Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands”. But nowhere it is specified to whom these territories should be handed over for the simple evidence that they belonged to France and subsequently to Vietnam.

In 1954, the Geneva agreements concluded the 1st Indochina war. They do not specifically mention the islands but it was clear that, since France was handing over all its Vietnamese possessions to the two Vietnamese governments, North and South, due to the partition at the 17th parallel, the French possessions in the South China Sea should have normally fallen back into the hands of the Vietnamese side. It is effectively what happened when the South Vietnamese regularly settled troops in the Spratlys and, in the Paracels, on the Crescent group, unoccupied by the Chinese. This is our **9th marker**.

In 1956, on the 15th of May, the situation in the South China Sea started to become even more complicated with the arrival of the Philippines on the scene. At that time a Filipino retired admiral and businessman, Tomas Cloma, considering the Spratlys as “terra nullius” or “non regnis”, took possession, on his own behalf, of more than the four fifths of the archipelago. The area thus determined had been christened Kalayaan. The Philippines militarily occupied some of the islands in the North and are still there.

We must take notice here that, at that time, France did not react to that occupation of a territory which, at the end of the colonial era, could have appeared as being

³ UNCLOS, Part IV, Archipelagic states

under a peculiar status, either still French or newly Vietnamese. Let us remind here that during the colonial era, France had administratively attached the Spratly islands to the governorate of Cochinchina. Therefore they were officially attached to a Vietnamese administrative entity. So when France left Vietnam she handed over all her powers to Vietnam who, even separated into two parts, assumed the continuity of the administration on the whole territory. Therefore the administration authority of the Spratleys fell directly under Vietnam's sovereignty.

Should we deny this reality consequent to the application of the international rule concerning the continuity of the administration of a territory, in this case the Spratleys are still French. As a matter of fact and according to the international law, to lose her sovereignty over the Spratlys, France should have, in this case of figure, officially pronounced her abandonment through an official act of derelictio. What she, up to now, has not done and cannot do. Doing otherwise would contradict what happened at the end of the colonial era and would be an intrusion in the Vietnamese affairs. So when Thomas Cloma, and later, in 1971, the Philippines government took possession of the Kalayaan territory, the silence France observed on these occasions cannot be, as far as the international law is concerned, considered as an act of derelictio. Referring to the hand-over of power from France to Vietnam at the end of the colonial era, France simply could not and cannot do it. This is the **10th marker**.

In 1974, China took advantage from the partition of Vietnam and from the situation of strategic dependency under which North Vietnam was placed because Beijing was providing a strong military support to the Vietcong for its fight against the Southern regime. That situation created for China the opportunity to send troops on the Crescent group of the Paracels islands. Since the Chinese were performing a conquest against the Saïgon administration, North Vietnamese were thus torn between three dilemmas: their antagonism with the South, their support from China, and their will to assert their sovereignty over the Paracels. Hanoï chose the third solution but because of the military support it was receiving from Peking, it could not do it otherwise than *mezzo voce*.

By completing the final conquest of the Paracels by force in 1974 the Chinese operated for the first time in obvious violation of the international principle of *Uti possidetis juris* against Vietnam. May I remind here that the *uti possidetis juris* principle is a principle that has been commonly agreed by the nations at the end of the colonisation era so as the borders of the former colonies must not be modified by newly independent states through the use of force. If the nations want to modify these borders they must do it only through negotiations⁴. If, in 2000, China showed the respect due to the *uti possidetis juris* principle when negotiating the final delineation of her land border with

⁴ Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980, ratified by 110 States of October 2009

Vietnam and the partition of the waters in the Gulf of Tonkin, that was not obviously the case when conquering the Paracels. This is the **11th marker**. The situation inherited from that action is not conducive to peace and stability in the region.

After the 70s, the dispute on the South China Sea became more sensitive and festered because of the presumed existence of rich hydrocarbon deposits in this tertiary basin. These presumptions became reality, at least partly, when the first discoveries were made by Mobil oil Co, on February 1975, on the Vietnamese continental shelf, and when, later on, the developed exploration – exploitation activities indisputably confirmed the first assumption. So the claims tied to the economical interests came in addition to the pure disputes for sovereignties over the area. This one is the **12th marker**.

After 1982, when the UNCLOS was adopted, part V opened the possibilities for coastal States to extend their maritime responsibility beyond their national waters and claim a 200 miles economic exclusive zone. In the South China Sea, such a disposition introduced the opportunity for Malaysia and Brunei to cover maritime areas overlapping some of the Southernmost islands of the Spratlys : 7 for Malaysia, three of which are militarily occupied and one, Louisa reef, for Brunei. But here, as far as the international law is concerned, Malaysia and Brunei wrongly interpreted the situation because, based on strict juridical considerations, the possibility of claiming a 200 miles EEZ does not provide any sovereignty right over the islands that can be reached under the new UNCLOS extension. As a matter of fact, whilst the UNCLOS stipulates that territorial waters are attached to territories lying under the sovereignty of a State, it cannot further transfer automatically any sovereignty to a State over the territories that the extension of its maritime area puts a its reach. It is indisputably the case of those Spratlys islands claimed by Malaysia and Brunei. The paradox here is that the UNCLOS indirectly induced a new ferment of discord between the adjacent States of the South China Sea. That's the **13th marker**.

On March 1988, China operated a second violation of the *uti possidetis juris* principles by leading a violent amphibious military assault against 11 islands of the Spratly archipelago, once more challenging by force the Vietnamese sovereignty. And the Chinese settled troops and military means on the newly conquered islands. Consequently, Chinese and Vietnamese forces are today intertwined one in the other in the Spratlys, depending on the positions of the islands each one is respectively occupying. This is the **14th marker**. That cannot generate any seed of peace and stability in the area.

By the way let us pay attention to one fact. Contrarily to the claims that Hanoi consistently and clearly repeated over the Spratlys (Truong Sa in Vietnamese) and the Paracels (Hoang Sa in Vietnamese), the Macclesfield bank is never included in Vietnam official assertions of its sovereign rights in the South China sea. Thus when

the sketches or maps which draw the Vietnamese claims in the area encompass the Macclesfield bank, they are incorrect. Nonetheless, this unsolicited Vietnamese claim on Macclesfield bank, depicted and indefinitely repeated by erroneous documents in such a way, without any reference to any accurate and reliable source, is adding to the confusion.

On the 25th of February 1992, China published her “Law on the territorial Sea and the contiguous area of the People’s Republic of China”. This law lays down the principle of the straight baselines bordering the Chinese sea territory. Besides the mainland and the coastal and nearing islands, the text defines the national Chinese territory in article 2 as “Taiwan and the various affiliated islands including Diaoyu Island (or Senkaku), Penghu Islands (Pescadores), Dongsha Islands (Pratas), Xisha Islands (Paracels), Nansha Islands (Spratly) and other islands that belong to the People’s Republic of China”. This very last point is lacking of accuracy and opens the door to a lot of possible interpretations. If we rely upon what is written here and there about spots subject to claims from China we may determine that, among the “other islands” still to be listed, we may find: 1 - James Shoal and Luconia reefs, both being situated off the Malaysian State of Sarawak and consequently being source of dispute with Malaysia ; 2 - Scarborough reef, laying off the Philippine island of Luzon, subject to dispute between China and the Philippines, 3 - Truro shoal, in a median position between Macclesfield and Scarborough.

We must narrowly keep in sight here that China considers Scarborough reef and Truro shoal as integral parts of the Macclesfield bank even though these two atoll type reefs or islands groups are rather far away from the geographical Macclesfield bank. The Chinese gather all these scattered places under the globalizing concept of Zhongsha Qundao which, in these conditions, covers a very large surface. This concept is obviously conflicting with the accepted geographical definition of the Macclesfield bank⁵. Should China one day succeed in having such a claim internationally agreed or even discussed in the appropriate forum, the acceptance of the Zhongsha Qundao would bear very important consequences for the other users of the South China Sea.

In the unlikely event that China would convince the largest part of the international community to let her attain the objectives she wants in the South China Sea i.e. keep the baselines already defined around the Paracels; enjoy sovereignty rights all over the Spratlys islands and Macclesfield bank according to its all-inclusive toponym as Zhongsha Qundao; drawing the baselines around this cluster, what could be the risks? They would be that China would have gained the capability to deliberately check all the maritime movements between the Northern and Southern parts of this South China Sea, to restrain these movements according to its own will, and even to deny the

⁵ See also Zou Keyuan, “Scarborough reef: a new flashpoint in sino- philippine relations”, *Boundary and Security Bulletin*, International Boundaries Research Unit, Department. of Geography, University of Durham, Summer 1999, p.71

innocent passage to the foreign military navies, what, in this case, would be contrary to the dispositions of the UNCLOS. Already today, China does not recognize the right of innocent passage. She demands that, before crossing her territorial sea, foreign warships first request an authorization from the Chinese authorities. An extension of power for China in the South China Sea could result in that navies crossing the South China Sea from South to North should be constrained to sail only through a narrow corridor between the Paracels and the geographic Macclesfield bank and be denied any passage through the Zhongsha Qundao. Although such an hypothesis may appear extreme, it deserves to be studied before the international community takes the risk of facing a burgeoning fait accompli.

By the way, it would also be interesting to study, under the same extreme hypothesis, how the future scientific and hydrographic researches could be pursued in the basin, considering the fact that World States tend to interpret differently the UNCLOS dispositions in this field of activities.

To conclude this part, which will be the **15th marker**, it clearly appears that the way China defines its territory outside the mainland, in the ocean, is not conducive to peace and stability.

To continue this chronology, we must remind that, on May 1992, China conferred to the American company Crestone the right to explore and exploit a polygon shaped area striding on the far South West of the Spratly islands, on Vanguard bank (Wan An Bei in Chinese, Tu Chinh in Vietnamese). But what must be noticed is that the Vietnamese did not protest against the fact that the Chinese had walked on the Spratlys but against the fact that the Chinese did so on the Vietnamese continental shelf. To support their claim they demonstrated that Tu Chinh is separated from the main part of the Spratly islands by a trough which is marking the continental margin at this place. At that time the dispute threatened to flare up because the Chinese side resorted to a strong demonstration of naval military force. But it must be outlined however that, afterwards, China has finally behaved so as not to worsen the situation since the Crestone contract has, up to now, remained without any concrete follow up. This must be noticed as a sign of appeasement from China. This is a **16th marker**.

Later, on March 1994, the Chinese once more aggravated the situation in the Spratlys, in their Northern part. At that time they came there to mark what they consider as falling under their sovereignty by settling troops on one of the islets, Mischief reef, which is situated in the exclusive economic zone (EEZ) declared by the Philippines, then on some other ones, right in the heart of the territory claimed by the Filipinos as well as by the Vietnamese. This is the **17th marker** which cannot be considered as a harbinger of peace and stability in the region.

Finally, starting from the middle of the 90s, some small gleams of light came

appearing and could be interpreted as messengers of hope for a betterment of the conflicting situation in this maritime region, even if the causes of the disputes remain deeply rooted in the minds. That was because China, while sticking to her assertion, made nonetheless little positive steps in the direction of an apparent appeasement. On the side of the other claimants, even they are sincerely wishing an improvement of the situation, continued however remaining firm on their respective positions to defend what they consider as their sovereignty rights. That explains why recent developments in the South China Sea are most often a mixture of counterproductive events and at the same time, possible occasions conducive to peace, stability and cooperation. Some other events are frankly counterproductive while some others genuinely bear witness of a kind of will to reach some harmony in the region.

II. LATEST DEVELOPMENTS IN THE SOUTH CHINA SEA – IMPLICATIONS TO PEACE, STABILITY AND COOPERATION IN THE REGION

1. Recent developments as a mixture of counterproductive events and at the same time possible occasions conducive to peace, stability and cooperation

When, on the 15th of May 1996, China officially introduced a declaration on the “baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands” (Paracels), registered in due form at the United Nations, China appeared to be ready to comply with the international rules of the UNCLOS. But by defining baselines around the Paracels, China has been introducing a new element of dispute with Vietnam about the archipelago. It is expression of the Chinese will to pile up useful deeds necessary to help her assert more and more deeply her rights for a sovereignty that is not genuinely established over the Paracels territory.

Moreover let us say also that by defining baselines around the Paracels, China is unduly interpreting the UNCLOS part IV, Archipelagic States, at its own advantage. As a matter of fact, by drawing baselines around the Paracels, China applies the status of the archipelago States to the islands concerned. This assumption is wrong since the Paracels do not constitute an Archipelagic State. Thus the Chinese procedure obviously appears as an abusive interpretation of the UNCLOS article 46. Consequently this offers China the possibility to arbitrarily extend the maritime surfaces under her jurisdiction. This introduces a new seed of aggravation of the situation in the area. More generally, whosoever is the genuine owner of the Paracels, the statutes that should be applied to the archipelago should be the regime of other land territories, i.e. islands, taken one by one, as stated in the UNCLOS, part VIII, article 121, regime of the islands, and not the regime of the Archipelagic states. So even if the 15 May 1996 declaration on China’s baselines pretends to conform with the international rules, it also feeds the dispute between China and Vietnam. It is more a counterproductive act towards peace and stability in the region rather than the contrary. This is an **18th marker**.

Before proceeding further we must stress here that China published her declaration on the baselines before she ratified her accession to the UNCLOS on the 7th of June 1996. This is an **19th marker**.

Later, on the 26th of June 1998, and this is the **20th marker**, Peking published the “Exclusive economic zone and continental shelf act of the People’s Republic of China”. The terms used are generally reassuring as are those used in article 2. They state that “Conflicting claims regarding the exclusive economic zone and the continental shelf by the People’s Republic of China and States with opposite or adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the areas so claimed”. If everything sounds clear in almost all the articles in the text, at least apparently, an ambiguity suddenly appears in item 14, which stipulates: “The provisions of this Act shall not affect the historical rights of the People’s Republic of China”. What does that mean?

My conclusion as drawn from the 30 interviews I conducted in Vietnam and China in Spring last year, is that Chinese historical rights is interpreted in China according to three following lines of thoughts⁶.

The first school asserts that the South China Sea is a territorial sea. It is based on the fact that the nine dots line had been drawn before the UNCLOS was even thought for. It is a historical heirloom. This rejoins the second line of reasoning of those who argue that the South China Sea is a Chinese historical sea. In both cases the arguments are not acceptable because, as far as the law of the sea is concerned, there is no such thing as historical seas. Historical bays exist, not seas. Considering the South China Sea as a territorial sea is also a nonsense because the distances claimed and covered in such case are several times longer than the distances admitted by the UNCLOS to cover territorial seas, contiguous zones, EEZs and even continental shelves. Furthermore, this point of view is somewhat contradictory with the fact that on one hand the Chinese government considers all archipelagos are Chinese territories and, on the other hand, regards the baselines it has defined or imagined around the archipelagos to be those of an Archipelagic state. That cannot be the case as I already demonstrated when I introduced marker N° 18.

The third line of reasoning appears to keep the usual Chinese claims on the archipelagos but considers that the nine dots line does not match with any clause of the UNCLOS and therefore cannot be opposed to the law of the sea. This is the first point. The second point is that, by claiming her sovereignty on almost the whole South China Sea, China does not deliver a picture of seriousness to the rest of the World. It would be exactly the same sort of abuse as if the Greeks were telling that the Mediterranean

⁶ Li Jinming and Li Dexia, “the dotted Line on the Chinese Map on the South China Sea: a Note”, *Ocean Development and International Law*, Taylor and Francis, London, 3rd of January 2003, p. 287-295

Sea is theirs since they were the first ones to navigate on it. So, if China wants to keep some credibility and be listened to by the international community, the better for her is to drop the nine dots line. This opinion has been launched as of late by Professor Zhao Lihai⁷. After having been himself a harsh defender of the nine dots line, he realized that deploying such a kind of argument to defend the Chinese claims in the South China Sea would have an opposite effect to what China is looking for: being be listened to in earnest.

After a series of serious incidents which regularly poisoned the situation in the South China Sea, Beijing, one day proposed to the ASEAN countries to stand on the existing status quo through the building of a “code of conduct to abide by”. The arguments the Chinese used to promote their idea was that the countries around the South China Sea put aside their different claims of sovereignty and refrain from acting in a way that could consequently disrupt the balances and worsen the situations. Worried about the rise of the Chinese military power, the ASEAN countries welcomed the Chinese proposal and agreed to negotiate. That led to the final common signatures of the “Declaration on the conduct of parties in the South China Sea”, on the 4th of November 2002, in Phnom Penh.

Let us underline here, for it is of the utmost importance, that the text is labelled as a “declaration” and not a “code of conduct”, and even less as a “code of good conduct” as sometimes abusively quoted. Moreover, the wish of the different parties to reach a settlement of a genuine code of conduct is explicitly expressed as such at the end of the Declaration on the conduct, paragraph 10.

As this Declaration sounds like, it lists a series of intentions to be abode by each country concerned. In some way, it is no more than a simple declaration of intent and does little more than laying some moral principles that, in fact, each party may interpret at its own will and feelings. Since in such a framework it was never envisaged to refer to any court of arbitration in the case of an abuse denounced by any of the parties concerned, such a Declaration finally appears as a text deprived of law enforcement power. Thus, this is from these somewhat casual basis that, on the 10th of April 2007, the Chinese government seems to have drawn its arguments to protest violently the authorisation given by the Vietnamese to the BP - Conoco Phillips – Petrovietnam consortium to exploit the Moc Tinh and Hai Thach gas fields, those gas fields being situated at the Far West side of the Spratlys islands, on the Vietnamese continental shelf. And this is probably what, in spring 2008, led Beijing to protest against the projects of agreement between Petrovietnam and Exxon Mobil Oil for exploration-exploitation activities on one block located off the Vietnamese coast.

These are two illustrations of the ambiguities left in the “Declaration on the conduct of the States in the South China Sea”. They indicate to which extent the Parties

⁷ Zhao Lihai, *Studies on the Law and of the sea issues*, Beijing, Peking University Press, 1998

have the possibility to interpret the declaration according to their own standards and to their own interests. But, whatever the weakness of such a declaration, it still appears as an encouraging genuine positive development possibly conducive to peace and stability. But that depends very much on the goodwill and the interpretation given by the different parties.

However, when the “Declaration on the conduct of the States in the South China Sea” was adopted, the event raised a lot of hope for improvement of the situation around the basin and offered bright prospects for solving the regional problems. Moreover that hope was reinforced when, 3 years later, on the 22nd of December 2005 China published her white paper entitled “China’s peaceful development road”. Shouldn’t this be reassuring? The following events in the area proved that, in reality, China is pursuing a two pronged policy there: a pacific one which makes believe that from now on everything will go on well; a coercive one, through different means of pressure, in order to compel the different parties to the disputes to come up to China’s view.

This finding leads us to study first the developments counter productive for Peace, Stability and Cooperation in the Region

2. Counterproductive developments for Peace, Stability and Cooperation in the Region

Before coming back to China, who is indisputably the dominant power in the area, let us examine quickly the situation between the different ASEAN bordering countries. What we must start by saying is that they are all confronting one another especially because of their claims over the Spratly islands on which each one considers have either full rights, as Vietnam, or partial rights as the Philippines as main contend, as Malaysia and Brunei as minor candidates. This factor of division between ASEAN countries is a cause of collective weakness whilst facing the Chinese greed.

But these countries have recently started to become aware that it would be more profitable to avoid tearing each other instead of trying to find solutions to the existing problems. That has started in the 1990s with, for example, the “Agreement between the Government of the Kingdom of Thailand and the Socialist Republic of Vietnam on the delimitation of the maritime boundaries between the two countries”. That was signed on the 9th of August 1997. More recently Vietnam and Malaysia reached a “broad understanding” on how to fix the limits of their respective continental shelves. After that, between the 6th and the 7th of May 2009, the two countries proceeded to a joint submission on the limits of the continental shelf beyond 200 nautical from the baselines to the Commission on the Limits of the Continental Shelf of information, and Vietnam submitted its own one. Later, between the 27th and the 28th of August 2009, Vietnam presented it at the 24th plenary session of the UN Commission, in New York. But such an agreement, which could be reached without China meddling during the negotiations,

does not please Peking which loudly denounces it as illegal.

This Chinese reaction leads us to speak about the ways and means of soft or hard coercion that Beijing uses to establish what it considers to be its rights over the South China Sea.

A first series of actions leans on harassment though the threat of using military or paramilitary means. That has been the case in April 2007 when China succeeded in compelling the international oil consortium BP-Conoco-Petrovietnam to stop its exploitation activities on the gas fields of Moc Tinh and Hai Thach, arguing that these activities were violating the Chinese sovereignty. There are other significant incidents similar to this one. This was the case, to quote only one, when in July 2007 the Chinese Navy dispatched one warship in the South of the South China Sea to compel Vietnam to stop its hydrographic campaign for gathering the data needed to determine the extension of her Continental shelf as convened under the UNCLOS.

However, what is noticeable is that, since the time when the Declaration on conduct was signed, whilst China usually resorted to the threat of using force by occasionally dispatching warships over the whole area to compel the other countries to break their activities, she has no more used the military force to strike as she had done in March 1988 against Vietnam in the Spratlys.

In the field of the paramilitary pressures or identical ones, we must take into account some fishing incidents artificially created by the Chinese side, a pretty good number of them in the Gulf of Tonkin. The problem is to distinguish these fabricated incidents from day to day ordinary quarrels between fishermen, especially in the Tonkin Gulf. It is possible to provide a non exhaustive list of these incidents. But we must also admit that China is not the only nation which intervenes against the fishermen of the other countries in the South China Sea. These countries, at their turn, can also resort to strong actions against the Chinese fishermen coming in their national waters or considered as such. It happens that the Philippines or Indonesia proceed sometimes to the arrest of Chinese fishermen.

However, to counterbalance all these incidents that are deteriorating the atmosphere between the countries bordering the South China Sea, we must observe in another way that Chinese fishermen or Chinese maritime search and rescue services do not hesitate to come to the rescue of their neighbors' endangered fishermen, especially during the typhoon season. Such behaviors must be accounted for as possibly inductive to peace, stability and cooperation in the region. But assuming voluntarily such a responsibility for life saving in the South China Sea may reversely represents some way for China to assert a kind of domination over the area.

With reference to the lesser degree of pressure, we must take into account all the

Chinese lobbying strategies, direct and indirect, towards the various local governments, sometimes with the support of local pro-Chinese lobbies.

An example of the softer method used by China to convince the different countries to act according to her wishes is the proposal of conciliatory solutions as enclosed in the declaration on conduct.

In this field of soft policy I would say, we can also find some arrangements engineered between China and local governments. We may count in here the development that has been denounced by the Filipino opposition parties to President Macapagal Arroyo. For that we must come to the Joint Marine Seismic Undertaking (JMSU) that had been signed between the Philippines National Oil Company (PNOC) and China National Offshore Oil Company (CNOOC) on the 1st of September 2004, joined the following year by Vietnam. The purpose of the agreement was to commonly proceed with a 2D seismic campaign in order to detect oil in an area lying in the Philippines exclusive economical zone, North of the Spratly islands, partly astride with the Kalayaan territory as defined by the Filipinos, and 88 nautical off Palawan island. This JMSU should have lasted three years and be eventually renewed, depending on a decision to be taken before the 30th of June 2008. Two campaigns were conducted but the 3rd one did not take place because of the harsh attacks of the Filipino opposition to president Arroyo accused of selling out the national territory to the Chinese. And in support of its assertion, the Filipino opposition pointed out that, if the JMSU agreement had been passed between PNOC and CNOOC, this was in exchange of preferential tariffs that ZTE, one of the two leaders in the Chinese telecommunications, granted to the Philippines for installing a telecommunication network in the country.

At an upper level we may find more determined Chinese lobbying strategies on the regional governments. I'll take again here the example of the Philippines and the pressure exerted by China. This one concerns the disagreement that China is marking to oppose the internal Filipino political debate about whether or not the present limits of the Philippines territory should be changed. To better understand the roots of the debate we must come back to history.

After the Spanish-American war of 1898 when the Philippines fell under the United States of America's rule by virtue of the treaty of Paris (10th of December 1898), the limits of the territory ceded by Spain to the USA had been clearly defined in article III of the treaty. These limits, which encompassed a large maritime area around the archipelago, are still valid today. And the present internal Filipino debate is turning around the choice to be made between keeping the present delineation or shifting to a delineation determined according to baselines defined by the UNCLOS, part IV, articles 5, 7 and 47 i.e. baselines around an Archipelagic state. The latter final choice should forcibly have important incidences on the definition of all the surrounding waters of the Philippines archipelago, and consequently on the extension of its continental shelf.

Such a prospect does not suit the Chinese at all, all the more so because some Filipino politicians with senator Antonio F Trillanes IV at their head are wanting the straight baselines to encompass the Kalayaan territory and Scarborough reef.

It is the reason why, at least twice, the Chinese discreetly intervened on the Filipino side to the effect that the project of law, including the two latter disputed areas, be withdrawn from the vote by the Philippines assembly. However, if the Filipino government finally decided to temporarily withdraw such a project in order to review it, it is not only because of the Chinese objections but also because some genuine Filipino specialists of the Law of the Sea succeeded in demonstrating that the inclusion of the two controversial territories within the Filipino baselines would contravene the UNCLOS dispositions.

Along the political pressures that China exerts on other countries bordering the South China Sea in order to bring them to what she wants, China applies economical and administrative pressures. In the economical sector, this was the case when, in spring 2008, Peking protested against the project of agreement between Petrovietnam – Exxon Mobil Oil for the exploration-exploitation on oil and gas fields located off the Vietnamese coasts and presumed to be laying in a disputed area. Since no agreement has yet been signed between the Vietnamese and American companies, we must consider that China's strategy of blocking the project has succeeded and China is therefore the winner.

Regarding administrative pressures, we can observe that China tries it utmost to create irreversible situations. This was the case when, on the 26th of October 2007, she decided, though unofficially, to re-create on a different scheme than previously, the Sansha District, as a district level administrative region encompassing Paracels, Spratlys, and Zhongsha Qundao. This new administrative district would be placed under the authority of the city of Wenchang in Hainan island. We must remind here that the scheme is not new. It is only a continuation of what has been left by history since the moment when, on the 5th of May 1949, the nationalists already tried a similar organisation and later Peking tried it again regularly under different names, the last one having been created on the 19th of September 1988 as the "Hainan Province Paracels, Spratlys and Zhongsha islands Authority".

Moreover, we must also take notice that, as it has been announced on the occasion of a press conference on the 10th of December 2008, China is encouraging people to settle on the uninhabited islands of the Paracels and the Spratlys. The scheme is to help China building the proof that she has continuously ruled these areas, since continuously ruling a territory is one of the compulsory legal elements that a country must produce for her to be recognized as legally sovereign over this territory. But to be fair, we must also recognise that all the bordering countries, except Brunei, do their utmost as well, by settling people on some of the Spratly islands, with the view to create a de facto

administrative presence on these territories.

However, when one looks at the unstable situation in the South China Sea, it is not black on both sides. There are also positive aspects that could lay the bases for Peace, Stability and Cooperation.

3. Developments possibly conducive to Peace, Stability and Cooperation in the Region

Through the brief flashes that appeared in the first part of this presentation and in spite of the prevailing dark side of these conflicts of interests, we can perceive however developments that could be conducive to peace, stability and cooperation. These small burgeons of hope may be classified into the following categories: i/the preservation of navigation safety at sea and in the air above; ii/first attempts to develop scientific and economic cooperation projects; iii/ sustainable development; iv/ preliminary and cautious political steps towards negotiations of respective maritime territories; v/ possibilities referring to supra national instances to find at least limited solutions to the existing problems; vi/ and possibilities of request for assistance of think tanks independent enough to provide suggestions without being influenced by the pressures of the States involved in the regional debate.

Safety of sea and air navigation is certainly the motive for which, at least in the main lines, the States forget their territorial disputes in the South China Sea for the prior sake of safety.

As far as the safety of life at sea is concerned and, in the limits of the means they are able to deploy, all countries participate to the search and rescue of endangered lives. Among them however, China has the capacity to deploy the largest and most efficient search and rescue capabilities. By taking so much care in the safety of life, the different parties to the South China Sea dispute are genuinely behaving in accordance with the directions of the UNCLOS as they are stipulated in article 98, Duty to render assistance, and to the SOLAS convention.

As far as the question of air safety is concerned, because of the necessity to comply strictly with the international rules of air traffic safety, all the countries have decided that the territorial disputes at sea should be set aside so as not to disturb the specific air traffic safety schemes. Starting from this basic principle, they chose to share in earnest the airspace above the sea and define Flight Information Regions (FIR) duly recognized by the International civil aviation organization (ICAO).

Attached to those concerns of safety at sea and in the air above take place the meteorological forecasts. In that sector, a series of different agreements have been passed for cooperation between the countries so as to establish a communications

network in order to exchange meteorological information and bad weather.

Scientific and economic projects exemplify positive aspects inductive to peace, stability and cooperation.

Amongst these kinds of projects we find the Joint Marine Seismic Undertaking (JMSU) that, we mentioned earlier. Although it has been terminated, it can be quoted as one of the first attempt to internationally cooperate in the economical and hydrocarbon detection sector between competing companies and moreover between competing countries.

Another example of cooperation that can be quoted, in the scientific field this time, is the Joint Oceanographic Maritime Scientific Research Program (JOMSRE). This program has been settled through a cooperation agreement signed in 1994 between Philippines and Vietnam with a view to study the living stocks and the environmental situation in the South China Sea. Since then 4 campaigns of oceanographic researches have been executed in 1996, 2000, 2005 and 2007 along a broad East West axis from the Philippine island of Palawan to Nhatrang city in Vietnam. China has expressed the wish to participate to further expeditions should they occur.

Whatever the difficulties or successes of these two programs, they provide two examples of what can be done in the spirit of article 123 of the UNCLOS, Cooperation of States bordering enclosed or semi-enclosed seas, applied to the South China Sea.

Among the economical agreements established with a view to operate in the best conditions of equity we must take into account all the fishing agreements signed between the South China Sea coastal States. Most of these agreements are bilateral ones signed between the different users of the South China Sea. It happens that some of them are denounced by third parties, not involved in the agreement, as fringing on what they consider their sovereign rights. China remains however the country which protests most often of the time.

In the field of economic cooperation, it is obviously in the sector of exploration – exploitation of hydrocarbons that the agreements will be the most difficult to reach, not because of the territorial disputes, not because China denies the other countries the rights to determine fair limits for their maritime spaces either, but because all the countries bordering the South China Sea are squeezed under a stressing need for oil and gas, to sustain their national economies and respond to their strategic needs.

One might quote as a model the China – Japan agreement signed in June 2008 in order to exploit the Chunxiao / Shirakaba gas field which is lying right astride on the median line of the East China Sea, the question of the median line being also a subject of dispute between Japan and China due to their divergent interpretations of the Law

of the Sea on the continental shelf. The reverse side of such a model however is that in order to get access to the gas field the Japanese have been forced to agree that they are merely invited, as written in the text of the agreement, by the Chinese to operate along with them on Chunxiao.

In the South China Sea some tentative partnership agreements have already been signed between CNOOC and some national oil companies such as Petronas for Malaysia and as Petrovietnam for Vietnam, this last one having been signed in Hanoi in November 2005.

For her part, Vietnam, which insists that a distinction should be made between her claims on the archipelagos and her continental shelf, is ready to invite foreign companies, among them some Chinese ones, to search and exploit hydrocarbons on its continental shelf, the problem for the Vietnamese is having their continental shelf recognized as such by the other countries.

In the field of their proposals to ease the tensions in the South China Sea between the adjacent countries and to promote an economic cooperation, the Chinese put forward the idea of a Pan – Tonkin Regional Economic Cooperation scheme. Such a project sounds pleasing at first but is raising concerns among the regional countries because under the intention of reinforcing cooperation between the Far Eastern partners appears a scheme by China to firmly tie them to Beijing in a way similar to the vassal states of the Chinese empire. Moreover the scheme amounts to tying the ASEAN countries not to China, but to the Southern provinces of China. Such a configuration would reduce the different ASEAN countries to the level of Chinese provinces, not full States.

Sustainable development

Outside the economic field, countries in the region are involved in programs dedicated to the protection of the environment at sea and in the coastal zones. These programs would concern areas which cover areas larger than the South China Sea *stricto sensu* but would include the environmental questions concerning the region.

The first of these programs is the “Partnerships in Environment Management for the Seas of East Asia” (PEMSEA) which involves all the Far East countries, among them China and the ASEAN countries. This program has been launched in 1994 with international support but is encountering difficulties while moving on the implementation phase. This program mainly concerns the environmental protection in the South China and settles a scheme of cooperation between all the countries around. The efforts will be oriented towards the biological protection, the fight against oil pollution and the protection of the coastal environment.

The second program is the Coordinating Body for the Sea of East Asia (COBSEA).

It involves the ASEAN countries and Australia and, when operational, which is not yet, is intended to preserve the coastal environment.

Political activities

In the field of political activities there exist tiny indicators that may appear as possibly encouraging for the improvement of the situation around the basin, though we must remain exceedingly prudent before trying to draw optimistic conclusions.

The first observable steps in that trend are those either accomplished, or on the way, by China and Vietnam to start solving their border problems through negotiations. If, on land the question has been rather quietly solved, at sea it is gradually addressed. This has started by the discussions to delineate the partition of the Gulf of Tonkin by the median line instead of the former delimitation defined after the Paris meridian 105° 43'E, or the Greenwich meridian 108°03'13". This was a situation inherited from the colonial era and the Convention passed on the 26th of June 1887 between the French and the Chinese governments at that time. As a matter of fact, thanks to the partition along the 108th meridian, Vietnamese was allocated at least the two thirds of the waters of the Gulf while China had the rest.

After lengthy discussions, the two parties reached an agreement signed on the 25th of December 2000 and 4 years later, on the 30th of June 2004, they exchanged their instruments of ratification. Alongside the signature of the agreement on the new maritime border in the Gulf of Tonkin, the two countries passed some fishing agreements. The purpose is for their respective fishermen to be able to continue their activities, on each side of the new line, without being bothered by their neighbors. In order to avoid abuses, the two countries have convened to conduct common naval patrols which in turn give rise to a certain number of problems such as coordination, means to be used, frequency of the patrols, and so on. The same agreement establishes also the conditions of cooperation for the exploitation of the hydrocarbons lying in the depths of the Gulf. The application of this part of the agreement is sometimes problematic.

What is remarkable in such a termination of a situation inherited from the colonial past is that China, in order to reach her goal, agreed to negotiate with Vietnam instead of using the military force as she did previously when she occupied the Paracels and some islands in the Spratlys. By behaving like that China demonstrated that it has the full capacity to respect the *uti possideti* principles. This deserves to attract a special attention because a similar approach could be applied to the archipelagos of the South China Sea.

Presently, China continues showing the same respect of the *uti possideti* principles by continuing the negotiations with Vietnam in order to try fixing a new part of the delineation of the maritime border at the Southern entrance of the Tonkin Gulf from

Quang Binh, Quang Tri to Hue, Da Nang.

Elsewhere we can take note that Vietnam also signed an agreement on the delimitation of the continental shelf with Indonesia, another one on the sea delimitation with Thailand in 1997, and an agreement on historical waters with Cambodia on the 7th of July 1982, plus the “broad understanding” recently reached between Vietnam and Malaysia on how to fix the limits of their respective continental shelves and condemned by China.

In the light of these encouraging developments we may be led to wonder whether China will finally agree to definitely delete the line from their maps and from their speeches. It is not forbidden to dream!

III. CONCLUSION⁸

My conclusion will be brief. Recent developments in the South China Sea region comprise encouraging signs that could indicate some progress towards peace, stability and cooperation. But numerous other developments are counterproductive towards a better future because the remnants of the past are weighing too heavily on a situation which, I am afraid, cannot be completely and satisfactorily solved. There may be solutions but each country in the area must abandon parts of its claims, especially China whose greed cannot be accepted by the other countries or by the United Nations Convention on the Law of the Sea.

⁸ Complementary short bibliography and websites:

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COMPROMISE AND COOPERATION ON THE SEA: THE CASE OF SIGNING THE DECLARATION ON THE CONDUCT OF PARTIES IN THE SOUTH CHINA SEA

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On 4 November 2002, ASEAN and the People's Republic of China signed the Declaration on the Conduct of Parties in the South China Sea (DOC). Although the declaration fell short of a binding Code of Conduct as ASEAN had been seeking and did not go very far in implementation, the DOC was regarded within the Association as a turning point in the South China Sea issue. Since China had previously insisted on bilateral negotiations with claimant states and declined multilateral negotiations, the DOC indicated China's change in its approach to the dispute and the success of ASEAN in getting China involved. This paper focuses on the formulation of the DOC between ASEAN and China, contributing factors to the decisions of the parties concerned and analysis of the outcome.

THE FORMULATION OF THE DOC

Prior to the DOC, the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone concluded in 1976 and 1995 respectively were the main legal instruments governing behaviours of the parties concerned in the South China Sea. The fundamental principles guiding the contracting parties in the TAC include the settlement of differences by peaceful means, non-resort to the threat or use of force and the promotion of effective cooperation among the concerned parties.¹

ASEAN members first adopted their common stance on the South China Sea dispute in the ASEAN Declaration on the South China Sea signed in Manila in 1992. The declaration demonstrated ASEAN's concerns over the tension between Vietnam and China after the latter licensed the Creston Energy Corporation (from the United

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¹ Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976, www.aseansec.org/1217.htm

States) to exploit oil in Vanguard Bank on Vietnam's continental shelf and passed its Law on the Territorial Sea on 25 February 1992 stipulating China's absolute sovereignty over both the Paracels and the Spratly islands. The Declaration called on the parties concerned to settle the dispute by peaceful means, exercise restraint and cooperate in applying the principles enshrined in the TAC as a basis for establishing a code of international conduct over the South China Sea. In addition, all parties concerned were invited to subscribe to this Manila Declaration.² Vietnam, a non-ASEAN country at the time, supported Manila Declaration. China, however, reiterated its position on its refusal to accept multilateral discussion of the issue and its view that the Paracels and Spratlys dispute did not concern ASEAN.

Bilaterally, China and the Philippines reached an agreement on an eight-point Code of Conduct in their Joint Statement on Consultations on the South China Sea and other Areas of Cooperation in August 1995. The fourth annual bilateral consultative dialogue between Vietnam and the Philippines also produced a nine-point Code of Conduct in October 1995.³

The 1995 Chinese occupation of Mischief Reef in the Spratlys, a reef well within the Philippines' Exclusive Economic Zone, marked a change in China's policy toward the South China Sea. Previously, China only resorted to force twice, namely in 1974 and 1988 against Vietnam, a non-ASEAN country. After the Mischief Reef incident, ASEAN sought initiatives that could prevent existing disputes from escalating into conflicts.

The idea of a regional Code of Conduct (COC) was officially endorsed at the 29th ASEAN Ministerial Meeting (Jakarta, 21-27 July 1996) in the hope that it would provide the foundation for long-term stability in the area and foster understanding among the countries concerned.⁴ The ASEAN Foreign Ministers expressed their concerns over the situation in the South China Sea in the joint communiqué and underlined that the parties concerned should apply the principles of the Treaty of Amity and Cooperation in Southeast Asia (TAC) as the basis for a regional code of conduct in the South China Sea to build a secure and stable regional environment. 'Recent developments affirmed the need of a COC in the South China Sea and this will lay a foundation for long term stability and foster understanding among claimant countries', stated the Communiqué.⁵ At the 6th ASEAN Summit (Hanoi, 15-16 December 1998), ASEAN leaders agreed to

² ASEAN Declaration on the South China Sea, Manila, Philippines, 22 July 1992, www.aseansec.org/1196.htm

³ Nguyen Hong Thao, 'Vietnam and the Code of Conduct for the South China Sea', *Ocean Development and International Law*, vol. 32, issues 1-2 (2001), pps 105-130.

⁴ The idea of a COC was previously put forward in the 1992 ASEAN Declaration and the workshop series on managing potential conflicts in the South China Sea in 1991-2000.

⁵ Joint Communiqué of the 29th ASEAN Ministerial Meeting, Jakarta, 20-21 July 1996, www.aseansec.org/1824.htm

formulate the Code of Conduct in the South China Sea. Vietnam and the Philippines were tasked with co-preparing a draft of this document for the ASEAN Senior Official Meeting (SOM) in Singapore in March 1999.⁶ Vietnam and the Philippines, however, failed to co-produce this draft since Vietnam's request to put the Paracels within the scope of application of the COC was not met.

The two countries, then, presented their first individual versions at the ASEAN SOM in May 1999. Vietnam wanted the Code to apply to the Paracels. Malaysia opposed the Philippine version since it gave the impression of a binding agreement. Indonesia also shared the view of a non-binding COC with Malaysia.

The first ASEAN draft was presented at the Ministerial Meeting and ARF meeting in July 1999. ASEAN Foreign Ministers, however, did not approve the draft. Malaysia demanded that it be discussed at the senior level. Malaysian Foreign Minister Syed Hamid Albar criticized the Philippine version for failing to reflect the spirit widely agreed earlier.⁷

The Philippines, then, submitted its second draft to ASEAN in September 1999. This time, ASEAN did not reach a consensus on the scope of application of the COC. The Philippines suggested the whole South China Sea, which was opposed by Malaysia. From Malaysia's point of view, part of its claimed sovereignty in the South China Sea is not in the disputed area and part of the South China Sea is overlapping with its territorial sea of the states of Sabah and Sarawak. If the COC covered the Spratlys only, Malaysia would consolidate its occupied posts on several islands within its continental shelf and avoid direct dispute with China. Vietnam, on the other hand, supported the phrase 'disputed areas in the South China Sea' because the COC, then, would also cover the Paracels.⁸

ASEAN eventually reached a proposed draft COC to negotiate with China based on the 3rd Philippine draft prior to the Informal ASEAN Meeting of Heads of State and Government. The basic principles of the ASEAN draft include: the COC is purely a political, thus non-binding, document; the COC sets forth confidence-building measures and does not affect the current sovereign stance and rights of parties concerned; the COC only suggests general principles to govern the settlement of the dispute in the South China Sea, to ensure peace and stability in the region like peaceful solutions to the dispute, self-restraint and consensus from all parties concerned before undertaking any activities.⁹

⁶ Section 7.16, Hanoi Action Plan, www.vpa.org.vn/ENGLISH/activities/ac_asean.htm

⁷ 'Peaceful settlement of disputes urged', *The New Straits Times*, 25 July 1999

⁸ 'Positive ASEAN response to proposed code of conduct in the South China Sea noted', *Business World (Philippines)*, 14 September 1999

⁹ ASEAN's Draft Code of Conduct in the South China Sea, 25 November 1999

Previously, due to increasing pressure from ASEAN, China proposed its own draft at the meeting between Chinese Deputy Foreign Minister Wang Yi and Philippine counterpart Lauro Baja in Beijing.¹⁰

China's draft contained three major differences from that of ASEAN. First, China insisted that the dispute over the Paracels remained solely a bilateral issue between Vietnam and China while ASEAN wanted to cover this archipelago in the COC. Second, China's draft did not contain any provision on the halt of new occupation and construction on reefs or islets in the disputed areas like those in the ASEAN's. Third, China demanded that all parties concerned stop military reconnaissance activities near the disputed areas and limit patrol activities, referring to U.S. attempts to gather intelligence and conduct joint military exercises with its allies in the South China Sea.

China rejected ASEAN-proposed draft at the SOM held on 25 November 1999. Apart from the above differences in the two drafts, China would never accept any code of conduct prepared without its participation.¹¹

The end of 1999 marked a turning point for ASEAN and China in finalizing a COC. Instead of proposing separate drafts, the two sides began negotiating on a common COC. The process started with an informal dialogue between ASEAN and China in Hua Lin, Thailand, in March 2000. At the 6th China-ASEAN Senior Official Meeting held in Kunching (Malaysia) on 25-26 April 2000, the two sides agreed to establish a joint research team to formulate a COC. The first session of the team in May 2000 (in Kuala Lumpur) ended with two major differences in the issue, namely the geographical scope the COC and the provision related to the new occupation and construction. The Philippines threatened to withdraw from the negotiation if Beijing did not take the principle of 'no new occupation' seriously.¹²

Within ASEAN, especially among the parties directly concerned with the dispute, there remained great obstacles also. Four existing major problems after the 3rd meeting of the working group on COC in Hanoi (October 2000) were as follows: the scope of the COC; the issue of new occupation; joint military exercises and humane treatment of habitants in the disputed areas. Among those, the scope of the code was the most heated. Vietnam supported the scope of application for the whole South China Sea, i.e. including both the Paracels and the Spratlys. If this provision is endorsed, Vietnam could mobilize ASEAN support in its negotiations on the Paracels. Though other ASEAN members did not oppose Vietnam's stance, Malaysia supported the scope

¹⁰ China's Draft Code of Conduct in the South China Sea, October 1999

¹¹ Christopher Chung, 'The Spratly Islands Dispute: Decision Units and Domestic Politics', Doctoral thesis, 2004, p328

¹² 'ASEAN, China move toward a code of conduct in South China Sea', Asian Political News, 14 July 2000

limited to the Spratlys only.¹³ ASEAN also failed to reach a common stance on the issue of new occupation and military exercise since they were sensitive and dependent on the perspectives from the military force in individual member state.¹⁴

In order to break the deadlock, at the 35th ASEAN Ministerial Meeting hosted by Brunei in July 2002, Malaysian Foreign Minister Syed Hamid Albar proposed a Declaration on the Conduct of Parties in the South China Sea (DOC) instead of a code of conduct,¹⁵ which was welcomed by other members. As a result, in the framework of the 8th ASEAN Summit in Phnom Penh (Cambodia), ASEAN and China signed a Declaration on the Conduct of Parties in the South China Sea on 4 November 2002.

SUBSTANCE OF THE DOC

The first and foremost aim of the Declaration stated in its introduction is to consolidate and develop the existing friendship and cooperation as well as to create favourable conditions for a peaceful and durable solution of disputes in the South China Sea among the signatories.¹⁶

The DOC is composed of three main components, namely the basic norms governing state-to-state relations and dispute settlement, confidence-building measures, and cooperation activities.

The first point of the DOC reaffirms the commitment of the parties to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the 1976 Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law.

In point 2, the parties are committed to exploring ways for building trust and confidence on the basis of equality and mutual respect. It seems that mutual trust is a foundation for any peaceful settlement of dispute while confidence-building measures reduce the risk of provoking conflict or misunderstanding of activities in the South China Sea.

Point 4 underlines the duties of the parties concerned to resolve their territorial disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the

¹³ Ibid

¹⁴ Ibid

¹⁵ 'Malaysia seeks 'code of conduct' for Spratlys, Reuters, 24 July 2002

¹⁶ Declaration on the Conduct of the Parties in the South China Sea 2002, www.aseansec.org/13163.htm

1982 UN Convention on the Law of the Sea. For ASEAN, this point is considered the most important since this Association, especially the members directly involved, is concerned about the possible use of force from China as in the past. Therefore, China's official acceptance to give up the military option partially meets ASEAN's expectations. For China, on the other hand, this point will prevent ASEAN from filing the case to an international arbitration body or involving another outsider in the case as a mediator or an intermediary.

Concrete measures are listed in point 5 in which the parties concerned undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from inhabiting the currently uninhabited islands, reefs, shoals, cays, and other features.

Point 7 in the DOC underlines the need for the parties concerned to continue their consultations and dialogues concerning relevant issues, including respecting the Declaration, to promote good neighbourliness and transparency and establish harmony, mutual understanding and cooperation. This point allows the parties concerned to consult among themselves through either bilateral or multilateral channels. It is also seen as a legal framework for ASEAN-China mechanism for the DOC implementation.

Concerning cooperative activities, the DOC states five areas, including a) marine environmental protection; b) marine scientific research; c) safety of marine navigation and communication; d) marine search and rescue; and e) combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms. These areas, which are considered of less sensitivity, can help the parties concerned build mutual trust and confidence. Originating from the 1982 UN Convention on the Law of the Sea, these are also actual fields of cooperation at both bilateral and multilateral levels between and among the countries involved. It is stressed in point 6 that 'The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation', which shares the essence of the 'consensus' principle of ASEAN. This principle, however, may retard the decision-making procedure since it requires consent from every party.

Points 8, 9 and 10 reaffirm the parties' commitments to respect the DOC and take actions consistent herewith. The DOC is also seen as a step toward the adoption of a more binding COC which defines the rights and responsibility of the parties concerned to further promote peace, stability and development in the region. This, in turn, implies that the DOC is insufficient to govern the relations among the parties in the dispute.

The DOC, therefore, is not a document to resolve disputes but to create favourable condition and opportunities for the parties concerned to seek resolutions. The DOC can help build a cooperative and friendly environment by confidence-building measures,

paving the way for a long-term solution.

Though representing the spirit of cooperation between ASEAN and China, the DOC receives considerable criticism. A political declaration among countries presents the political will of their leaders. Therefore, if these nations enjoy friendly relationship, the political will can be respected. On the other hand, if these ties get strained, for instance as a result of actual behaviour threatening other claimants' legitimate interest or sovereign right in the case of this DOC, the political will shall be bent since it is not a binding document. Every political declaration shares this characteristics, especially this DOC since the South China Sea dispute is delicate and complicated.

The signatories to the DOC can make good use of its loose provisions to either condemn any unilateral act of other claimants or justify their own move. Mark Valencia anticipated that the Declaration was doomed, considering it a half-way effort to reduce the heat over territory in the South China Sea. The DOC, in his view, is just 'a self-deceiving exercise that satisfied ASEAN's thirst for political accomplishment, but did not offer profound changes in the security situation in the South China Sea'. He also emphasized that no loose agreement would prevent claimants from positioning themselves strategically in the lingering dispute.¹⁷

FACTORS CONTRIBUTING TO THE SIGNING OF THE DOC

That China signed the DOC marked a major change in its approach to the South China Sea dispute. Previously, China had advocated only bilateral negotiations to take advantage of its position as a regional power and avoid any unified ASEAN front against its interest. In response to the pressure from the Association after the Mischief incident in 1995, China agreed to discuss the South China Sea issue with ASEAN. During the ARF meeting in July 1995, Qian Qichen, the then Chinese Foreign Minister, announced that Beijing was prepared to negotiate for the settlement of the South China Sea dispute by peaceful means in accordance with international law, particularly the 1982 UN Convention on the Law of the Sea. This, however, was seen as a tactic from the Chinese side to preserve its position after a new successful occupation, or a tactic of making 'two steps forward, one step back'.

With the DOC, China also wanted to gain political and economic benefit and alleviate ASEAN's concern about China. Southeast Asia is the focus of China's friendly policy. In response to the 'China's threat' theory, China advocated 'peaceful-rise' and 'peaceful- development' policies as its national development guidelines to calm its neighbours. The signing of the DOC partly helped China gain trust and confidence of ASEAN members, laying the foundation for further development in economic and trade ties. Better ASEAN-China relations opened more windows of opportunities for China

¹⁷ According to Ronald A. Rodriguez, *Conduct Unbecoming in the South China Sea?*, PacNet No 23, 21 May 2004

to enter the dynamic ASEAN market. In order to serve its economic development, China needed to expand its market, thus expanding its sphere of influence in the region.

Furthermore, the DOC presented a change in China's approach to the settlement of the South China Sea from bilateralism to 'bilateralism under the umbrella of multilateralism'.¹⁸ Though China was determined to claim sovereignty in the disputed areas, it seemed prepared to join multilateral organisations as well as respect the rules and values of the game. China's decision to join the DOC was part of its 'new security theory' announced at its annual talks with ASEAN in August 2002, prior to the DOC signing ceremony. 'The new security concept is, in essence, to rise above one-sided security and seek common security through mutually beneficial cooperation... China is vigorously seeking settlement of dispute with its neighbors through peaceful negotiation.... Disputes over territorial land and water are no longer an obstacle for China and its neighbors to develop normal cooperation and good-neighborly relations and jointly build regional security',¹⁹ stated a document distributed at the meeting.

In addition, China intended to take the advantage of the COC/DOC negotiations to divide ASEAN. In the drafting process, for instance, China urged ASEAN to decide the controversial issue concerning the scope of the DOC and this country would accept either it was 'the South China Sea' or 'the Spratly islands'. This move was seen as a wedge to ASEAN. Moreover, while discussing the COC with ASEAN in 2000, China used the deadline of the end of that year to put this association under pressure with the implication that it was the division within ASEAN that impeded the finalization of the COC/DOC. If ASEAN could solve its problem, China would be willing to make concession on issues like new occupation, military exercise, and humane treatment to fishermen in the disputed areas.²⁰

The regional security situation in the wake of September 11 also contributed to the signing of the DOC in 2002. After the incident, the United States declared that Southeast Asia was the second front of its war against terrorism, which aroused China's concerns over the U.S. geo-political position in the region.²¹ With the relatively large Muslim community in Southeast Asia and possible links between Al Qaeda and regional terrorist groups like Moro Islamic, Abu Sayyaf, Kampulan Mujadihin and Jeemaah Islamiah, the region took on greater significance in the U.S. anti-terrorism war. Immediately after September 11, the Philippines supported the U.S. and allow this country to gain access to Clark Air Base and Subic Naval Base. In November 2001,

¹⁸ Personal communication with Prof. Zou Keyuan, Central Lancashire University, UK.

¹⁹ China offers New Security Concept at ASEAN Meetings, People's Daily, 1 August 2002, the copy of which can be viewed at <http://au.china-embassy.org/eng/jmhzt46228.htm>

²⁰ 'China calls for early finalization of South China Sea Code of Conduct', www.chinahouson.org/news/20001017202639.html

²¹ June Teufel Dreyer, *Encroaching on the Middle Kingdom? China views of its place in the world*, http://www.baylor.edu/Asia_Studies/dreyer.pdf

Philippine President Arroyo visited the U.S. to commemorate the 50th anniversary of the U.S.-Philippine Mutual Defence Treaty. The two sides agreed that the terrorist attack in the U.S. and the activities of Abu Sayyaf terrorist group (which abducted American and Philippine citizens in the Southern part of the Philippines) led to the need for greater military cooperation between the two countries.²² Previously, the Philippines had also tried to enlist U.S. support, signing the Visiting Forces Agreement in 1998 and conducting joint military exercises off Palawan in the South China Sea in February and March 2000.

The relations between the U.S. and Malaysia were also enhanced after September 11. Malaysia not only sped up the intelligence-sharing process but strengthened security for U.S. ships in the Strait of Malacca. On 14 May 2002, the U.S. and Malaysia signed an Anti-Terrorism Declaration in which the two sides were committed to further cooperation in various fields, including military matters, intelligence, border control, transportation, law enforcement, and banking.²³ Prime Minister Mahathir then paid a visit to the United States on 15-17 May 2002 and held talks with President Bush.

The relations between the United States and Vietnam were also strengthened. Vietnam supported the U.S. in its war against terrorism, provided assistance in checking suspicious financial transactions and allowed U.S. planes to enter Vietnam's airspace. In May 2002, the U.S. invited Vietnam to observe its combined Cobra Gold military exercise in the region.

The Philippines, Malaysia, and Vietnam, all of them ASEAN members, were directly involved in the South China Sea dispute with China. Other ASEAN members like Thailand, Singapore and even Indonesia, the world's biggest Muslim country, supported the U.S. in its anti-terrorism war. In August 2002, the ASEAN-U.S. Joint Declaration for Cooperation to Combat International Terrorism was signed.²⁴

The increased cooperation between the U.S. and its Southeast Asia allies exerted an influence on China's strategic calculations. China was concerned that greater military presence of the U.S. in the region might lead to its engagement in the South China Sea issue. As a result, China feared that the issue would be multilateralized and internationalized. Chinese Ambassador to the Philippines Guan Dangming warned Manila about the U.S. factor and stated that a third party should not interfere.²⁵ Chinese delegates constantly voiced their concerns over U.S. involvement in certain issues at ASEAN meetings. At the ASEAN-China Senior Ministerial Meeting held in Cha-am,

²² 'U.S.-Malaysia Defense Cooperation: A solid success story', the Heritage Lectures, No. 742, Heritage Foundation Reports, 1 May 2002

²³ 'Malaysia, U.S. Sign Anti-terrorism Declaration,' The Straits Times (Singapore), 14 May 2002, page 6.

²⁴ ASEAN-United States of America Joint Declaration for Cooperation to combat international terrorism, Bandar Seri Begawan, 1 August 2002, <http://www.aseansec.org/7424.htm>

²⁵ Philippine Daily Inquirer, 8 January 1999

Thailand, in March 2000, the head of Chinese delegation, Councilor Yangi Yi expressed his country's opposition to an ASEAN-U.S. military alliance, stating that the current confidence-building process in the region should not be meddled in by an outsider.²⁶ According to Leszek Buszynski, the main reason leading to China's participation in the DOC was that this country realized the significance of a regional code of conduct in discouraging ASEAN member countries from further enhancing their political and military relations with the U.S., thus avoiding U.S. interference in the South China Sea dispute as well as its possible advantage in the Taiwan issue.²⁷

With the DOC, China managed to exclude outside interference since an internal issue should be dealt with by the parties concerned. This was clear at the ASEAN-China SOM on the DOC implementation held on 7 December 2004 in Malaysia. China consistently opposed the option of inviting experts and scholars from countries outside the region in the regulations of the joint working groups.

Furthermore, the DOC, a political and non-binding document, did not affect any China's sovereignty claims. It also projected the role and image of China in the eyes of others as a country with a political goodwill to solve its existing dispute. At the same time, the DOC would not provoke any negative reaction from within China itself who always claimed absolute sovereignty over the whole South China Sea.

From ASEAN's perspective, China's economic growth was seen as an opportunity for its member countries. On 5 November 2002, in Phnom Penh, an ASEAN-China Framework Agreement on Comprehensive Economic Cooperation was signed, paving the way for an ASEAN-China Free Trade Area in 2010. This represented an important step forward in ASEAN-China relations.²⁸ The potential profit from their two-way trade contributed to the signing of the DOC. 'From a political angle, the realization of a China-ASEAN free trade zone agreement indicates that historical fraud and political clashes between ASEAN member states and PRC are no longer one of the most important factors influencing ASEAN-PRC relations', quoted Amitav in his studies.²⁹

For ASEAN members, some have conflicting claims in the Spratlys while others are not concerned about the problems of sovereignty.³⁰ The ASEAN member countries directly involved in the dispute joined the COC/DOC to maintain the status-quo and stability, avoid differences and conflict through cooperative and confidence-building

²⁶ Sa-Nguan Khumrunroj, 'China warns ASEAN against boosting ties', *The Nation*, 17 March 2000

²⁷ Leszek Buszynski, 'ASEAN, the Declaration on Conduct, and the South China Sea', *Contemporary South East Asia*, Dec 2003, Volume 25, p343

²⁸ Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China, www.aseansec.org/13196.htm

²⁹ Amitav Acharya, *Seeking Security in the Dragon's shadow: China and Southeast Asia in the Emerging Asian Order*, IDSS Working papers, March 2003

³⁰ *The Straits Times*, 22 November 2002

measures. This, therefore, could bolster cooperation in the South China Sea. Their ultimate goal is to foster the legal foundation for their legitimate rights in the area, including the utilization of and benefit from resources in the South China Sea. For other ASEAN members not directly involved, the DOC enhanced their position, strengthened their relations with claimants, and benefited from the South China Sea cooperation. These differences from the two groups might weaken ASEAN as a group.

Differences in interests and priorities made ASEAN accept the DOC since it was the only way to save the face of the Association and project its unity image. On the other hand, it reflected existing division over substance in ASEAN. Pending a solution to the differences, ASEAN has chosen a middle-way document, a DOC, with watered-down commitment and vague scope of application.

CONCLUSION

Although a binding code of conduct had been considered the primary goal, ASEAN eventually accepted a political document due to the differences among its member countries over national interests and priorities in foreign policies in general and with regard to China in particular. The DOC, therefore, was not a document to resolve territorial disputes but to create a friendly environment through confidence-building measures and cooperation activities for a long-term solution.

The DOC, however, indicated a change in China's approach to the South China Sea dispute. Although China insisted on its sovereignty over the disputed areas and favoured bilateralism in the settlement of the issue, it was prepared to participate in multilateral mechanisms to enhance its role, maximize its profit and sow division in a possible anti-China coalition in the region. China accepted legally non-binding regulations to protect its fundamental interests.

A relatively 'softer' China's policy toward the South China Sea might be resulted from certain factors, including i) ASEAN's consensus and unity; ii) an increasing engagement from outside forces, especially the United States, in the South China Sea issue; and iii) China's need to project a good image and promote its relations with other countries in the region.

RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA: IMPLICATIONS FOR PEACE, STABILITY AND COOPERATION IN THE REGION

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INTRODUCTION

This paper focuses on Chinese assertiveness in the South China Sea in 2009.¹ According to official policy, China promotes ‘peace, cooperation and development’ in the Asia-Pacific under the new doctrine of creating a ‘harmonious world’. China has therefore given priority to the primacy of economic growth and a peaceful international environment.² China’s phenomenal economic growth has been driven by export-orientated trade. China’s economic growth has also fueled a rising demand for resources and energy. These two factors have combined to heighten the importance, from a Chinese perspective, of ensuring that vital Sea Lines of Communication (SLOCs) remain safe and secure.

The global financial crisis has impacted negatively on China’s economy, slowing its high growth rate; nonetheless China’s economy will continue to expand. China is in an especially strong position because it holds U.S. \$2 trillion in foreign exchange reserves (2008 figures). China’s domestic stimulus package, with priority on infrastructure, and China’s current spree of overseas investments in energy and natural resources, will make China even more competitive internationally when global economic recovery occurs.

¹ This paper draws on Carlyle A. Thayer, ‘Maritime Strategic Overview of the Asia-Pacific Region’, in Joshua Ho, ed., *Realising Safe and Secure Seas for All: International Maritime Security Conference 2009*. Singapore: Select Publishing in association with Republic of Singapore Navy and S. Rajaratnam School of International Studies, 2009. 25-44; and Ian Storey and Carlyle A. Thayer, ‘The South China Sea Dispute: A Review of Developments and their Implications since the 2002 Declaration on the Conduct of Parties’, in Kesavan and Daljit Singh, eds., *South and Southeast Asia: Responding to Changing Geopolitical and Security Challenges*. Singapore: Observer Research Foundation of India and the Institute of Southeast Asian Studies, forthcoming.

² People’s Republic of China, *China’s National Defense in 2008*. Beijing: Information Office of the State Council of the People’s Republic of China, January 2009, 3. See also: Zhang Yunling and Tang Shiping, ‘China’s Regional Strategy’; Bates Gill, ‘China’s Evolving Regional Security Strategy’; and Robert Sutter, ‘China’s Regional Strategy and Why It May Not Be Good for America’, in David Shambaugh, ed., *Power Shift: China and Asia’s New Dynamics*. Berkeley, Los Angeles and London: University of California Press, 2005, 48-68, 247-265 and 289-305, respectively; and David Lai, ‘Chinese Military Going Global’, *China Security*, 5(1), Winter 2009, 3-9.

China's phenomenal economic growth has provided the wherewithal for the transformation and modernization of its defense forces. In many respects China's defense transformation may be viewed as part of the normal process of military modernization brought on by technological developments such as the Revolution in Military Affairs and is defensive in orientation.³ For example, at the strategic level China has and is continuing to develop a robust second strike ballistic nuclear missile force based on land and deployed at sea. China has also developed a potent short- and medium-range ballistic missile capacity to deal with contingencies in the Taiwan Strait.⁴ China's nuclear force, therefore, may be viewed as a deterrent to U.S. nuclear blackmail. Similarly, China's military build-up along its eastern coast may be viewed as both a deterrent to any unilateral action by Taiwan to declare its independence from China and United States military intervention in a Taiwan contingency as it did during the crisis of 1995-96. Additionally, China's development of blue water navy may be viewed as an effort to ensure the security of SLOCs in order to overcome what Chinese defense analysts have called the 'Malacca dilemma' – the threat to China's national security by the closure of narrow straits or choke points in Southeast Asia.⁵

The United States, Japan, Australia and several other regional countries have reiterated long-standing concerns about the size and growth of China's defense budget and the lack of transparency regarding the intentions behind increased defense expenditure. Official Chinese military budget figures are widely believed to understate the actual budget.⁶ These states have voiced concerns that China's military build-up is more than defensive. In the words of Chairman of the Joint Chiefs of Staff Admiral Mike Mullen, the strategic intent behind China's development of new capabilities 'seem very focused on the United States Navy and our bases that are in that part of the world...'⁷ Strategic analysts argue that China has recently developed power projection capabilities out to the first island chain extending from Japan, east of Taiwan to include possessions in the South China Sea) and is now seeking to extend their range to the

³ For nuanced assessments see: Michael D. Swaine, 'China's Regional Military Posture', and David M. Lampton, 'China's Rise in Asia Need Not Be at America's Expense', in David Shambaugh, ed., *Power Shift: China and Asia's New Dynamics*. Berkeley, Los Angeles and London: University of California Press, 2005, 266-285 and 306-326, respectively; Ellis Joffe, 'The "Right Size" for China's Military: To What Ends?', *Asian Policy*, 4, July 2007, 57-60; Michael R. Chambers, 'Framing the Problem: China's Threat Environment', *Asian Policy*, 4, July 2007, 61-66; and David M. Finkelstein, 'China's National Military Strategy: An Overview of the "Military Strategic Guidelines"', *Asian Policy*, 4, July 2007, 67-72.

⁴ Office of the Secretary of Defense, *Military Power of the People's Republic of China 2009. A Report to Congress Pursuant to the National Defense Authorization Act Fiscal Year 2000*. Washington, D.C.: Department of Defense, 2009, 48 and 51-52.

⁵ Ian Storey, 'China's "Malacca Dilemma"', *China Brief* (The Jamestown Foundation), 6(8), April 12, 2006 and Thomas M. Kane, *Chinese Grand Strategy and Maritime Power*. London and Portland: Frank Cass, 2002. 127-128.

⁶ Office of the Secretary of Defense, *Military Power of the People's Republic of China 2009*. 31-39.

⁷ Admiral Michael Mullen, 'Remarks and Q & A at the Navy League Sea-Air-Space Exposition', Gaylord National Resort and Conference Center, National Harbor, Maryland, May 4, 2009.

second island chain (including the sea of Japan, the Philippines sea and Indonesian sea, including the Marianas and Palau islands in the south) with a focus on Guam.

The tenor of Australia's current Defense White Paper is that Australia is sufficiently unsettled by China's military transformation and modernization to embark on its most expensive procurement program. This involves the acquisition of twelve submarines, new Air Warfare Destroyers and frigates, cruise missiles and 100 Joint Strike Fighters. According to *Defending Australia in the Asia Pacific Century: Force 2030*: 'we would be concerned about the emergence of a security environment dominated by any regional power, or powers, not committed to the same shared goals. It would be in our strategic interests in the decades ahead that no power in the Asia-Pacific region would be able to coerce or intimidate others in the region through the employment of force, or through the implied threat of force, without being deterred, checked or, if necessary, defeated by the political, economic or military responses of others in the region (p. 43).'

The U.S.-China relationship is not entirely an adversarial one; it contains elements of rivalry, peer competition and cooperation.⁸ For example, the U.S. Congress, through the Taiwan Relations Act, has mandated that the Department of Defense sell defensive weapons to Taiwan, and further mandated that the U.S. Pacific Command maintain the capability to prevail in a conflict with China over Taiwan. The Taiwan question will remain a major irritant in Sino-American relations until Beijing and Taipei can settle the matter. Although China and the United States improved the tenor of their bilateral relations during the second Bush Administration, military-to-military relations were suspended by China in September-October 2008 when United States announced a major arms sale to Taiwan.

Shortly after President Obama took office, China resumed military-to-military relations and bilateral relations improved markedly. Secretary of State Hillary Clinton visited Beijing on her first official overseas trip. China's Foreign Minister was received at the White House and Presidents Obama and Hu Jin-tao met informally at the G20 summits in London and Pittsburgh. Both sides elevated their Strategic and Economic Dialogue to ministerial level.⁹ And most significantly, President Obama declared on the eve of his first official visit China that the United States was not threatened by a rising China.

The paper is divided into five sections each covering a current issue: Sanya Naval Base, Chinese harassment of U.S. naval ships, China's unilateral moratorium on fishing in the South China Sea, proposals for extended continental shelf, U.S. policy and China's four obstacles. The paper concludes with suggestions for future cooperation.

⁸ Michael D. Swaine, 'Managing China as a Strategic Challenge', in Ashley J. Tellis, Mercy Kuo and Andrew Marble, eds., *Strategic Asia 2008-2009: Challenges and Choices*. Seattle: National Bureau of Asian Research, 2008, 71-105.

⁹ James D. Steinberg, Deputy Secretary of State, 'Remarks At National Bureau of Asian Research Conference Engaging Asia 2009: Strategies for Success', Washington, D.C., April 1, 2009.

SANYA NAVAL BASE

In 2008 commercial satellite imagery confirmed that China was constructing a major naval base at Sanya on Hainan Island. When construction at the Sanya Naval Base is completed this will be an important strategic development because this will provide China with the potential capability to extend China's military reach into the Pacific Ocean and South China Sea. In order to fully comprehend the strategic importance of the construction of naval base facilities at Sanya, it is necessary to understand both Chinese intentions and capabilities. China has so far refrained from providing any insights into the former.

As for capabilities, the piers and docks at Sanya Naval Base berth several major surface combatants and a single nuclear submarine. Further construction is underway to accommodate larger surface combatants including assault ships and eventually aircraft carriers. At the same time, China has extended an airfield on Woody Island in the Paracel islands, consolidated its facilities at Fiery Cross Reef in the Spratly archipelago, and maintains a continuing naval presence at Mischief Reef off the west coast of the Philippines. In sum China is developing an enhanced capability to exercise its sovereignty claims over the South China Sea and protect its vital SLOCs through the Malacca and Singapore Straits as well as to surge expeditionary forces into the South China Sea from these bases that considerably shorten the logistics tail.¹⁰ By extension, China will also have the capacity to threaten the same SLOCs on which Japan, Taiwan and South Korea are dependent.

Other construction indicates that the Sanya Naval Base will have strategic implications for the balance of power in the region. Portions of the base are being built underground to provide facilities that cannot be easily monitored. Satellite imagery has confirmed the presence of a Chinese Type 094 Jin-class submarine since late 2007. The Type-094 submarine is a second-generation nuclear vessel and represents China's most lethal naval strike weapon. Up until now all nuclear submarines were under the command of China's Northern Fleet; this marks the first permanent deployment to China's Southern Fleet.

An analysis of construction activities that can be viewed from satellites indicate Sanya Naval Base will be capable of housing nuclear submarines capable of launching inter continental ballistic missiles. When these facilities are completed they will provide China with the potential capability to station a substantial proportion of its submarine-based nuclear deterrent capabilities there. China's most modern strategic nuclear

¹⁰ On June 18, 2009, General Zhang Li, a member of the Chinese People's Political Consultative Conference, recommended that China send larger surface combatants to the South China Sea and construct an air and sea port on Mischief Reef in order to control the Spratlys and bypass the Malacca Straits; L. C. Russell Hsiao, 'PLA General Advises Building Bases in the South China Sea', China Brief [The Jamestown Foundation], 9(13), June 24, 2009, 1-2.

submarine is not yet fully operational but when it is the submarine is expected to carry twelve Sea Launched Ballistic Missiles. This class of submarine will be even more potent if China succeeds in equipping the missiles with multiple warheads. Chinese nuclear subs will be able to patrol and fire from concealed positions in deep waters off Hainan island if China can develop the necessary operational skills. According to the U.S. Defense Department five more Chinese ballistic missile nuclear submarines (SSBN)¹¹ are expected to become operational next year. It remains to be seen how many these will be based at the Sanya facility.

China's naval modernization represents a challenge and potential threat to all of Southeast Asia and especially Vietnam. China is the dominant regional military power when compared to the navies of the ASEAN states. China will also present a growing challenge to the Indian Navy if it continues to extend its operations west of the Malacca Straits. India has already expressed concern about the projected growth of China's nuclear submarine fleet. The Australian Navy will also feel that its technical superiority will be not only challenged but eroded. Although China is developing niche capabilities to challenge the U.S. Navy in the Western Pacific, the People's Liberation Army-Navy (PLAN) is at present no match for the might of the United States now or a decade in the future.

CHINESE HARASSMENT OF U.S. NAVAL SHIPS

In February-March 2009, the United States dispatched the USNS Impeccable to conduct military scientific research related to Chinese submarine activity operating from Sanya Naval Base. The USNS Impeccable was reportedly operating 75 miles south of Hainan when, on 5th March, a PLAN frigate crossed its bow at a range of approximately 100 yards without first making radio contact. Two hours later a Chinese Y-12 aircraft repeatedly flew over the USNS Impeccable at low altitude. Then the PLAN frigate crossed Impeccable's bow again, at a range of approximately 400–500 yards. One Chinese crewman used a grappling hook in an attempt to snag Impeccable's towed sonar array.

On 7th March a PLAN intelligence collection ship contacted the Impeccable over bridge-to-bridge radio and informed its captain that his ship's operations were illegal and that the Impeccable should have the area or 'suffer the consequences'.¹² On the

¹¹ SSBN is the designation used by the U.S. Navy for a nuclear-powered ballistic nuclear missile-carrying submarine. The SS refers to a submersible ship, the B stands for ballistic missile, and the N denotes nuclear powered.

¹² For a discussion of the legal positions held by the United States and China see: Sam Bateman, 'Clashes at Sea: When Chinese vessels harass US Ships', RSIS Commentaries, March 13, 2009; Patrick J. Neher, Raul A. Pedrozo and J. Ashley Roach, 'In Defense of High Seas Freedoms', RSIS Commentaries, March 24, 2009; and B. A. Hamzah, 'EEZs: US Must Unclench its Fist First', RSIS Commentaries, April 9, 2009. The RSIS Commentaries are produced by the S. Rajaratnam School of International Studies, Nanyang Technological University in Singapore. The most recent incident took place in the Yellow Sea in early May; BBC, 'Pentagon warns over Chinese boats', May 5, 2009.

following day, five Chinese ships shadowed the Impeccable, including a Bureau of Maritime Fisheries Patrol Vessel, a State Oceanographic Administration patrol vessel, a Chinese Navy ocean surveillance ship, and two small Chinese-flagged trawlers.

The trawlers closed on the Impeccable, coming within fifteen meters waving Chinese flags, and ordering the Impeccable to leave the area. When one trawler moved closer to the Impeccable it was sprayed with water from its fire hose. The Impeccable then radioed the Chinese vessels and requested safe passage out of the area. The two Chinese trawlers then attempted to obstruct the Impeccable by stopping abruptly in front of it, forcing the Impeccable to execute an emergency full stop in order to avoid a collision. As the Impeccable attempted to depart the crew of one of the Chinese trawlers used a grappling hook to try to snag the Impeccable's towed sonar array.

The standoff between the USNS Impeccable and PLAN vessels was followed by the collision of a PLAN submarine with a towed sonar array by the USS John S. McCain on 11th June. The USS McCain was one of three U.S. warships participating in combined exercises with six Southeast Asian navies, including the Philippines and Malaysia.

These two incidents have reawakened concerns in Southeast Asia that Sino-US strategic could affect regional stability. Clearly the rapid expansion of China's naval forces has precipitated greater scrutiny from the U.S. military and submarine operations out of Sanya Naval Base. As China's submarine fleet grows so too will U.S. interest. But for China to deploy its submarines effectively, it too will need to develop the capability to acquire the same scientific and technical information that the U.S. Navy is gathering. Future incidents at sea cannot be ruled out as long as China attempts to override the UN Convention on Law of the Sea with its own unilateral interpretation of international law.

CHINA'S UNILATERAL MORATORIUM ON FISHING

In May 2009, China announced a unilateral three-month moratorium on fishing in the South China Sea (above the 12th parallel) from 16th May to 1st August in order to preserve fish stocks, prevent illegal fishing and protect Chinese fishermen. This was the height of the Vietnamese fishing season. Eight modern Chinese fishery administration vessels were dispatched to enforce the ban.¹³ Vietnam lodged a diplomatic protest. The Vietnamese news media reported that the Chinese vessels stopped, boarded and seized the catches of fishing boats and chased other Vietnamese boats out of the proscribed

¹³ 'Patrol ships trawl for disorder in Beibu Gulf', China Daily.com, May 28, 2009; 'One more ship to patrol South China Sea', Chinadaily.com.ch, 15 May 2009 and 'Reinforced patrol sails from Hainan', Chinadaily.com.ch, 19 May 2009.

area. In one instance a Chinese fishery vessel rammed and sank a Vietnamese boat.¹⁴ On 16th June, China seized three Vietnamese boats and thirty-seven crewmembers in waters near the Paracel islands. After freeing two boats and their crews, China detained the third and its twelve crewmembers pending payment of a fine totaling US \$31,700.¹⁵ Chinese actions prompted defiance from local government officials in Quang Ngai province, the home of the detained fishermen, who declared they would refuse to pay the fine.¹⁶ The Vietnamese Foreign Ministry issued a protest note to the Chinese Embassy in Hanoi demanding the release of the detained fishermen.¹⁷

In the midst of these developments, an article prepared by China's Ministry of Trade critical of Vietnam's claims appeared on a website jointly maintained by the trade ministries of China and Vietnam. This prompted Vietnamese officials to close the site temporarily.¹⁸ In August, when two Vietnamese fishing boats with a total crew of twenty-five sought to avoid a tropical storm by seeking safe haven in the Paracel archipelago, they were detained by Chinese authorities.¹⁹ Vietnam not only demanded the boat's release, but also upped the ante by threatening to cancel a meeting that had been scheduled to discuss maritime affairs. China released the fishermen.²⁰ The 'border and territory' talks were held at deputy minister level from 12-14 August 2009 in Hanoi.

EXTENDED CONTINENTAL SHELF

The United Nations Commission on the Limits of the Continental Shelf (UNCLCS)²¹ set 13th May 2009 as the deadline for states to lodge claims extending their continental shelf beyond the 200 nautical mile limit set by the UN Convention

¹⁴ 'Controversial Chinese ban affects more Vietnamese fishing vessels', Thanh Nien News, 5 June 2009 and 'Fishermen intimidated and harassed by Chinese patrol boats', Thanh Nien News, 8 June 2009.

¹⁵ 'MOFA Spokesman answers reporters' question', Nhan Dan on line, 27 June 2009; 'Calling for signs of goodwill from China', Thanh Nien News, 28 June 2009; and 'VN official asks for Chinese counterparts; help in detained fishermen case', VietNamNet Bridge, July 23, 2009.

¹⁶ 'China arrests Vietnamese fishermen, demands astronomical fines', Vietnam.net, 30 June 2009 and 'China again demands money for Vietnamese fishermen', Vietnam.net, 7 July 2009.

¹⁷ 'Fishermen team up for protection, Vietnam asks China to lift ban', Thanh Nien News, 8 June 2009.

¹⁸ 'Vietnam shuts down Web site in dispute with China', Associated Press, 18 May 2009 and Deutsche Presse-Agentur (DPA), 'Vietnam-China territory dispute moves to cyberspace', 19 May 2009. In April 2009, Vietnam's Ministry of Information and Communication suspended Du Lich (Tourism) newspaper for three months for publishing a series of articles praising the patriotism of Vietnamese students who demonstrated against China in late 2007. Nga Pham, 'Vietnam paper banned over China', BBC News, April 15, 2009.

¹⁹ DPA, 'China detains Vietnamese fishermen fleeing storms', 4 August 2009; DPA, 'Vietnam asks China to release fishermen', 5 August 2009 and Beth Thomas, 'China Releases Vietnamese Fishermen Seized Near Paracel Islands', Bloomberg, 12 August 2009.

²⁰ 'Chinese nabbed Quang Ngai fishermen return home', Vietnam News Agency, August 15, 2009.

²¹ The UNCLCS maintains a home page at: http://www.un.org/Depts/los/clcs_new/clcs_home.htm.

of Law of the Sea. On 6th May, Malaysia and Vietnam submitted a joint proposal²² and on the following day Vietnam also presented a separate claim.²³ China quickly lodged a protest but did not make a formal submission.²⁴ Under the rules of the UNCLCS contested submissions cannot be evaluated. Vietnam responded to China's by presenting its own protest.²⁵

China documented its maritime claims by attaching a map (see Appendix A) containing its traditional 'nine brush marks' or nine dash lines which form a U-shaped area embracing virtually the entire South China Sea. It would appear to be the first time that the People's Republic of China (PRC) has officially presented its claim in this matter.²⁶ No map of this nature was attached to the three major declarations and one law that China regularly uses to support its maritime claims: Declaration on China's Territorial Sea (September 1958), Declaration of the People's Republic of China on the Territorial Sea and Contiguous Zone (1992), Declaration of the People's Republic of China on Baselines of the Territorial Sea (1996), and the Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf (1998).

The United States categorically rejects the basis of Chinese claims to the South China Sea. In testimony to the Senate Foreign Relations Subcommittee on East Asia and Pacific Affairs, Deputy Assistant Secretary of State Scot Marciel rejected out of hand China's claims to territorial waters and maritime zones that did not derive from a land territory. 'Such maritime claims are not consistent with international law', he asserted.²⁷

²² A copy may be found at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm.

²³ A copy may be found at: http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

²⁴ A copy may be found at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm.

²⁵ Neil Ford, 'Progress in the South China Sea', International Gas Report, 8 June 2009; 'Receipt of the joint submission made by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf', Secretary General of the United Nations, 7 May 2009; Xinhua, 'China urges UN commission not to review joint Malaysia-Vietnam submission on outer limits of continental shelf', 7 May 2009. A copy of Vietnam's reply to China may be found at: http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_chn_2009re_mys.

²⁶ Unofficially, an earlier map had been in circulation based on a 1947 map drawn up by the Kuomintang (KMT) government. The KMT map contained eleven dash lines; the PRC later deleted two dashes in the Gulf of Tonkin (Beibu Gulf). See the map reproduced in Stein Tonnesson, 'China and the South China Sea: A Peace Proposal.' Security Dialogue, Vol. 31(3), September 2000.

²⁷ Testimony of Deputy Assistant Secretary Scot Marciel, Bureau of East Asian and Pacific Affairs, U.S. Department of State before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, 15 July 2009.

U.S. POLICY AND CHINA'S FOUR OBSTACLES

In most recent annual report to Congress on the People's Liberation Army, the Pentagon warned that the rapid transformation of the Chinese armed forces was changing Asia's military balance in favor of China and providing it with the capabilities to conduct military operations beyond Taiwan, including in the South China Sea. He U.S. has demonstrated a keener interest in Southeast Asia's most intractable territorial dispute over the past several years, driven mainly by freedom of navigation concerns but also by the need to protect the commercial activities of American energy companies.

The Obama Administration has built on the legacy left by the Bush Administration by retaining Robert Gates as Secretary of Defense. During the most recent Sino-Philippine spat over the Spratlys, President Obama called President Gloria Macapagal-Arroyo to reaffirm the U.S.-Philippine alliance relationship and Washington's commitment to the Visiting Forces Agreement.²⁸ The intent of that call is open to interpretation, but the timing suggests it was a gesture of support for the Philippines in its altercation with Beijing.

In July 2009, the U.S. Administration made clear its policies towards maritime issues in the Asia-Pacific, including the South China Sea, in testimony by two high-ranking officials to the Subcommittee on East Asia and Pacific Affairs of the Senate Committee on Foreign Relations. Deputy Assistant Secretary of State Scot Marciel opened his remarks by noting that the United States has "a vital interest in maintaining stability, freedom of navigation, and the right to lawful commercial activity in East Asia's waterways" (*italics added*). And more pointedly, after reviewing cases of Chinese intimidation against American oil and gas companies working with Vietnamese partners, Marciel stated, "We object to any effort to intimidate U.S. companies".²⁹

The Administration's policy with respect to harassment of U.S. naval vessels discussed above was made clear by Robert Scher, Deputy Assistant Secretary of Defense, who outlined a four-point strategy:

In support of our strategic goals, the [Defense] Department has embarked on a multi-pronged strategy that includes; 1) clearly demonstrating, through word and deed, that U.S. forces will remain present and postured as the preeminent military force in the region; 2) deliberate and calibrated assertions of our freedom of navigation rights by U.S. Navy vessels; 3) building stronger security relationships with partners in the region, at both the policy level through strategic dialogues and at the operational level by building partner capacity, especially in the maritime security area, and 4) strengthening

²⁸ Philippine Daily Inquirer, 17 March 2009.

²⁹ Testimony of Deputy Assistant Secretary Scot Marciel, Bureau of East Asian and Pacific Affairs, U.S. Department of State before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, 15 July 2009.

the military-diplomatic mechanisms we have with China to improve communications and reduce the risk of miscalculation.³⁰

The incoming Obama Administration has reached out to China and raised bilateral relations to ministerial-level with the convening of the first Strategic and Economic Dialogue (SED) in Washington in July 2009. One hopeful outcome of the SED was agreement to hold a Military Maritime Consultative Agreement meeting in Beijing later in the year.

In October Secretary of Defense received General Xu Caihou, vice chairman of China's Central Military Commission. General Xu also met with National Security Advisor James, Jones, Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, Deputy Secretary of State James Steinberg and paid a courtesy call on President Obama. Xu and Gates reached agreement on seven issues:

Promoting high-level visits; enhancing cooperation in the area of humanitarian assistance and disaster relief; deepening military medical cooperation; expanding exchanges between armies of the two nations; enhancing the program of mid-grade and junior officer exchanges; promoting cultural and sports exchanges between the two militaries; invigorating the existing diplomatic and consultative mechanisms to improve maritime operational safety.³¹

It was clear that U.S.-China military relations still had a long way to go. General Xu, for example, tabled four major obstacles that he claimed harmed bilateral relations.

The first and foremost obstacle is the U.S.-Taiwan military relationship... The Taiwan issue is related to the core interests of China and is a core issue that prevents the development of the U.S.-China military relationship. If the U.S. side can't handle this issue very well, a healthy and stable China-US. Military relationship will not be possible.

Second, U.S.-military aircraft and ships' intrusions into China's maritime exclusive economic zone should be terminated. China hopes the U.S. military can observe UN Convention on the Law of the Sea and Chinese maritime legislation, and stop such acts which would threaten China's security and interests.

Third, there is some U.S. legislation which restricts the development of the China-U.S. military relationship. Most notably is the 2000 Defense Authorization Act

³⁰ Testimony of Deputy Assistant Secretary of Defense Robert Scher, Asian and Pacific Security Affairs, Office of the Secretary of Defense before the Subcommittee on East Asia and Pacific Affairs, Senate Committee on Foreign Relations, United States Senate, 15 July 2009.

³¹ Yang Qingchuan, 'Chinese, U.S. military ties face opportunity for new development', Xinhua, October 29, 2009.

passed in 1999.

Another obstacle is the United States lacking strategic trust in China.

CONCLUSION

During 2007-09, the South China Sea dispute has moved from the back to the middle burner of Asian security issues despite the intentions of the 2002 Declaration on Conduct of Parties in the South China Sea (DOC) for parties to exercise ‘self restraint in the conduct of activities that would complicate or escalate disputes’. Recent naval incidents between China and the United States discussed above raise the possibility that the South China Sea could once again become ‘front burner’ issue if not managed properly.

There are several possible explanations to account for recent Chinese assertiveness in the South China Sea.³² First, Beijing may be attempting to pressure Hanoi into accepting a joint exploration and production agreement covering energy fields located off the Vietnamese coast, similar in nature to the June 2008 pact between China and Japan to jointly develop the Chunxiao gas field in the disputed waters of the East China Sea. If so, Beijing’s efforts are unlikely to succeed, as the offshore energy fields lie within, or at the edge of, Vietnam’s declared 200 nm EEZ. Moreover, Vietnamese nationalism suggests that Hanoi will resolutely resist perceived attempts by China to bully it into accepting such an arrangement. As a tactic in pursuit of this goal Beijing seems to be ratcheting up the pressure on foreign oil companies not to enter into energy deals with Vietnam, with the implicit threat that corporations that do so will be excluded from future energy projects in the PRC. Thus far this tactic has proven unsuccessful, as both BP and ExxonMobil have indicated their intention to proceed with existing deals and the United States has clearly signaled it will resist such intimidation.

Second, China may be signaling to Vietnam its strong disapproval of deeper U.S.-Vietnam security ties. Since Vietnam and the United States normalized relations in 1995, Hanoi has been careful to calibrate its defense relations with the U.S. so as not to offend China. However, in recent years the pace of development of U.S.-Vietnamese military-security ties has noticeably stepped up. In June 2008, Vietnam’s Prime Minister Nguyen Tan Dung made a high-profile trip to the United States where he met with President George W. Bush and became the first Vietnamese prime minister since 1975 to visit the Pentagon.

In a joint statement released after the Bush-Dung meeting, both sides agreed to hold regular high-level talks on security and strategic issues. Moreover, President Bush also stated that the United States supported “Vietnam’s national sovereignty, security

³² This section is drawn from Storey and Thayer, ‘The South China Sea Dispute: A Review of Developments and their Implications since the 2002 Declaration on the Conduct of Parties’, op. cit.

and territorial integrity” (italics added).³³ Bush’s unprecedented comment was open to interpretation, as it did not explicitly identify the South China Sea. However, it reinforced comments made by U.S. Defense Secretary Robert Gates earlier in 2009 in Singapore: ‘In my Asian travels, I hear my hosts worry about the security implications of rising demand for resources, and about coercive diplomacy and other pressures that can lead to disruptive complications... All of us in Asia must ensure that our actions are not seen as pressure tactics, even when they coexist beside outward displays of cooperation’ (italics added).³⁴ The U.S. position has been that it does not recognize the claims of any of the disputants in the South China Sea; taken together, however, the comments made by Bush, Gates and Marciel indicate that Washington is warning Beijing not to blackmail U.S. energy companies into non-participation in Vietnam’s oil and gas sector.

A third possible reason is that Beijing has reverted to a more assertive policy in the South China Sea driven by an increasing thirst for off-shore energy deposits, the growing importance of Southeast Asian SLOCs to China’s strategic interests, and Great Power ambitions. China has not only embarked on a major program to modernize the People’s Liberation Army-Navy but has constructed a major naval base on Hainan Island from which China can enforce its maritime claims and project power into the South China Sea.

SUGGESTIONS FOR COOPERATION

All regional states have an interest in China’s rise and the peaceful management of China-United States relations. All regional states and regional multilateral institutions related to security should therefore continue to bring their diplomatic influence to bear on China and the United States to resolve their differences through dialogue and confidence-building measures. The two powers should hold regular high-level military-to-military meetings and work out an effective Incidents at Sea Agreement.

The ASEAN Defense Ministers Meeting Plus) ADMM Plus) should be activated to extend the ASEAN Regional Forum’s effective engagement in addressing security issues. This would be an effective forum to adopt agreed principles on military transparency that would address concerns about China’s military transformation and modernization programs.

China and other nuclear states should become signatories to the Southeast Asia

³³ Joint Statement Between the United States of America and the Socialist Republic of Vietnam, 24 June 2008. <http://www.vietnamembassy-usa.org/news/story.php?d=20080627045153>

³⁴ International Institute for Strategic Studies (Singapore) speech as delivered by Secretary of Defense Robert M. Gates, Singapore, 31 May 2008. <http://www.defenselink.mil/speeches/speech.aspx?speechid=1253>

Nuclear Free Weapons Zone Treaty. China has long indicated it would be a signatory. But deployment of SSBNs to Sanya Naval Base raises questions about the geographic scope of Southeast Asia that need to be clarified.

Under the DOC, if China has concerns about the viability of fish stocks in the South China Sea it should seek to engage the other claimants (Vietnam, the Philippines, Malaysia and Brunei) in joint scientific research on fisheries management. China should refrain from unilaterally declaring and enforcing a ban on fishing in the South China Sea until a scientific basis for its actions are established. In 2009, while China was enforcing its moratorium on fishing by chasing Vietnamese boats out of the area, Taiwan was complaining that Chinese fishermen were encroaching on its waters. If there is a scientific basis for halting fishing for a period of time it should apply to all nations.

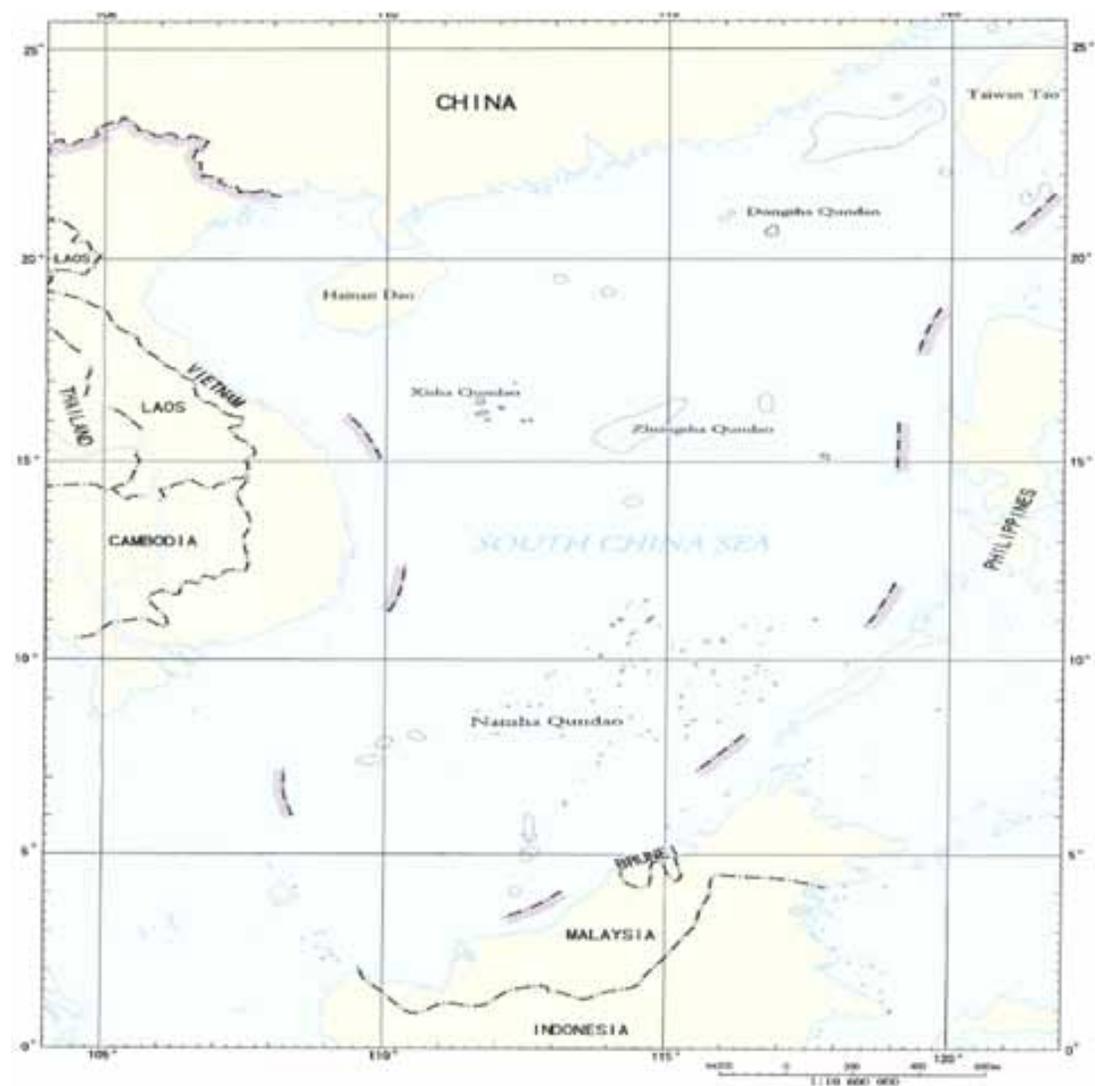
ASEAN should support the South China Sea littoral states in engaging China in a new round of diplomatic talks to raise the status of the DOC to a fully-fledged Code of Conduct for the South China Sea.

Regional states should undertake an initiative to hold Senior Official-level discussions on the UN Convention on Law of the Sea in order to further clarify a number of matters that are either unclear or in dispute. Such discussions could explore the legal basis for claims to extended continental shelves and what actions foreign military vessels can undertake in the EEZ of another country.

Regional states should seriously consider proposals by the governments of Australia and Japan to enhance the effectiveness of regional security architecture either through an Asia-Pacific community concept³⁵ or an East Asia Community concept. The eventual development of a new leaders' mechanism would contribute positively to addressing a range of issues that affect regional security.

³⁵ See Carlyle A. Thayer, 'Kevin Rudd's Asia-Pacific Community Initiative: Suggestions and Insights for the Future Process of East Asian Regional Cooperation', Paper presented to International Conference on East Asia and South Pacific in Regional Cooperation, sponsored by The Shanghai Institutes of International Affairs, Shanghai, People's Republic of China, September 9-10, 2009. Available at Scribd.com.

Appendix A: China's claims to maritime territory in the South China Sea



SOUTH CHINA SEA SECURITY ISSUE & REGIONAL COOPERATION¹

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In 2009, enormous changes have been witnessed in the South China Sea (SCS). It is essential to note a few security issues as follows:

First, as the UNCLOS set the deadline for all coastal states to submit their establishments of the outer limits of the continental shelf to the Commission of the Limits on the Continental Shelf (CLCS) by May 13, 2009, Southeast Asian states adjacent to the SCS were hastened to submit their submissions in the SCS's sea areas. Notably, on February 17th, the Filipino Congress approved the legislation on territorial waters, putting Scarborough Shoals and part of Spratlys under the Filipino jurisdiction. On May 6th, Malaysia and Vietnam made a joint submission relating to an area in the South of the SCS. On May 7th, Vietnam submitted a separate submission on its own relating to an area near the center of the SCS.

In accordance with Article 9, Annex II of the UNCLOS: "The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between states with opposite or adjacent coasts". In accordance with Article 46 (sic) of the Rules of Procedure of the Commission: "In cases there is a dispute in the delimitation of the continental shelf between opposite or adjacent states , or in other case of unresolved land or maritime disputes, submission shall be considered in accordance with Annex I to these rules. In accordance with para.5 of Annex I of the Rules of Procedure: "In cases where a land or maritime dispute exists, the Commission shall not examine and qualify a submission made by any of the states concerned in the dispute"; and "the submissions made before the Commission and the recommendations adopted by the Commission thereon shall not prejudice the position of states which are parties to land or maritime dispute". From these regulations, the Commission is not in the position to settle disputes of sovereignty on the sea, and has no mandate to resolve the overlapping areas in the extended continental shelf. They are, instead, in charge of the delimitation of the extended continental shelf. Therefore, any solutions to SCS disputes would eventually depend on claimants themselves through their negotiations. Submissions of the outer limits of the continental shelf only highlight the existing disputes and increasingly broaden the dispute scope. (???)

¹ Translated version

Second, many transnational oil companies have entered the SCS for exploration. In 2007, the cooperation project between PetroVietnam, British giant BP, and ConocoPhillips of the US, aiming to construct a natural gas pipeline in the disputed sea area in the southern part of Vietnam, has gone into operation. On July 20th, 2008, Vietnam and Exxon-Mobil of the US reached a preliminary cooperation agreement on oil exploration, of which exploration sites were located right in Sino-Vietnam disputed sea areas. In August 2009, the Filipino government approved an oil and natural gas exploration project by Forum Energy, a British Company and its partners on the Reed Bank in the Spratly archipelago, etc.

The involvement by the transnational oil corporations has further complicated the SCS disputes. These transnational oil companies have strong economic and commercial ties with both governments of host countries and their own governments. Therefore, as tension increases in the SCS, their governments cannot avoid being embroiled in the disputes so as to protect their own interests. The involvement by transnational oil companies itself is a double-edged sword. On the one hand, they could exert their influence on the host countries, ensuring detente in the SCS to avoid the loss and damages inflicted upon their self-interests. On the other hand, as their invested oil fields are threatened by other parties to the disputes, they may seek to put pressure on the host government to use force to protect their oil exploration contracts. Therefore, the involvement by various transnational oil companies definitely causes potential security threats in the SCS region.

Third, countries surrounding the SCS have dispatched armed forces to strengthen their unilateral control of the sea areas that they always claim sovereignty. As a result, attacks, harassment, and arrests of Chinese fishermen in the Chinese traditional fishing waters occurred. For instance, on June 20th 2009, Indonesia's patrol boats twice entered into China's traditional maritime space, arresting 8 Chinese fishing boats and 75 Chinese fishermen. This is among a few incidents that have occurred over the past years. According to reports by fishing administration in Hainan Province, Guangxi Province and local government as well as fishermen, the arrest by SCS littoral states have been on the rise, inflicting enormous sufferings on the Chinese fishermen. According to the statistics reported by the "defense police" in Hainan Province, from 2003 to 2008, the total number of fishing boats of Hainan Province operating in the Spratlys arrested by littoral states reached 75, with 75 fishing boats and 738 fishermen arrested, and direct economic loss and damage of up to RMB 3.5 million. The harassment of the Chinese fishing boats operating in the Chinese traditional sea areas by foreign militaries has adversely affected the SCS security, thus sharpening contradiction among the countries involved.

Fourth, the interference by major external powers in the SCS has further aggravated the SCS issue. As mentioned above, on the Filipino Congress's approval of "New Baselines Law", Director of the Asia Research Center at the US Heritage Foundation

Waiter Lohman published an online-paper titled “Spratly Islands: t, appealing to the US government for a more public support of the Filipino sovereignty claim to the SCS, and pointing out that China’s territorial claim to this area is “aggressive, and unjustified”. He wrote that the Spratly disputes were not only the Filipino’s problem but a more fundamental issue for the US and other states which pinned their hopes on the US as their leader in the Asia-Pacific. This provocative remark obviously did no good to security and stability in the SCS region. Therefore, countries surrounding the SCS have continued to deploy their troops in the SCS region and conduct frequent military exercises in the SCS region to assert their claims to the SCS sea areas, thus constituting a formidable threat to the security in the SCS region.

I would like to put forward some proposals to address the above-mentioned security issues. There are a few proposals to these above security issues.

First, the SCS is a semi-enclosed sea. Given this geographical condition, it is relatively difficult for littoral states to claim an extended continental shelf beyond 200 nautical miles. If Exclusive Economic Zones (EEZs) and continental shelves are measured from the starting point of the coastlines or from the ones of the main island adjacent to the continent, there will emerge a “common sea” “beyond 200 nautical miles”. Therefore, this “common sea” can be included in the reports submitted to the CLCS, “rather any related parties to the disputes”. Yet, in case any disputed islands, including the Paracels and the Spratlys, are recognized as islands not rocks, they shall have EEZs and continental shelves in accordance to Article 121 of the UNCLOS. Therefore, there should be an area in the middle of the SCS that is not under any state’s jurisdiction. Hence, the requirement that littoral states should submit their limits of continental shelves to the Commission of Limits on Continental Shelves (CLCS) by May 13, 2009 is unrealistic. It is necessary that parties involved use peaceful means through diplomatic negotiations to delimitate the overlapping sea areas.

Second, concerning oil exploitation in the SCS, China’s initiative of “setting aside disputes for joint development” has achieved limited success over the past 10 years. The main reason is because of the involvement by transnational oil companies, and the fact that the countries surrounding the SCS have lost their interest in the initiative of joint development. In addition, some states adjacent to the SCS are unwilling to share with other states the economic benefits which accrued from their oil exploitation in the disputed sea areas. More importantly, the lack of appropriate responsibility among claimants has prevented them from sitting down to discuss joint development and work it out effectively. To remove those obstacles to regional cooperation on exploration and development of natural resources, it is essential that a mechanism or arrangement be set up to help strengthen mutual trust among disputants. The establishment of such an arrangement means the institutionalization of cooperation among countries involved through diplomacy so as to achieve harmony and mutual understanding with regard to the SCS issue. In this sense, China and ASEAN countries are expected to double their

efforts to this end.

Third, due attention should be given to cooperation on development of fish resources in the SCS to minimize or avoid the occurrence of attacks, harassments and arrests. Management and preservation of the fishing resources for cooperation in the SCS is a daunting task since fish always move in flocks on a very large scale on the sea. In this light, over exploitation of fish resources in the region is a very serious and pressing issue. In the scope of a semi-enclosed sea, no single country can handle well the task of preserving fishing resources. Therefore, it is necessary to establish an institution in charge of the minimum preservation of fish resources. On January 11th, 2008, Filipino House Speaker stated that the Philippines and China agreed to set up a joint fishing ground in the disputed areas in the SCS which would reduce tensions in the region. He proposed that the two countries can invite other Southeast Asian countries, especially Vietnam to participate in the joint fishing ground, eventually reaching an agreement on fishing. If successful, the countries surrounding the SCS would be able to undertake fishing cooperation activities inside the area and it is my strong confidence that attacks, harassments and arrest of fishing boats would be significantly reduced.

RENEWED TENSIONS AND CONTINUING MARITIME SECURITY DILEMMA IN THE SOUTH CHINA SEA: A PHILIPPINE PERSPECTIVE

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INTRODUCTION

On 10 March 2009, the Philippine government signed Republic Act (RA) 9522 to comply with the requirements of the United Nations Convention on the Law of the Seas (UNCLOS), which stipulates that all claims to be made for sea bed or continental shelf extensions to Exclusive Economic Zones allowed under the treaty be filed by 13 May 2009. Otherwise known as the New Philippine Baselines Law, RA 9522 reaffirms the Philippines' claims to its territorial waters, including its extended continental shelf, economic zones and an area of the contested Spratlys archipelago known as the Kalayaan Island Group (KIG).¹

China, Taiwan and Vietnam immediately protested the passage of the New Philippine Baselines Law, which is part of a regional pattern of developments that have inevitably led to an upsurge of security tensions in the South China Sea. These developments include the China-Vietnam controversy over Sansha island

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¹ For a complete electronic copy of the New Philippine Baselines Law or Republic Act 9922, see http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.htm

in December 2007,² the China-Philippines hullabaloo on the Joint Marine Seismic Undertaking (JMSU) in early 2008,³ the discovery of a major Chinese naval base on Hainan Island in mid-2008⁴ and a naval skirmish involving the US surveillance ship *Impeccable* and five Chinese vessels off Hainan Island in March 2009.⁵

This paper argues that security tensions over the disputed Spratly Islands have increased over the past two years despite the adoption of the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. While tensions in the South China Sea has no doubt de-escalated during and after the signing of the DOC,⁶ security irritants pervaded as claimants continued to improve their civilian and military facilities in their occupied islands, islets, reefs and shoals. Taiwan even protested the signing of the DOC as it only included Brunei, China, Malaysia, the Philippines and Vietnam. It is believed that the exclusion of Taiwan in the DOC has made the declaration ineffective in managing tensions in the South China Sea.

Though the DOC temporarily calmed the waters in the South China Sea by upholding the principle of amicable settlement of maritime boundary disputes, its “non-binding” character made the DOC fragile and tenuous. Thus, disputes in the South China Sea continue to be major sources of maritime security dilemma in Asia. China’s growing naval power in recent years has exacerbated this regional maritime security dilemma, leading the other claimants to upgrade their naval assets and modernize their maritime capabilities. The maritime security dilemma in the South China Sea raises the possibility of armed conflict in the Spratlys, something claimants and stakeholders alike are keen to avoid.

STRENGTHENING EFFECTIVE OCCUPATION IN THE SPRATLYS

The South China Sea is composed of two major island-chains: the Paracels and the Spratlys. The Paracels are being contested between China and Vietnam while the Spratlys are being claimed in whole or in part by Brunei, China, Malaysia, Taiwan and Vietnam. This paper focuses only on the dispute in the Spratlys.

² For an analysis of this controversy, see Ian Storey, “Trouble and Strife in the South China Sea: Vietnam and China”, *China Brief*, vol. 8, no. 8 (14 April 2008).

³ For an article that triggered the hullabaloo, see Barry Wain, “Manila’s Bungle in the South China Sea”, *Far Eastern Economic Review* (January -February 2008). For further analysis, see Ian Storey, “Trouble and Strife in the South China Sea: The Philippines and China”, *China Brief*, vol. 8, no. 8 (28 April 2008).

⁴ See David Lague, “Dangerous Waters: Playing Cat and Mouse in the South China Sea”, *Global Asia*, vol. 4, no. 2 (Summer 2009), pp. 56-61.

⁵ For an excellent analysis, see Ian Storey, “Impeccable Affair and Renewed Rivalry in the South China Sea”, *China Brief*, vol. 9, no. 9 (30 April 2009).

⁶ For a study of the de-escalation of conflicts in the South China Sea, see Ralf Emmers, “The De-escalation of the Spratly Dispute in Sino-Southeast Asian Relations”, *S. Rajaratnam School of International Studies Working Paper Series*, No. 129 (6 June 2007).

Based on the ten-day field research of the author in the Philippine occupied islands in the Spratlys on 6-15 May 2009.⁷ All claimants involved in the disputes, with the exemption of Brunei, are strengthening their effective occupation of what they consider their territories in the Spratlys. China, Malaysia, the Philippines, Taiwan and Vietnam have been seriously consolidating their physical presence in the South China Sea since the adoption of the DOC.

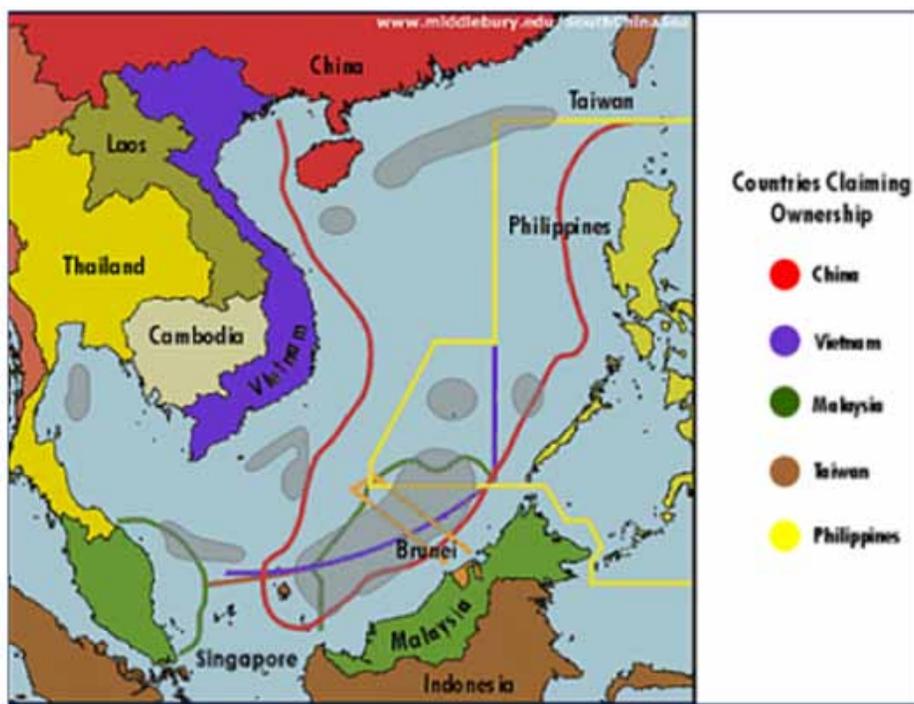
Photographic evidences indicate that claimants have been involved in various infrastructure projects that aim to intensify their military and civilian presence in their occupied islands, islets, reefs and shoals with the strategic intention to prove their effective occupation of these areas and thereby strengthen their claims for ownership. Proving their ownership of these areas has huge implications for the definition of their baselines and exclusive control and exploitation of rich maritime resources in the South China.

Figure 1 shows the already well-known overlapping claims in the South China Sea. Figure 2, on the other hand, shows the overlapping baselines of claimants. Because baselines controversies among claimants in the South China Sea have not been settled, there have also been overlapping fishing activities in the whole area as shown in Figure 3.

Fishing activities in the South China have been major sources of irritants among claimants as they accuse each other of illegal fishing and poaching in their internal waters. To justify the construction of facilities in their occupied territories, claimants even call these facilities “fishermen shelters”. Some claimants even erected some light posts and observation towers in their controlled areas in aid of navigation. It is already known that there is an enormous navigational traffic in the South China Sea making it one of the maritime superhighways of the world. Figure 4 shows the huge number of ships and tankers passing through the South China Sea, which account for more than 50% of the world’s annual navigational activities.

⁷ The author made a follow -up visit on 23-25 September 2009 at the Western Command of the Armed Forces of the Philippines based in Puerto Princesa Palawan where the author received a restricted security briefing in the South China Sea.

Figure 1: Overlapping claims in the South China Sea



Source: Energy Information Administration, 2009

Figure 2: Overlapping baselines in the South China Sea

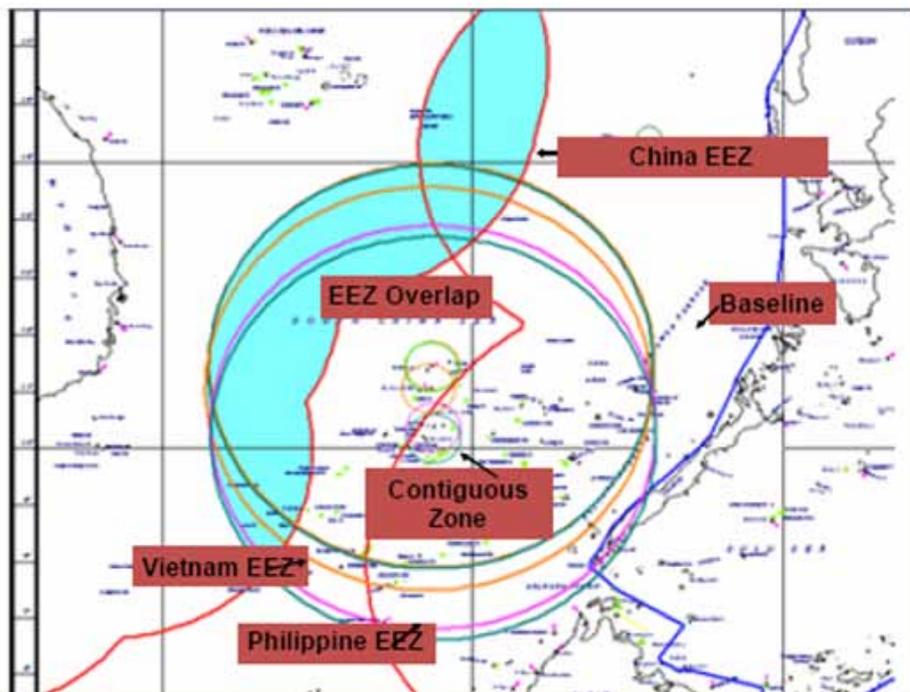
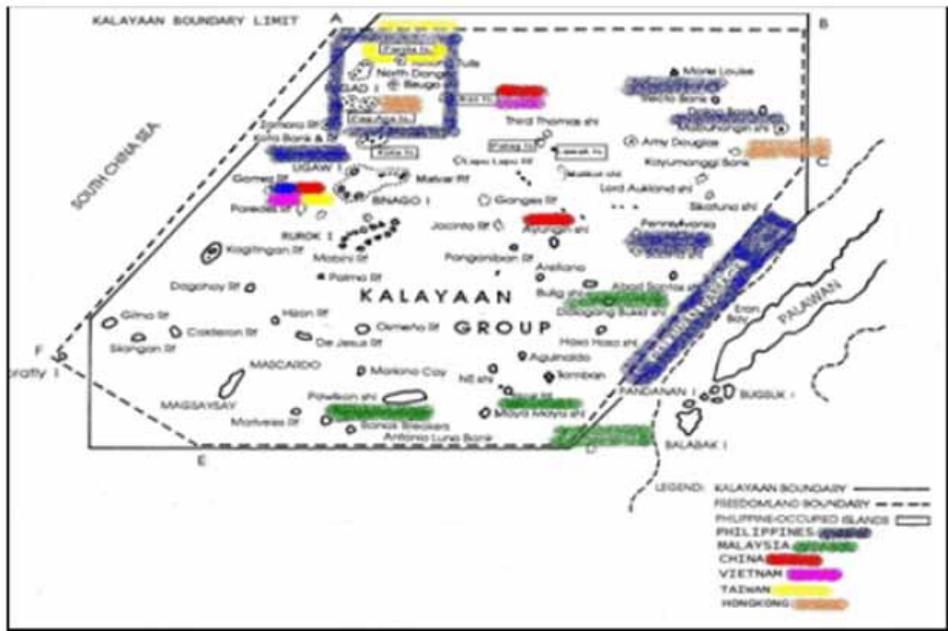


Figure 3: Overlapping fishing activities in the South China Sea



Source: The Philippine Navy, 2009

Figure 4: Navigational activities in the South China Sea



Source: Global Ballast Water Management Program, 2005

Because of strategic and economic value of the South China Sea, all claimants, except Brunei, have invested their resources in their occupied territories to maintain and consolidate their physical presence and prove their effective occupation. Figure 5 shows the number of territories occupied by claimants and the estimated number of troops deployed by claimants. Since 2002, claimants have been engaged in a number of construction activities that aim to improve and fortify their military and civilian presence in their occupied areas.

Figure 5: Presently occupied areas in the Spratlys and estimated number of troops

CLAIMANTS	ISLANDS PRESENTLY OCCUPIED	ESTIMATED TROOPS DEPLOYED IN ALL OCCUPIED AREAS
Vietnam	21	900-1000
China	7	900-1000
Taiwan	1	500-600
Malaysia	5	230-330
Philippines	9	60-70
Brunei	0	0

1. Vietnam

Vietnam presently occupies 21 islands, reefs and cay in the Spratlys. It has impressive facilities in the Spratlys. Its largest occupied island, Lagos (or Spratly Island), is the most heavily fortified with a solid runway, a pier, at least 35 building structures, around 20 storage tanks, at least 20 gun emplacements, at least 5 battle tanks and some parabolic disk antennas and a spoon rest radar. In April 2009, Philippine aerial surveillance found a two newly-constructed two-storey building in the Lagos Island with 12 newly-installed light posts and 12 wind mills. Figure 6 shows the current status of Lagos Island, which looks like a small community in the middle of the vast ocean.

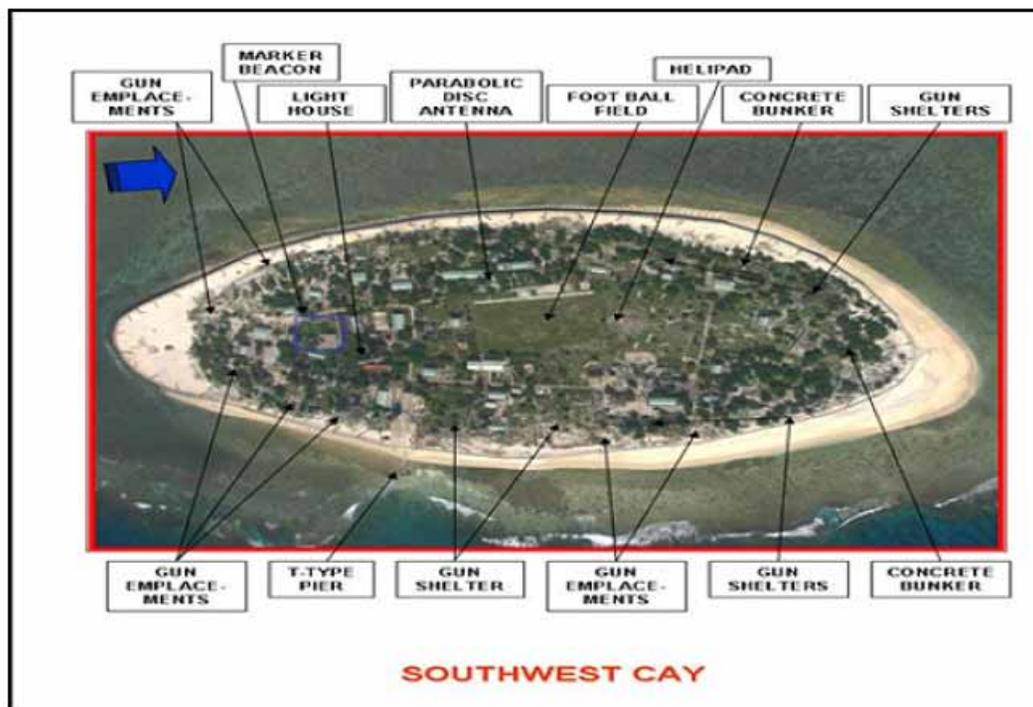
Figure 6: Lagos Island or Spratly Island (Vietnam)



Source: Philippine Air Force, 2009

Aside from Lagos Island, Vietnam also maintains facilities at Pugad Island (Southwest Cay), which is just less than two nautical miles away from the Philippine occupied island of Parola (Northeast Cay). Pugad Island has several gun emplacements, gun shelters, civilian buildings, military barracks, parabolic disc antennas, concrete bunkers, a light house, a football field, a helipad, and many light posts. In April 2009, the Philippine Air Force sighted a supply ship in the vicinity of Pugad Island with newly installed light posts, polarized dipole array antenna, and a broadband facility. Pugad Island also has a well-maintained lagoon suitable for tourists. The surrounding waters of Pugad Island are also good for scuba diving and other water-based sports. Figure 7 shows the present status of Pugad Island.

Figure 7: Pugad Island or Southwest Cay (Vietnam)



Source: Philippine Air Force, 2009

Other facilities of Vietnam in at least 14 occupied reefs seem to follow a standard pattern of construction. South Reef, Pentley Reef, Discovery Great Reef, Collins Reef, Pearson Reef, Lendao Reef, West Reef, Ladd Reef, Central London Reef, East Reef, Cornwallis Reef, Pigeon Reef, Allison Reef, and Barque Canada Reef have identical structures featuring a golden-painted three-storey concrete building with built-in light house on top, gun emplacements on both sides, T-type pier, solar panels, parabolic disc antennas, and garden plots. Figure 8 shows the Pentley Reef, which is identical with Vietnamese structures in other reefs mentioned above.

Figure 8: Pentley Reef (Vietnam)



PETLEY REEF

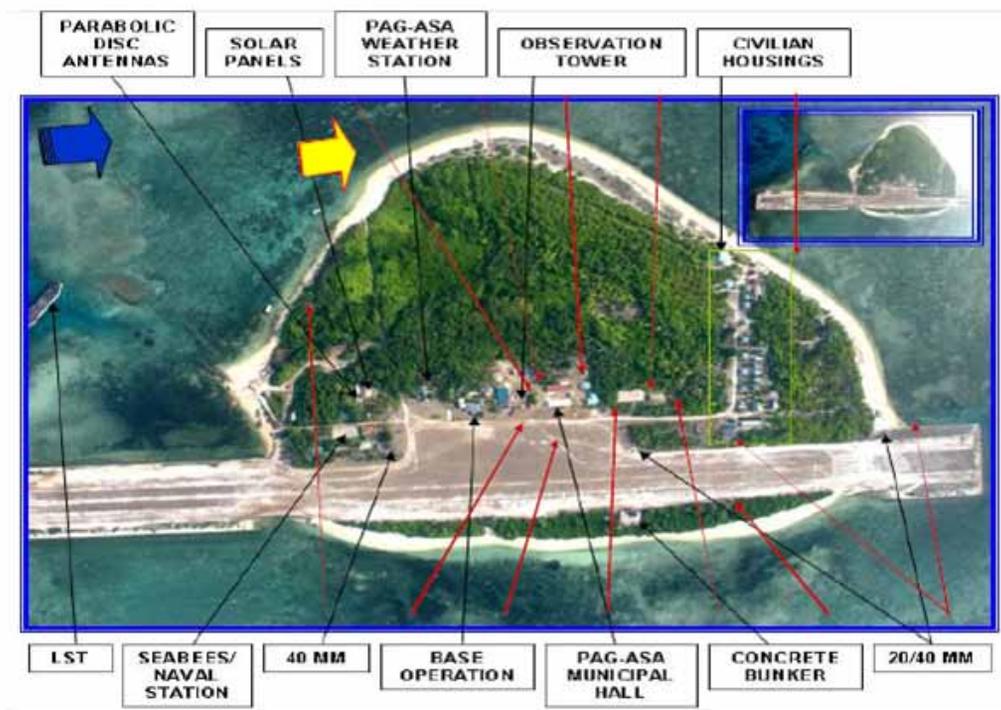
Source: 570th Composite Tactical Wing, Philippine Air Force, 2009

2. The Philippines

The Philippines ranks second in the most number of occupied areas in the Spratlys. It is presently in control of nine facilities that are considered parts of the Municipality of Kalayaan. Its largest occupied facility is the Pag-Asa Island (Thitu Island), the closest island to the Chinese occupied Subi Reef. Pag-Asa Island has an already deteriorating run-way maintained by the 570th Composite Tactical Wing of the Philippine Air Force. It also has a naval detachment maintained by the Naval Forces West of the Philippine Navy. Pag-Asa island has municipal hall called Kalayaan Hall, a village hall called Barangay Pag-Asa, a police station maintained by the Philippine National Police (PNP), sports facilities, observation tower, a commercial mobile phone station, and several civilian houses and military barracks.

Pag-Asa Island is the only occupied island of the Philippines with civilian residents. At least five families reside in Pag-Asa. This island is the main seat of the Municipality of Kalayaan established by virtue of Presidential Decree No. 1596 issued by then President Ferdinand Marcos on 11 June 1978. Registered voters of Kalayaan Municipality cast their votes in Pag-Asa Island during local and national elections. The Commission on Elections (COMELEC) maintains an office in Pag-Asa Island. The Mayor of Kalayaan Municipality has released the Kalayaan Medium Term Development Plan, 2006-2010 to civilianize the management of KIG. Figure 9 shows the current status of Pag-Asa Island.

Figure 9: Pag-Asa Island (Philippines)



Source: 570th Composite Tactical Wing , Philippine Air Force, 2009

The Philippines also maintains makeshift naval detachment facilities in five other islands, one reef and one shoal. Its facilities in the Rizal Reef (Commodore Reef) are just wooden structures and two small single-storey hexagonal concrete buildings (Figure 10) manned by four personnel of the Philippine Navy. The Philippines also maintains a naval detachment in Ayungin Shoal (Second Thomas Shoal) established out of dilapidated Landing Ship Tank called LST 57 (Figure 11). Ayungin Shoal is the closest structure of the Philippines to the controversial Mischief Reef occupied by China.

Figure 10: Structure in the Rizal Reef (Philippines)



Source: 570th Composite Tactical Wing, Philippine Air Force, 2009

Figure 11: LST 57 Docked at the Ayungin Shoal (Philippines)

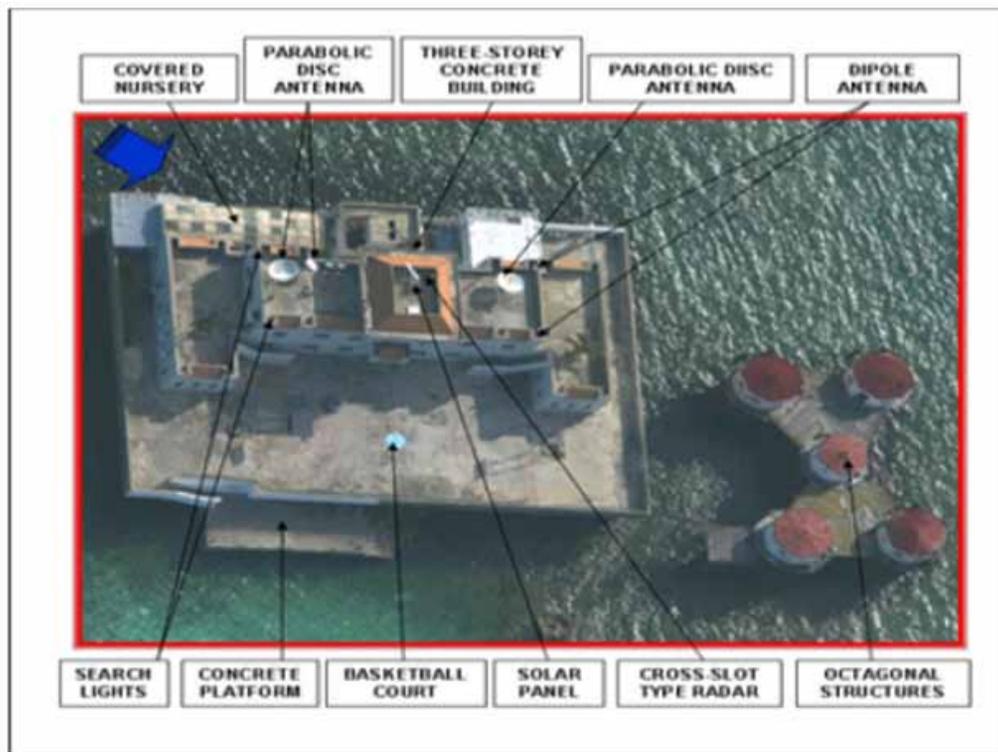


Source: Naval Forces West, Philippine Navy, 2009

3. China

Though China does not occupy any island in the Spratlys, it has solid facilities in seven reefs and shoals with concrete helipads and military structures. Its much publicized structure is in the Mischief Reef, which currently has a three-storey concrete building and five octagonal concrete structures in the vicinity. The three-storey building has a basketball court, dipole and parabolic disc antenna, search lights, solar panels and cross-slot type radar. In April 2009, the Philippine Air Force sighted three naval vessels in the vicinity of Mischief Reef: Fulin Class Survey Ship, Shijian Class Survey Ship and Yannan Class Survey Ship. Three fishing vessels were also sighted in the lagoon of Mischief Reef.

Figure 12: Mischief Reef (China)



Source: Western Command, Armed Forces of the Philippines 2009

China maintains a very impressive helipad facility in the Johnson Reef. This reef has three-storey concrete building armed with high powered machine guns and naval guns. Johnson Reef has identical structures in Chigua Reef and Gaven Reef. In April 2009, the Philippine Air Forces sighted in Johnson Reef a Huainan Jiangwei Class Frigate with body number 560 and it was believed to be armed by surface to surface missile, surface to air missile, 100mm guns, 32mm guns, anti-submarine mortars, and Harbin Z9A Dauphin Helicopter. Figure 13 shows Chinese structure in Johnson Reef.

Figure 13: Johnson Reef



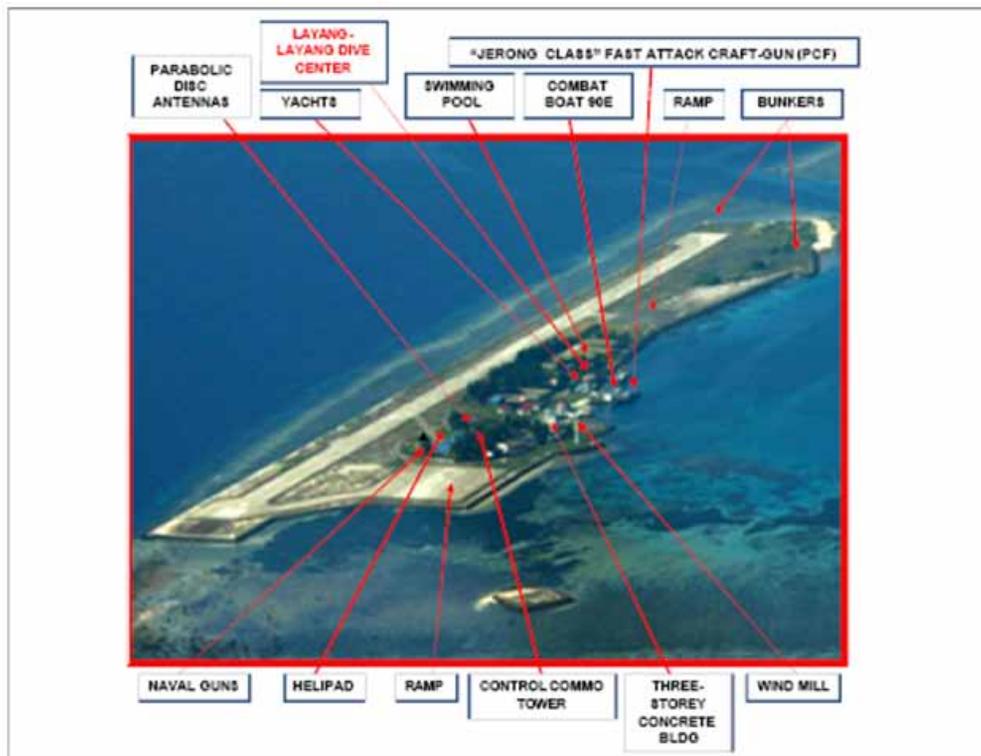
Source: Western Command, Armed Forces of the Philippines, 2009.

4. Malaysia

Malaysia, which presently occupies five areas in the Spratlys, has well-maintained facilities in the Swallow Reef. This reef has a diving center called “Layang-Layang”. Swallow Reef has a resort-type hotel, swimming pool, windmills, communication antennas, control communication tower, civilian houses, military barracks and a helipad (Figure 14).

Malaysia also has a very good facility in the Ardasier Reef with an excellent helipad, sepak takraw court, gun emplacements and control tower (Figure 15). The facilities in the Ardasier Reef are almost identical with the Malaysian facilities in Erica Reef, Mariveles Reef and Erica Shoal. Malaysia also maintains a symbolic obelisk marker in the Louisa Reef.

Figure 14: Swallow Reef (Malaysia)



Source: Western Command, Armed Forces of the Philippines 2009.

5. Taiwan

Taiwan only occupies one island called Itu-Aba, officially named by Taiwan government as Taiping Island. It is the largest and the most heavily fortified among the occupied islands in the Spratlys. It has more than 50 buildings used for military and civilian purposes. Itu-Aba has excellent helipad and a very long run-way inaugurated by then President Chen Shuibian in March 2008. The whole island is protected by at least 500 troops armed with at least 20 coastal guns, 20 gun emplacements and communication towers. Like other occupied islands in the Spratlys, Itu-Aba has several parabolic disc antennas, radars, solar panels and concrete bunkers. The island also has firing range and sports facilities. Aerial surveillance of the Philippine Air force in April 2009 indicated that Itu-Aba has newly-constructed three-storey building, new access ramp, and a new firing range. Figure 14 shows the current status of Taiwan's facilities in Itu-Aba.

Figure 14: Itu-Aba (Taiwan)

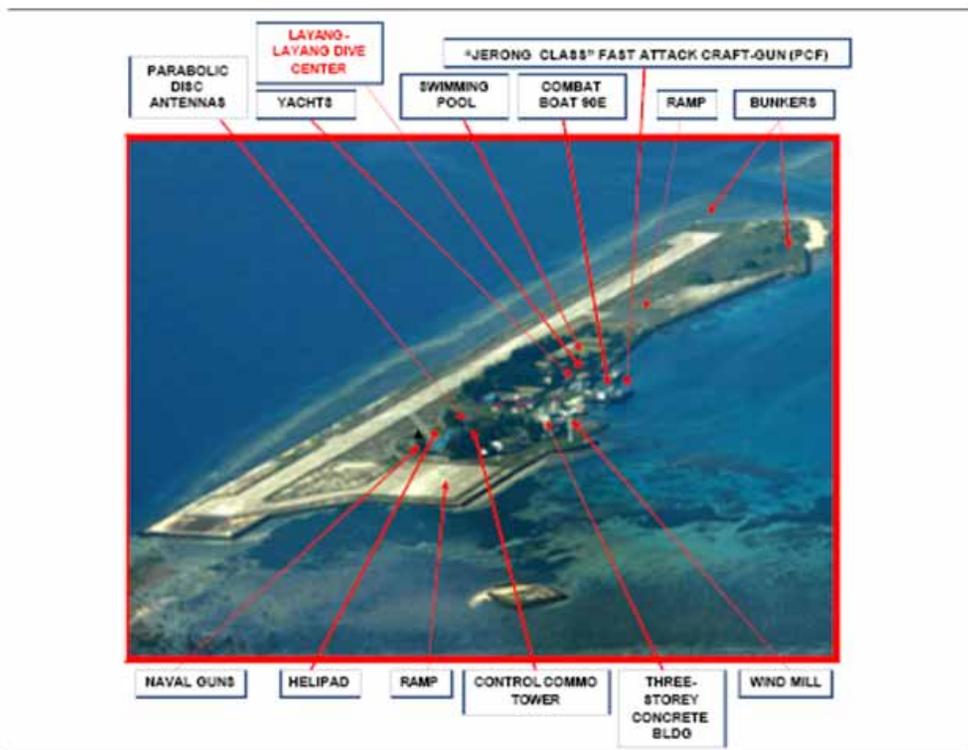
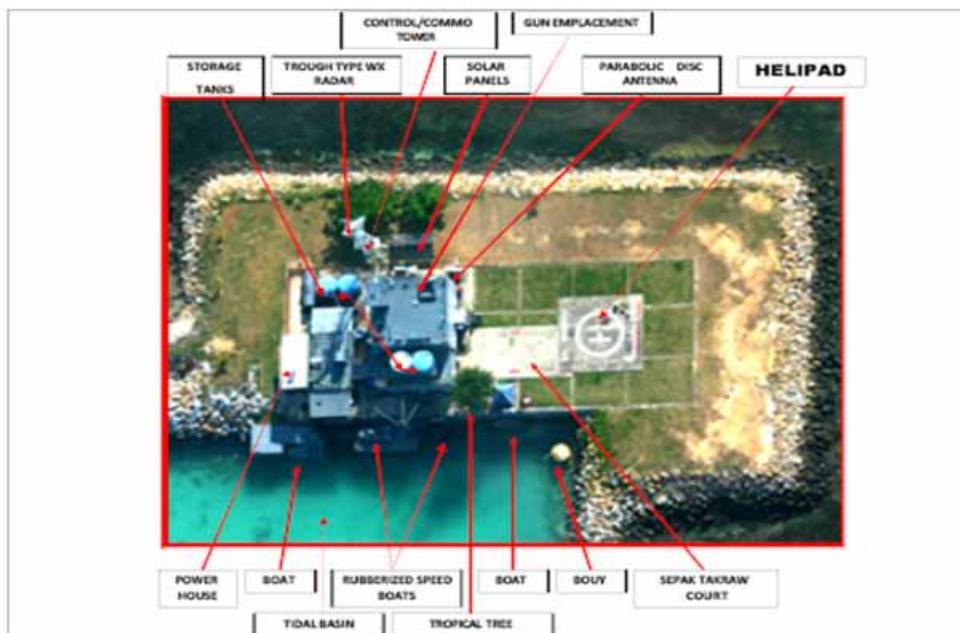


Figure 12: Ardasier Reef (Malaysia)



Source: Western Command, Armed Forces of the Philippines 2009

From the foregoing, China, Malaysia, Taiwan and Vietnam have invested their resources to erect solid and more stable structures in their occupied areas. Philippine structures in its nine occupied territories remain modest and in the dismal stage of rapid deterioration. However, the Philippines occupy the most number of Islands (Kota, Lawak, Likas, Pag-Asa, Parola and Pugad) that are vegetated and suitable for human habitation if properly developed. China's occupied areas are all reefs but with solid and highly cemented structures. Majority of the areas occupied by Vietnam are also reefs. But like China, these reefs have solid three-storey buildings. Though Taiwan only occupies one island, it is, however, the largest island in the Spratlys. Malaysia does not occupy any island like China. But all Malaysian occupied reefs are located in an area of huge oil and natural gas deposits (Figure 15). Moreover, its Swallow Reef called Layang-Layang is the most developed reef in the Spratlys for tourism purposes.

Figure 15: Oil and Natural Gas Fields in the South China Sea



Source: "Oil and Gas Resources in the South China Sea" at <http://community.middlebury.edu/~scs/maps/EEZ%20Claims,%20Oil%20and%20Gas%20Resources.jpg>

CONCLUSION

Based on photographic evidences gathered by the author from various official and non-official open sources, all claimants, with the exemption of Brunei, have been consolidating their civilian and military presence in the Spratlys to assert their territorial claims. Though there seems to be a de-escalation of conflict in the South China Sea with the adoption of DOC in 2002, renewed security tensions have occurred in the late 2007 indicating the limitations of DOC in managing territorial disputes and perpetuating the maritime security dilemma in one of the contested waters in the Asia Pacific. Beyond doubt, the territorial disputes in the South China continue to play a destabilizing role in the security of the Asia Pacific region.⁸ There is therefore a great need to increase transparency and to enhance confidence-building among claimants and other stakeholders in the disputes to effectively overcome the security dilemma in the South China Sea and decisively create a cooperative management regime necessary for regional peace and stability.⁹

⁸ For an excellent analysis of the most recent developments in the South China Sea, see Ralf Emmers, “The Changing Power Distribution in the South China Sea: Implications for Conflict Management and Avoidance”, S. Rajaratnam School of International Studies Working Paper Series, No. 183 (30 September 2009).

⁹ See Sam Bateman and Ralf Emmers (eds), *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime* (New York and London: Routledge, 2008).

RECENT DEVELOPMENTS IN THE SOUTH CHINA SEA: CAUSE FOR CONCERN

Dr. Ian Storey

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Tensions are on the rise in the South China Sea and this has worrisome implications for peace, stability and cooperation in the region, the subtitle of this session. In my presentation this afternoon I would like to address recent developments by examining three broad themes: first, the underlying causes of rising tensions, particularly the role played by China; second, ASEAN's lackluster response to increased friction over the past two years and the shortcomings of the dispute management mechanisms it has put in place with the PRC; and third, the implications of rising tensions on regional stability.¹

PART I: WHY ARE TENSIONS ON THE RISE IN THE SOUTH CHINA SEA?

In the first half of this decade the South China Sea dispute moved to the back burner of Asian security concerns. This was partly due to the Al Qaeda attacks of September 11, 2001 which put the spotlight on the threat posed by transnational terrorist groups, and the subsequent US-led military interventions in Afghanistan and Iraq. Mainly, however, the relaxation in tensions in the South China Sea can be attributed to the more flexible and accommodating stance adopted by the PRC. Cognizant that its assertive posture in the South China throughout the 1990s had fueled fears of a "China threat" in Southeast Asia, in 1999 Beijing agreed to discuss the problem with ASEAN in a multilateral setting. These discussions led to the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC). The DoC was one component of China's "charm offensive" towards Southeast Asia, a diplomatic campaign designed to assuage

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¹ For a comprehensive overview of recent developments in the South China Sea see Clive Schofield and Ian Storey, "The South China Sea Dispute: Increasing Stakes and Rising Tensions", Jamestown Foundation Occasional Paper, November 2009.

regional fears over its rising political, economic and military power - other measures included the 2001 proposal to establish a China-ASEAN Free Trade Area (CAFTA) and China's accession to the Treaty of Amity and Cooperation (TAC) in 2003, ASEAN's 1976 non-aggression pact. Although the claimants continued to protest each other's moves in the South China Sea, in general, there was a noticeable relaxation in tensions in the disputed waters. The DoC also set out to promote confidence building measures among the claimants, and the 2005 Joint Marine Seismic Undertaking (JMSU) - an agreement among the state-owned energy companies of China, the Philippines and Vietnam to conduct seismic surveys in the South China Sea - was widely hailed as a potentially significant breakthrough in the long-running dispute.

Since 2007, however, tensions have ratcheted up, particularly between China and Vietnam and China and the Philippines. Why is this?

As the most powerful actor among the claimants, China's behaviour sets the tone of the dispute, and since 2007-2008 its behaviour has become more assertive. This can be ascribed to several factors. First, China's insatiable demand for energy resources is an important driver of the dispute. China is not only keen to diversify its energy resources away from the Middle East, but also to exploit hydrocarbons closer to home and advances in technology allow energy companies to drill in deeper waters and further from the coast. A related concern is Beijing's imperative to secure its sea lines of communication (SLOCs) that bring vital energy supplies from the Middle East and Africa through the maritime chokepoints of Southeast Asia, particularly the Malacca, Sunda and Lombok-Makassar straits, which some Chinese analysts view as a strategic vulnerability.

Second, China has moved to reinforce its jurisdictional claims in the area and undermine those of the other claimants. In late 2007, for instance, the NPC passed new legislation creating a county-level city called Sansha in Hainan Province to administer Beijing's claims in the Paracels and Spratlys, an act which led to anti-Chinese protests in Vietnam. China has rejected Hanoi's assertions of sovereignty in the South China Sea and even exerted pressure on foreign energy corporations not to undertake projects around Vietnamese coastal waters. In 2007 and 2008, reports emerged that Chinese officials had hinted at unspecified action against several foreign companies, including British Petroleum and ExxonMobil, unless they suspended work on oil and gas projects off Vietnam's southeast coast.² This tactic was confirmed by both the Chinese Foreign Ministry and later, the U.S. Department of State.³ The unilateral imposition of fishing bans in the South China Sea by the Chinese government since 1999 are also designed to reinforce its sovereignty rights in the area.

Third, the activities of other claimants have also led China to pursue a more hard-

² "Tussle for oil in the South China Sea," South China Morning Post, July 20, 2008.

³ "China opposes any act violating its sovereignty," Xinhua News Agency, July 27, 2008.

line policy. Earlier this year China made strenuous attempts to dissuade the Philippines from enacting its revised March 2009 baselines law but was ultimately unsuccessfully. This action earned the Philippines a sharp reprimand from Beijing. Furthermore, in early May 2009 China also reacted swiftly and vigorously to the joint submission made by Malaysia and Vietnam and a further submission on the part of Vietnam alone. Claims to the CLCS have added an extra dimension of complexity to the dispute.

The fourth factor that has given China more confidence to pursue its claims more vigorously is the modernization of the People's Liberation Army Navy (PLAN). The acquisition of advanced submarines, frigates, destroyers, and patrol boats, plus long-range aircraft, allows the Chinese military to project and sustain greater power in the South China Sea. China's emergence as Asia's pre-eminent naval power is potentially a game changer in the context of the territorial disputes and puts the other claimants, who cannot match the PLAN's increasing capabilities, at a disadvantage. China's growing military capabilities in the South China Sea also has implications for Sino-US relations. The build-up of naval forces at the Sanya Naval Base on Hainan Island has led the United States to increase surveillance of the PLAN in the South China Sea, a development that the Chinese government considers provocative and illegal. A number of confrontations between U.S. and Chinese vessels took place in early 2009, culminating in the standoff between the surveillance vessel USNS Impeccable and five Chinese-flagged vessels 75 miles off Hainan Island in March.⁴ Although the two countries have begun discussions over the issue, given their differing interpretations of international maritime law, and the build-up of military forces in the area, incidents such as those involving the Impeccable could well become more frequent.

The fifth factor is rising nationalism, both in the PRC and several of the other claimants. In the PRC the South China Sea dispute is not quite as emotive as "core" sovereignty issues such as Taiwan Xinjiang and Tibet, but the Chinese government cannot be seen as compromising the country's sovereignty claims in the maritime domain. Commentaries addressing the issue of other countries "stealing" China's maritime resources are increasingly common in the state-controlled press. In the Philippines allegations that the administration of President Gloria Macapagal Arroyo had sold out the national patrimony and violated the Constitution by agreeing to participate in the JMSU helped seal the fate of that agreement in June 2008. In Vietnam too sovereignty is a highly sensitive issue, especially when it comes to perceived attempts by its giant neighbour to the north to infringe that sovereignty. Moreover, sovereignty issues can be exploited for political purposes by exiled groups overseas.

The sixth reason is the failure of existing mechanisms to manage and ameliorate tensions in the South China Sea. That brings me to my second theme, the role of ASEAN.

⁴ Ian Storey, "Impeccable Affair and Renewed Rivalry in the South China Sea," *China Brief*, Vol. 9, Issue 9 (April 30, 2009).

PART II: ASEAN'S LACKLUSTER RESPONSE

Efforts by ASEAN to manage the South China Sea dispute have thus far proved of limited utility, and its response to rising tensions has been very disappointing.

The only extant agreement between ASEAN and China to address the dispute directly, the 2002 DoC, has deterred claimants from occupying vacant features in the South China Sea but failed to prevent states from building up their physical infrastructure on the disputed islands. As a result, since 2002 all of the disputants in possession of atolls have continued, and in most cases substantially accelerated, the construction of civilian and military infrastructure in the Spratlys, a development that has gone largely unnoticed by the media given the remoteness of the area. Infrastructural improvements have included reclamation projects to expand the area around the atolls, the construction of sea walls, typhoon shelters, piers, landing docks, lighthouses, civilian amenities and barracks, helicopter landing pads and airstrips, and the provision of clean water supplies and telecommunications networks.

Moreover, confidence building measures (CBMs) outlined in the DoC have failed to promote meaningful cooperation. While seductive in concept, the JMSU proved fundamentally flawed in execution. The contents of the agreement were never made public in order to forestall criticism, and it was not until 2008 that it was revealed that one-sixth of the survey area lay within Philippine territorial waters and outside the claims of both China and Vietnam. The JMSU became embroiled in controversy in 2008 as a result of which the Arroyo government sought to distance itself from the agreement. The JMSU was allowed to lapse in June 2008, essentially putting the dispute back to square one. Since the JMSU's demise, no cooperative projects among the disputants have been launched. Nevertheless, all parties continue to express support for the DoC and ASEAN has repeatedly pledged to achieve full implementation and oversight of the agreement.⁵ Yet, seven years after the Declaration was issued, ASEAN and China have not yet even drawn-up guidelines on how to implement the DoC.

The DoC was designed as an interim measure while ASEAN and China worked towards a more comprehensive and binding regional Code of Conduct in the South China Sea (CoC). While both ASEAN and China remain rhetorically committed to the eventual conclusion of the CoC, no substantive discussions towards such an agreement are currently underway. Unfortunately, the DoC may be the best ASEAN and China can hope to agree on, at least for the near future.

As tensions have risen in the South China Sea, ASEAN has noticeably failed to highlight the issue at any of the countless meetings the organization hosts. In July

⁵ ASEAN Political-Security Community Blueprint, March 1, 2009, <http://www.aseansec.org/22337.pdf>

2009, ASEAN foreign ministers, ASEAN Plus Three⁶ ministers, and the ARF discussed a host of pressing issues from the global financial downturn to the political situation in Myanmar. Yet, on the South China Sea issue, ASEAN merely reiterated its support for the DoC, encouraged “the continued exercise of self-restraint by all the parties concerned and the promotion of confidence building” and looked forward to the eventual conclusion of a CoC.⁷ The sovereignty dispute was not discussed at the 12th ASEAN-China Summit in Cha-am, Thailand in October 2009.⁸

ASEAN’s lackluster response to rising tensions may be ascribed to three main factors. First, a growing tendency among the ASEAN states to accentuate the positives in their relationship with China—especially growing economic interaction—while downplaying the negatives. Second, the lack of consensus within the organization—which includes both disputants and non-disputants, as well as countries with close ties to Beijing—over how to deal with China over the issue. Third, China has been able to take advantage of the above two factors to prevent meaningful discussion on the dispute at multilateral forums such as the ASEAN Regional Forum (ARF).

ASEAN’s failure to address the problem head-on has allowed tensions to simmer. Indications suggest that when Vietnam takes over the rotating chairmanship of ASEAN in January 2010 it is likely to use its position to put the South China Sea on the formal agenda, including at meetings with China. Absent a consensus within ASEAN, however, it is unclear how far the other members will allow Vietnam to push the issue and how China will react. In anticipation of Vietnam’s chairmanship of ASEAN, Beijing seems to be pre-empting moves to give greater prominence to the South China Sea issue. Prior to the ASEAN-China Summit in Cha-am, China’s Ambassador to ASEAN, Xue Hanqin, stated that because ASEAN members included both claimant and non-claimant states, it was not an appropriate venue to discuss the South China Sea issue and that the Chinese government wanted to resolve the territorial dispute through bilateral negotiations.⁹ At a seminar at ISEAS, Singapore on 19 November 2009, Ambassador Xue clarified China’s position on this issue by stating that while Beijing was willing to discuss measures to relax tensions and promote stability in the South China Sea with ASEAN as a group, a resolution to the problem could only be

⁶ The ASEAN Plus Three process is participated in by the 10 ASEAN countries, China, Japan, and South Korea.

⁷ See, for instance, Joint Communique of the 42nd ASEAN Foreign Ministers Meeting, Phuket, Thailand, July 20, 2009, <http://www.aseansec.org/PR-42AMM-JC.pdf>; Chairman’s Statement the 10th ASEAN Plus Three Foreign Ministers Meeting, July 22, 2009, <http://www.aseansec.org/PR-42AMM-Chairman-Statement-ASEAN+3.pdf>; and Chairman’s Statement 16th ASEAN Regional Forum, July 23, 2009, <http://www.aseanregionalforum.org/PublicLibrary/ARFChairmansStatementsandReports/tabid/66/Default.aspx>.

⁸ Greg Torode, “A diplomatic victory for China,” *South China Morning Post*, October 31, 2009.

⁹ Stephanie Ho, “Beijing: South China Sea territorial disputes not on ASEAN agenda,” *VOA News*.com, October 21, 2009, <http://www.voanews.com/english/2009-10-21-voa20.cfm>; “We want good ties, says China,” *Straits Times*, October 22, 2009.

achieved through bilateral negotiations – bilateral negotiations between China and each of the four ASEAN claimants, and between the four ASEAN claimants themselves.¹⁰

PART III: IMPLICATIONS FOR REGIONAL STABILITY

If ASEAN is serious about ameliorating tensions in the South China Sea, at a minimum it needs to address the issue head on with China and move towards a formal CoC. ASEAN and China must also operationalize the CBMs they have discussed over the years. Despite the failure of the JMSU, joint development offers the most sensible way forward, though admittedly the obstacles are daunting. One thing is for sure: if the South China Sea disputes are to be settled, such resolution will derive from a political rather than essentially legal process.

If tensions are left to fester, the implications for regional security are grave. The asymmetries in power between China and the ASEAN claimants will widen as the Chinese military enhances its capabilities, including, as seems increasingly likely, the acquisition of one or more aircraft carriers around 2020. In the short to medium term, friction over energy and fishing resources will increase, raising the possibility of naval clashes in the area. More ominously, any curtailment in freedom of navigation in the area risks provoking US intervention, thus placing the ASEAN countries in an invidious position.

¹⁰ Ambassador Ms. Xue Hanqing, “China-ASEAN Cooperation: A model of good-neighborliness and friendly cooperation”, ASEAN Ambassadors Seminar Series, ISEAS, Singapore, 19 November 2009.

THE GEO-POLITICAL REALITY OF REGIONAL CO-EXISTENCE IN A CHINESE LAKE

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INTRODUCTION

I wish to congratulate Vietnam for protesting to China's announcement on November 8, 2009 that it had established hamlet committees on Woody Island, capital of Sasha city. In its protest note Vietnam is reported to have remarked that the act was an infringement of its territorial sovereignty. Thus far I have not read Beijing's response to this latest protest from Hanoi. As a researcher in this field, I expect more protests and counter protests in the future as both parties dig in the South China Sea, trying to accommodate and relate with each other. This situation or predicament is also true of other claimants.

No drastic changes in geopolitical equations in the South China Sea especially power rivalry are expected in the immediate future. Of course, China is at the centre of geo-political dynamics and landscape. With the consolidation of its political, military and legal position in the South China Sea, I expect Beijing to call the shots in the near future, if it has not done so. Many critics believe that after the Mischief incident in 1995 and the passage of the Declaration on the Conduct of Parties in the South China in 2002, a lull would ensue following the proverbial stormy weather in the South China Sea. That this did not happen is no surprise at all.

The year 2009 has been an eventful time for South China Sea watchers. We can begin with the close encounters between the US spy ships and the PLAN vessels. The most notorious incident happened on 8 March 2009 when the USNS Impeccable was caught spying off Hainan. Four days before the incident, on 4 March 2009 a sister ship the USNS Victorious was also asked to leave the Chinese EEZ for improper activities (read spying).

The week of May 13, 2009 was especially busy as Malaysia, Vietnam, and Brunei rushing to submit their claims to the United Nations Commission on the Limits to the Continental Shelf in pursuant to Article 76 of UNCLOS. Manila submitted claims to the Benham Rise area to the East of Luzon on 8 April 2009. As expected there were protests and counter protests from the neighbouring countries. China and Taiwan protested to the joint submission by Malaysia and Vietnam and they also protested the separate claims of the Philippines and Vietnam.

Brunei provided preliminary information to the Commission on the Limits of the Continental Shelf on 12 May 2009.

In the East China Sea, Japan was the first to register its submission (12 November 2008), followed by South Korea and China giving preliminary information on 11 May 2009. In June and December 1988 Indonesia and Myanmar submitted claims in their respective continental shelf areas outside the South China Sea.

On 11 March 2009 President Gloria-Macapagal-Arroyo signed the Philippine Archipelagic Baseline law (Republic Act 9522). The law drew strong opposition and solemn protest from China which claims that the territories claimed by Manila “have always been part of Chinese territory and that the Republic of China has indisputable sovereignty over these islands.” Vietnam also protested on 16 March that the Law was “a serious breach of Vietnam’s sovereignty”.

Taiwan also lodged a diplomatic complaint against the Baseline Law on 14 March 2009 by calling on Manila to negotiate on the sovereignty status of the territories in the South China Sea and reiterating as always that “Taiwan has sovereignty over the islands and reefs in the South China Sea, including the Spratly.”

At the same time, in line with PLAN fleet expansion, there were numerous sightings of Chinese warships in the Spratly in 2009, more frequent than the previous year; other foreign warships are also sighted in the area used for international navigation. But on 16 March 2009 the Chinese Embassy in Manila denied Manila’s claim that it sent a warship to the South China Sea. The Chinese diplomat in Manila was reported to have said: “we just sent a fishery patrol ship, not a warship, to the South China Sea”. In a direct reference to earlier protests from China on the Philippines claims in the Spratlys, President Arroyo was reported to have candidly remarked that such posturing from China was normal.

From 24-26 September 2009 China hosted the Third China-Vietnam defense and security consultation talk in Beijing that some have hailed as a positive process of warming up to each other that began in 2007. Although the detail on the consultative was confidential, the fact that such consultation took place goes to show that both sides saw the merit of keeping the channel of communication open.

On 29 October 2009 the Chinese Foreign Minister Yang Jiechi was in Manila where he signed two agreements: the Philippines-China Joint Action Plan for Strategic Cooperation (JAP) and the Philippines-China Consular Agreement signaling perhaps a new chapter in China-Philippines relations after the latter protested to Manila’s signing of the PI Baseline law on 11 March 2009. Admittedly, Manila-Beijing relationship in the past has been on a roller coaster, more difficult during President Ramos than under Arroyo.

Malaysia hosted President Hu Jintao of China on November 10-11 2009 en route to the APEC meeting in Singapore. China and Malaysia signed five agreements during the visit to expand trade cooperation and investment. Both sides were keen to advance “strategic and cooperative ties.” President Hu was reportedly pleased with the visit as Malaysia has become China’s largest trading partner in ASEAN. Trade volume between the two countries has topped US\$53 billion last year.

Of course, the recently concluded President Obama’s first official visit (16-17 November) to China will further raise the stature of China in international relations. Although Obama is reported to have said that the US and China were not adversaries and that Washington did not want to contain China’s nor impose any particular system of governance but he also used the visit to criticize China on their human rights policy. This ambivalence is understandable. In the opinion of *The Economist* Obama has to tread carefully, balancing “his desire to secure China’s cooperation on global matters against demands at home that he takes China to task over issues such as human rights and trade.”

SOUTH CHINA SEA HAS BECOME A CHINESE LAKE

In my judgment Beijing has succeeded to convert the South China Sea into a Chinese Lake from 1974-1995. No derogatory intention or pun is intended by this assertion. The label “Lake” refers essentially to the body of water that China considers as its own territory, yet it is prepared to extend to other stakeholders the rights and obligations to use the lake so long as they do not subvert the security of China. For example, China will not interfere with the rights of navigation even for foreign warships so long as they do not undermine its security. However, conducting sea bed surveys and collecting data that can be used to undermine its security will not be tolerated as demonstrated in the case of the *Impeccable* and the *Bowditch*. Similarly, in my view, China will continue tolerate claimant states military presence in the lake so long as they do not gang-up to subvert China’s security.

China will no longer tolerate, for example, the presence of a strong external military power in the South China Sea that will upset the military balance in the Lake. Any attempt by any of the claimants, for example, to form a military pact with an external power (read United States) will be inviting danger from Beijing. Although China is not yet ready to challenge the US openly in the South China Sea because of military power asymmetry but it has the means to conduct attrition warfare against the claimant state. Geography, resources and time seem to favour China. Many view the US, despite recent foreign policy assertiveness, as a distant power, on the verge of losing its hegemony, will have no appetite to get embroiled in military confrontation in distant lands. One writer has recently suggested that the American hegemony in the region is nearing its end.

The recent warning from Lee Kuan Yew that the US has lost its influence in the Pacific region is instructive; there is no doubt that Washington has also reached the same conclusion judging by US recent initiatives in the region. But I am not convinced that the US would be prepared to balance China in a benign way, as suggested by Lee Kuan Yew, in the Pacific; at least not at the present time when it needs China to help ease the global economic downturn. For the same reasons, I do not expect the US to confront China militarily in South China Sea in the immediate future either unless it impedes the freedom of international navigation. However, no one can discount US naval assertions to protest against unilateral policies that it views as incompatible with international law. But such assertions are, in my view, part of diplomatic games of powerful nation states.

While motives and intentions are difficult to determine, certain behavior traits can be established by looking at past trends. All along, China has resisted in categorising the claimants as one group. On the contrary, China has emphasized bilateral relations. Like any other power, China does not treat bilateral relationship the same or on equal footing. China's relations with Vietnam have been quite hostile until the latter made some peaceful overtures in 2007 onwards. With Malaysia, it maintains a stable relationship despite occasional demarche or protest notes from Beijing whenever it is not pleased with activities that are seen to be strengthening Malaysia's legal position. As an example, China verbally protested to the visit of the visit by the Prime Minister of Malaysia to Pulau Layang-Layang on 3 June 2009.

The unfortunate incidents involving the Impeccable and the Bowditch in its EEZ in April 2009 are viewed by many in the West as a reminder of a more assertive China. Western media does not report China's claim that the US vessels had violated its EEZ legislation. Imagine if Chinese vessels were caught mapping the ocean floor 125 kilometers from San Francisco. Hell would have broken loose at Foggy Bottoms!! China has been accused of subverting customary international law by hampering the freedom of navigation on the high sea when it asked the USNS The Impeccable to leave its EEZ on April 9, 2009 for violating its domestic legislation. This is not a case of selective harassment. On the contrary, I think, China will not hesitate to harass any foreign vessel engaging in non-authorized activities detrimental to its security in its EEZ.

Some credit must be given to Beijing for tolerating the activities of the various claimants in the Spratly. I attribute this tolerance to the non-threatening nature of these activities unlike the activities of the US spy vessels which China viewed as undermining its security. On the contrary, as China continues to rise in power, according to Fravel, "it may paradoxically be more willing to compromise some aspects of its dispute with Vietnam, as it will be doing so from a position of strength..." The compromise may involve "the maritime rights in waters around the Paracels, perhaps sharing the resources in the manner similar to the 2020 fisheries agreement in the Tonkin Gulf."

DO CLAIMANT STATES NEED TO FEAR PAX SINICA?

NO.

We do not need to fear Pax Sinica. On the contrary, the new geo-political dynamics seem to suggest that a strong and rich China is good for the world and the region. China belongs to the region; it is part of the region. It is quite evident that China has not lost sight of a semblance of cultural compatibility with the claimant states that compliments its strategic objectives in the region. Despite this, China should not take the region for granted; China has no card Blanche to terrorize the South China Sea. China must reciprocate the good will and respect the present *staus quo* to ensure peaceful co-existence.

Part of the unfounded fear of Pax Sinica misbehaving itself as the British and America did in the past is because the world is still not used to the rise of Pax Sinica. We have got used to Pax Britannia and Pax Americana and their geo-political and geo-strategic antics many are not prepared to welcome a non-Caucasian power. Many fail to credit to China's non-belligerent behavior in the past especially in the 1860s when it controlled more than twenty per cent of the global economy in 1860s (about the same level as the US in 2009); during that period, it did not throw its weight around irresponsibly.

Perhaps China's past as a civilisational state (after Martin Jacques) has not been well understood and this has caused many to perceive its re-emergence in global affairs as being more hostile than benign. There seems to be a mirror image of powers like Great Britain to the United States whose rise was accompanied by many political uncertainties as well as crisis. President Obama admitted in Tokyo on 14 November 2009 "that in the 21st Century, the national security and the economic growth of one country need come at the expense of another...and, in an interconnected world, power does not need to be zero sum game and nations need not fear the success of another...". This reassurance is an oblique reference to remarks from Mr. Lee Kuan Yew, Senior Minister of Singapore, in Washington that the US must "hold ground" to remain a superpower in the twenty first century contest for supremacy in the Pacific.

It is easy to criticize China for flexing its military muscles without looking at the recent geo-political dynamics in the region that has put China in a jittery mode. The April 2001 incident involving the US spy plane over Hainan and a series of encounters with spy vessels in and around the South China Sea culminating with the Bowditch incident on March 8, 2009 have given the Chinese military reasons to flex their muscles. The decision by Washington to sell US\$6.5 billion worth of sophisticated weapons to Taiwan in October 2008 has caused Beijing to question US long-term military strategy in the region. The current geo-political dynamics, in my view, have put China on a more assertive mode in the South China Sea that it considers its Lake. The following

geo-political parameters have a major influence on Beijing policy in the South China Sea:

The perceived decline of US strategic influence in the region and elsewhere as a result of the US economic downturn;

India as a regional player that could threaten China's strategic interests;

The US policy of re-engagement with South East Asia has been described by some as competing for influence with China. The decision by Washington to send a delegation of senior officials to hold talks with Burma's military junta and Madam Aung San Suu Kyi on 4 November 2009 could be seen as Washington's attempt to weaken China's influence on Burma. This gesture is followed by President Obama's meeting with the Asean leaders, including the Prime Minister Burma, at the 21st APEC Economic Leaders' Meeting (AELM) on Nov. 14-15 in Singapore is indicative of a new US foreign policy initiative in the region.

Japan is also taking a higher profile in South East Asia. Its decision to host a two-day meeting (6-7 November 2009) with the leaders of South East Asia's five Mekong River nations in what analysts say is a move to counter growing Chinese influence in the region. China was not invited to the meeting although it has been, like Burma, a dialogue partner of the Mekong River Commission since 1996.

Since the 1990s China's geo-political interest in the South East Asia has changed as it pursues to influence global events. It is no longer interested in subverting the region. On the contrary, China counts on South East Asian States as regional allies; an important market for its manufactured products, a source of capital and primary commodities like rubber and palm oil. While many in South East Asia may still be suspicious of China's political motives, most would embrace China as a friendly economic powerhouse.

China has substantial trade with the region. For example, the volume of Asean-China trade has expanded more than five-fold between 1997 and 2005; in 2007 the Asean-China trade volume has surpassed the US \$ 200 billion target. Barring further major financial impediments, regional trade will receive a boost from the 2004 ASEAN-China Free Trade Area Agreement and the decision in April 2009 to ink the investment agreement, its final chapter. The FTA with China which takes effect in 2010 will be the world's largest with a population of 1.8 billion people and gross domestic product of US \$2 trillion. Going by recent reports on oil China's trade surplus in October 2009 and the strengthening of the economic recovery in China in an otherwise listless world economy, it gives hope to speculation that China's rise will drive further growth in Asia.

At the same time, China has strengthened trade with some claimant countries. For example, bilateral trade between Malaysia and China has exceeded US \$50 million in 2008 two years ahead of a 2006 forecast. However, there is one down side. According to Malaysian statistics, the trade balance is in China's favour (Ringgit \$1.8 billion in 2003, \$6.98 billion in 2004, \$14.7 in 2005, \$15.5 billion in 2006 and \$11.8 billion 2007). Likewise, Vietnam's economic relation has expanded from 1991 onwards. However, since 2001, according to one Report, Vietnam has incurred consistent trade deficit with China; in 2008 it was more than US 11 billion estimated at 12 per cent of the GDP. Vietnam's trade with China in the last six months of 2009 showed a significant decrease of almost 19 per cent (around US \$9 billion).

CLAIMANT STATES ARE NOT CHINA'S ADVERSARIES

The claimant states are not China's adversaries. They do not pose any credible threat to China's security. Those who view China as a hegemon and a military threat like to point to China's modernization and expansion of its Peoples Liberation Army (PLA) as a basis of their conclusion. Its relatively large defense budget and the establishment of a string of military basing facilities astride the sea -lanes -of communication (CIA describes them as "a string of pearls strategy") stretching from Africa through the Middle East, South Asia to the Far East are viewed as expanding the strategic infrastructure for power projection. Recent assertiveness against US spy vessels in its EEZ has drawn adverse comments from some critics in the region that China is flexing muscles.

I believe the skeptics are wrong.

The skeptics refuse to acknowledge, for example, that China's defence expenditure is about 3 per cent of US spending and 15 per cent of Japan's, if the official exchange rate is accounted for. The PLA spends per soldier much less than their counterpart in Israel or Singapore. As a ratio of the gross national product, at 6 per cent Singapore maintains a higher ratio. So much time is spent on speculating into China's military intention. I believe there is a risk in looking merely at capabilities and extrapolate intention; it is not always true that the relationship is always positive. The PLA Navy, most would agree, is not even blue water by comparison with the British Royal Navy or the Naval Wing of the Japanese Self Defence Forces. Yet, no one draws ill intention from these powers. I guess until the region get used to Pax Sinica ruling the waves, the PLAN will continue to receive adverse review.

There are also exaggerated claims that China's race for offshore hydrocarbon resources in the South China would sea will push China and South East Asian countries into contention and that China can disrupt the sea-lanes of communication in the disputed South China Sea. Although China has pressured some international oil companies from exploration in the Spratly, it has not interfered, for example, with similar offshore activities in Brunei, Sabah and Sarawak. Beijing is likely to increase

naval presence in the Spratly to prevent unauthorized military activities by unfriendly external powers (read US). With the exception of a few cases involving mainly Vietnam and the Philippines, China has not resorted to use force in the Spratly since it occupied the Mischief Reef in 1995.

There are also discordant voices claiming that China does not respect the freedom of navigation on the high sea in the South China. They offered as evidence the incidents in March involving US spy vessels the Impeccable and the Bowditch. Truth is: these vessels were conducting unauthorized military activities in China's Exclusive Economic Zone in violation of Chinese domestic laws. Of course, China has the military capability to disrupt the sea lanes of communication (SLOCs) but it will be perilous and a foolish strategy to do so. In fact, it is in China's commercial interest to keep the sea lanes of communication open. In the Strait of Malacca, for example, China has agreed in 2006 to help Indonesia repair five navigational aids in Indonesian waters which were destroyed during the tsunami off Aceh in 2005; it is in Beijing's global economic and military interest to have a waterway which is safe for its ships to navigate. However, for long term strategic reasons, China has jointly developed additional land-supply routes (mainly for oil) through Burma, Pakistan and Russia to ensure security of supply at all times.

CONCLUDING REMARKS

As its Lake, the South China Sea has come under China's zone of geo-political influence.

The failure to recognize changes in Beijing's geo-political outlook, its economic prowess as well as the desire to be involved in the mainstream of international politics and participate in bigger issues in international relations like its role in the current economic downturn has blinded many to believe that Beijing poses military threat to the region. Often cited in support of this assertion is China's assertiveness in the South China that it considers proverbially its Lake. Critics seldom look at the geo-political reality emerging in the region from China's perspective. Dealing with the changing geopolitical landscape like the US policy of containment (Obama downplays this) and the rise of India and the possibility that Japan may reassert itself politically in the region calls for extra vigilance and can help explain China's occasional tantrums in the region.

It is my view that China's military expansion is far from over. However, I do not believe that China is expanding the military infrastructure and facilities in the South China Sea to use against the claimant states -who are also their economic allies. On the contrary, the presence of its overwhelming military strength has made it much easier to make compromises (not amounting to relinquishing its claims). The sophisticated military assets are intended to protect against an uncertain future in the global strategic landscape and to give teeth to an emerging economic superpower with worldwide geo-strategic interests.

It is my firm belief that China does not consider the claimants as its military foe or adversaries. Nevertheless, China will continue to issue diplomatic demarches and protest notes for activities which it considers to be an infringement of its sovereignty. In the same vein, I expect the claimants will also continue to complain and protest against China's activities in the South China Sea. Such protest notes and counter protests are not likely to result in any military showdown. Protest notes are not only essential for domestic consumption but also for foreign policy purposes.

But the real challenge, in my view, is to recognize that the new geo-political landscape in the South China Sea has changed with the emergence of China as an economic and political power; although China's military might is nowhere that of the United States, it is the strongest military power in the South China Sea.

Beijing is acutely aware of the limits of the utility of using force in international relations especially at a time when its rise is shrouded with suspicion; it will not undertake any military misadventure against the claimant state. Hence, some form of *modus Vivendi* with the claimant states is desirable; the present status quo of co-existence in a Chinese Lake which allows the claimant states some space in expressing their respective national positions in a peaceful manner (like making diplomatic protests) provides political stability in the South China Sea.

Within these parameters, it is quite safe to be swimming in the Chinese Lake.

THE SOUTH CHINA SEA: AVENUES TOWARDS A RESOLUTION OF THE ISSUE

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DESCRIPTION OF THE ISSUE

The South China Sea area comprises the Spratly islands, known in Vietnam as the Trường Sa and in Chinese as the Nansha, the Paracel islands, known as the Hoàng Sa and the Zhongsha, the Pratas Islands, also known as the Dongsha, and the Macclesfield Bank, also known as Quần đảo Trung Sa or Zhongsha Qundao. Estimates of the number of features in the area vary considerably because of the difficulty of distinguishing between islands, atolls and reefs, many of which are only visible in low tide. Some estimate the number at 190 islets, still others opt for the general figure of 400 rocks, reefs, and islands, other estimates range as high as 650. Figures on the number of occupied islands for this reason vary and range from 48-50. The term occupation is ambiguous as some islands may have a permanent garrison while small atolls may be garrisoned for part of the year; others may have a token presence and still be called “occupied.” At present, Vietnam has occupied 27 islands and reefs; the Philippines has a presence on 8 islands in the eastern part; China has occupied 9, though some reports claim only 7; Malaysia has occupied 3 but has a presence on another 2 islands; Taiwan occupies 1 island. Both China and Vietnam claim the entire area, the Spratly Islands as well as the Paracels, which means that their claims overlap with the specific claims raised by the Philippines, Malaysia and Brunei. These countries have specific claims to areas contiguous to their own territory which also overlap. The Philippine claim to Kalayaan [freedomland] as an extension of the island of Palawan overlaps with the Malaysian claim which extends from Sarawak/Sabah; Brunei’s claim which extends from its own territory overlaps with that of both Malaysia and the Philippines.

Both Vietnam and China base their claims on historical contact or prior discovery.

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Vietnam has argued that contact was first made during the Nguyen dynasty [16th-19th centuries], though evidence exists for such contact with the Paracel Islands but not for the Spratlys. Vietnam also bases its claim on rights of succession as the heir to the French colonial regime which declared sovereignty over the Spratlys in 1933. China has claimed the area on the basis of prior discovery and it protested vociferously when the San Francisco Conference of September 1951 divested Japan of possession of the islands but refused to return them to China. The Philippines lay claim to an area contiguous to Palawan based on prior discovery by Tomas Cloma of what was then regarded as terra nullius. That claim was supported by the Carlos Garcia declaration of February 1957 and incorporated into the Ferdinand Marcos presidential declaration of July 1971. Malaysia's claim to the resources was based on the continental shelf and was raised with the publication of a map of the area in 1979. Malaysia and the Philippines have similarly occupied islands in their own claim zones in what has been an action-reaction response to the moves of neighboring states. When Tomas Cloma claimed Kalayaan for the Philippines in 1956 it triggered a response from South Vietnam which began the occupation of islands in the area. Taiwan protested against Cloma's actions and was motivated to re-occupy Itu Aba or Tai Ping Island after withdrawing from it in 1950. After Vietnamese reunification in 1975 a reunited Vietnam began occupying islands in the Spratlys and aroused China's hostility. The Philippines was moved to occupy the islands in its claim zone beginning in March 1978 and Malaysia was spurred to announce its own claim in the following year. China resorted to naval power to eject South Vietnam from the Paracel islands in January 1974 but its limited off shore naval capability could not reach down into the Spratlys, moreover the American naval presence in the Philippines and later the Soviet navy in Cam Ranh Bay acted as a deterrent to Chinese action. Only when Soviet leader Gorbachev began improving the relationship with Beijing did China have the confidence to move against Vietnam in the Spratlys and occupy islands. In March 1988 Chinese naval vessels clashed with Vietnamese near Fiery Cross Reef [Đá Chũr Thập or Yung Shu Jiao] 3 Vietnamese vessels were sunk with the loss of 72 sailors. China then occupied 7 islands, and later another two.

One important factor in the scramble for occupation of the islands was the law of the sea, the negotiations began in 1973 and culminated in UNCLOS-III in December 1982.¹ UNCLOS-III allowed each littoral state to claim an Exclusive Economic Zone [EEZ] of 320 kms or a continental shelf and specified that islands could generate their own EEZs or continental shelves. UNCLOS-III did not offer much support for Vietnamese and Chinese claims which go beyond their respective EEZs or continental shelves as historical rights of first discovery do not carry much weight. This has

¹ UNCLOS 1 was conducted over 1956-58 and resulted in the 1958 convention, UNCLOS-II met in 1960 without result; the negotiations for UNCLOS-III began in 1973 and were concluded in December 1982 with the signing of the convention; it came into force in 1994 when the required number of 60 state signatories was met. The Philippines ratified UNCLOS-III in 1984, Vietnam in 1994, while both Malaysia and China ratified the convention in 1996.

stimulated both claimants to occupy islands for the EEZs and the continental shelves they would generate. Other claimants such as Malaysia and the Philippines have been motivated to take preventive steps to ensure that islands in the own claim zone would not be occupied by others and have taken steps to demonstrate “effective occupation.” Indeed, international law has stressed the importance of the “effective occupation” of islands to prove title rather than historical rights or first discovery. This precedent was laid down in the *Island of Palmas* case in April 1928. More recently, The International Court of Justice decided in December 2002 in favour of Malaysia and against Indonesia in relation to ownership over Pulau Ligitan and Pulau Sipadan for similar reasons. The court applied the test of evidence of “activities evidencing an actual, continued exercise of authority over the islands, i.e., the intention and will to act as sovereign”. It found that Malaysia had engaged in a regular pattern of state-sponsored activities “revealing an intention to exercise state functions” in relation to the islands and which were not opposed by Indonesia.²

Another major hurdle for the claimants is that UNCLOS-III distinguishes between islands and rocks or reefs which cannot generate EEZs or continental shelves. Article 121 (3) refers to rocks and reefs which “cannot sustain human habitation or economic of their own shall have no exclusive economic zone or continental shelf.” Many of the “occupied” features in the South China Sea at first sight would not meet this standard.³ Nonetheless, claimants have acted to pre-empt others from occupying features in their own claim zones without as yet defining clearly their legal position which has been postponed to some later time. Then, they may press for more liberal interpretations of economic viability to support their claims. If the waters around a reef or an atoll are regularly used for tourism or fishing, if snorkeling or diving amongst the reefs is conducted on an organized basis this may satisfy the requirement. In the *Ligitan/Sipadan* case above the international court noted the importance of turtle egg collecting in supporting the Malaysian claim of “effective occupation” and similar arguments may be used in the future to support claims of economic viability.

WHAT IS AT STAKE?

The scramble for islands, the assertion of conflicting claims and the absence of any movement towards a resolution ensures that conflict is always a possibility. China has been the only claimant to employ force so far which has reflected its latecomer status. While the other claimants have occupied islands in their respective zones China was excluded from asserting its claim in a similar way by the lack of a suitable naval

² “International court finds that sovereignty over islands of Ligitan and Sipadan belongs to Malaysia,” Press Release, International Court of Justice/605, 17 December 2002 <http://www.un.org/News/Press/docs/2002/ICJ605.doc.htm>

³ Itu Aba [Ba Dinh, or Tai Ping Dao] which is approximately 960 by 400 metres has its own water supply may qualify, other possible candidates include London Reef, Namyit Island [Bai Nam Yet or Hung Ma Dao]

capability and the presence of superpower navies. As a latecomer China has had the incentive to use force to stake a claim to the area and to be included in future negotiations relating to the South China Sea. In 1974 and 1988 China acted against Vietnam as the claimant with the largest number of occupied islands; it alarmed the ASEAN states and the international community and aroused suspicions of Chinese long term intentions. In May 1992 China announced that it had negotiated an oil exploration concession with the U.S. Crestone Company which raised the stakes. Nonetheless, China was induced to join ASEAN to sign the Declaration of the South China Sea in July 1992. In this declaration China and ASEAN were obliged to resolve questions of sovereignty in the South China Sea “by peaceful means, without resort to force.”⁴ Subsequently, however, China reverted to stealth when in February 1995 it was revealed that it had occupied Mischief Reef [Meijijiao or Panganiban] which is within the Philippine EEZ. China then built structures on this reef which were extended and strengthened in 1999, supposedly for fishing purposes. Various epithets have been used to characterize the Chinese move including “creeping annexation” and “creeping invasion,” which at least pointed to an effort to minimize risk by avoiding direct confrontation. The Philippines was targeted as the least able among the ASEAN countries to patrol its EEZ and enforce its claim. The risk for China, however, was ratcheted up when the Philippines negotiated a Visiting Forces Agreement [VFA] with the US navy in 1998 which was ratified by the Philippine Senate in May 1999. The US was interested in obtaining visiting rights for the navy which would enable it to respond much more quickly in the event of another Taiwan crisis. Because of Taiwan the US navy became involved more closely in the South China Sea. Stalemate has characterized the situation since then as the competing claims remain unresolved. In November 2002 ASEAN and China signed a “Declaration on the Conduct of Parties in the South China Sea” [DOC] which was lauded as a positive development within ASEAN and an indication that China’s intentions had changed for the better. The DOC, however, was a measure to maintain the status quo and worked to Chinese advantage in a situation where Beijing feared US involvement. Rather than signaling a Chinese intention to resolve the issue DOC was a defensive move for China and an indication of prolonged stalemate.

Stalemated situations can exist for some time in international politics without erupting into violence in the absence of a pressing need for a resolution. If normal business can be conducted despite conflicting claims the status quo may be acceptable to all sides as an alternative to conflict. The status quo in the South China, however, is an uncertain one because the presence of oil and gas demands a resolution of the conflicting claims before large scale production can begin. Global demand for energy will increase in the future as China, India, and other producers seek new sources to fuel their expanding economies. China’s energy needs are increasingly rapidly and imports are slated to reach 50% of consumption in 2010. China has attempted to diversify energy supplies to reduce the risk of supply disruption by seeking long term agreements

⁴ ASEAN Declaration On The South China Sea Manila, Philippines, 22 July 1992
<http://www.aseansec.org/3634.htm>

with Venezuela, Nigeria, Sudan and at some point greater interest in the South China Sea's energy resources is likely to be stimulated. Chinese estimates of oil reserves in the South China Sea have been noticeably high prompting the US Department of Energy to declare that "there is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources."⁵ Natural gas may be more important than oil in the South China Sea as U.S. Geological Survey estimates claim that about "60 to 70% of the region's hydrocarbon resources are natural gas." Again, Chinese estimates of the area's natural gas reserves are considerably higher than others. In April 2006 the American company Husky Energy which was conducting exploration with the Chinese National Offshore Oil Corporation [CNOOC] claimed that proven natural gas reserves of nearly 4 to 6 trillion cubic feet existed near the Spratly Islands.⁶

As energy needs increase the effort to exploit the energy potential of the South China may indeed trigger conflict. When in 1992 China involved the American company Crestone in oil exploration in the area Vietnam protested. Tensions between Vietnam and China over Crestone's activities continued through the 1990s. Vietnam is the major oil producer in the area producing some 350,000 barrels a day in 2007. The joint venture called Vietsovpetro which was negotiated with the Soviet Union in 1981 and continues to function today operates three oil fields in the South China Sea; they are the White Tiger field [Bạch Hổ] which first began production in 1986, the Blue Dragon field [Rồng Xanh] and the Big Bear field [Đại Hùng]. Production at the White Tiger field which is Vietnam's main off shore oil field has been declining prompting a search for alternative fields. Vietnam has been exploring production feasibility in other fields such as the Black Lion [Sư tử Đen], the Gold Lion [Sư tử Vàng] and the White Lion [Sư tử Trắng]. As Vietnam attempts to exploit new fields there is the possibility of new clashes with China. In October 2004 a new offshore oilfield was discovered in northern Vietnam west of Hainan Island which involved a consortium including PetroVietnam, Malaysia's Petronas Carigali, Singapore Petroleum and American Technology Inc. Beijing's Foreign Ministry protested.⁷ Malaysia and Brunei have disputed the development of a gas field involving in an area where their claims overlap. Identical blocs were awarded to different companies, Malaysia awarded exploration rights to Murphy Oil while Brunei awarded similar rights to Royal Dutch Shell and France's Total. The dispute prevented work from continuing and it was not until March 2009 that the two claimants agreed to settle their territorial dispute to allow work to proceed.⁸ More recently in March 2009 Philippine Congress passed the baselines law which was intended to identify country's archipelagic baselines. The act

⁵ See "South China Sea' Oil and Natural Gas," Energy Information Administration, Official energy Statistics from the US Government http://www.eia.doe.gov/emeu/cabs/South_China_Sea/OilNaturalGas.html

⁶ Ibid

⁷ Tran Dinh Thanh Lam, "Vietnam oil find fuels China's worries", Energy Bulletin, 26 October 2004. <http://www.energybulletin.net/node/2838>

⁸ "Brunei, Malaysia settle 6-year oil territory," Sun. Star network online, <http://67.225.139.201/network/brunei-malaysia-settle-6-year-oil-territory-spat-146-pm>

excluded Kalayaan and Scarborough shoal from being part of Philippine territory but placed them in an ambiguous category as a “regime of islands under the Republic of the Philippines.”⁹ China protested nonetheless and its embassy in Manila declared it illegal. A resolution of the conflicting claims is required to avoid the uncertainty that would attend efforts to exploit the energy resources of the area.

APPROACHES TO A RESOLUTION

Multilateral negotiations

Proposals for multilateral negotiations over the South China have been opposed by China which has insisted that negotiations be conducted bilaterally. Philippine president Fidel Ramos in 1992 proposed an international conference on the Spratlys under UN auspices which many regarded as a logical step. The proposal was repeated by his Foreign Minister Raul Manglapus at the ASEAN Foreign Ministers meeting in July 1992. The Chinese Foreign Ministry, however, quickly voiced its opposition and the proposal has not been raised since.¹⁰ In March 1994 Ramos also called for the demilitarization of the Spratlys and a freeze on all destabilizing activities in the area. The intention behind Ramos’ thinking was to kick start negotiations over the issue which would bring the parties together to discuss the main issues at a later stage. In any case the demilitarization of the islands was a non starter because it would give the advantage to China, which had extensive claims but comparatively fewer islands under occupation. The chief rationale for the formation of the ASEAN Regional Forum [ARF] in 1993 was the need to engage China across the whole range of issues including the South China Sea. The Philippines discovered that that after China’s occupation of Mischief Reef the issue could not be raised at the ARF as senior officials were opposed and kept the issue off the agenda. Neither ASEAN nor the ARF is able to deal with the issue which raises questions about their role and purpose.¹¹ ASEAN has not been united over this issue in any case as Malaysia supported China over bilateral negotiations. Malaysia’s Prime Minister Mahathir sought to bandwagon with China over this issue which reflected his broader foreign policy agenda and his sparring with the US. A step by step approach to promote multilateral negotiations over the issue has been proposed. If the claimants start by agreeing over bilateral issues this could reduce the disputed area to manageable proportions and leave the difficult part which would require multilateral negotiations for later.¹² The idea may be attractive but because

⁹ David Cagahastian, “Arroyo signs baselines bill into law” Manila Bulletin, 11 March 2009, <http://www.mb.com.ph/node/198552>

¹⁰ Reuters, 16 July 1992

¹¹ Lee Lai To, “China, the USA and the South China Sea Conflicts,” Security Dialogue, Vol. 34, No. 1 March 2003

¹² Scott Snyder, “The South China Sea Dispute: Prospects for Preventive Diplomacy United States Institute of Peace”, August 1996, <http://www.usip.org/resources/south-china-sea-dispute-prospects-preventive-diplomacy>

Chinese and Vietnamese claims overlap with the others most bilateral issues would involve multilateral claimants. There are, indeed, few purely bilateral issues in the South China Sea. China did at least accept the November 2002 DOC which was prematurely regarded within ASEAN as evidence of Beijing's acceptance of multilateralism and a hope for the future. As explained above, however, DOC served Beijing's purpose in preventing ASEAN states from involving the US more closely in the dispute or from engaging in activities which would go against Beijing's interests. This agreement was preparatory to an actual code of conduct which was to be negotiated later but there has been no follow up and progress has been stalled.

Legal resolution

A legal resolution of the South China Sea dispute requires the adoption of UNCLOS principles to reconcile the different claims. One of the uncertainties of the dispute is that China has not defined its claim, it has published maps of its claim which include 80% of the South China Sea but these are vague and insufficient for legal purposes. In any case according to Articles 74 and 83 of UNCLOS-III in the case of overlapping EEZs and continental shelves delimitation will be effected by agreement on the basis of international law or the International Court of Justice to "reach an equitable solution." Both articles mention that if no agreement is reached within a "reasonable period of time" then the parties "shall resort" to the dispute resolution procedures in Part XV. In Part XV it is said that the parties have an "obligation to settle disputes by peaceful means" [Article 279], they may take the matter to the International Tribunal for the law of the Sea, or the International Court of Justice, or a special "arbitral tribunal" [Article 287]. The resort to compulsory mediation with binding authority is voluntary and UNCLOS-III stipulates that "a state shall be free to choose" one of these methods of dispute resolution. UNCLOS has no immediate way of dealing with a situation where the claimants have no intention to resort to binding mediation.

One way of prompting interest in a legal solution would be to utilize the Chinese proposal for joint development as a basis for resolving the claims. The idea was first broached by Chinese Premier Li Peng in Singapore on 13 August 1990 when he called upon claimants to set aside sovereignty to enable joint development to proceed. The proposal was repeated when the then Malaysian Defence Minister and current Prime Minister Najib Tun Razak visited Beijing in June 1992 and when Li Peng visited Hanoi in the following December 1992. Chinese Foreign Minister Qian Qichen told the ASEAN Foreign Ministers meeting in July 1992 that when conditions are ripe then negotiations over the South China Sea could begin, and that China was willing in principle to set aside its territorial claims.¹³ The idea of joint development has often been raised by the Chinese side on other occasions but without further clarification. Including the incentive of joint development in a proposal for legal resolution of the

¹³ Business Times [Singapore], 23 July 1992

conflicting claims may motivate the Chinese to clarify their position. It could unveil an avenue for the resolution of the issue that would meet their interest. There are at least four precedents for joint development that may have a bearing on the South China Sea. The first is the Japan- South Korea agreement of January 1974 for joint development of the area of overlapping sea claims in the Tsushima Strait. China subsequently opposed the agreement which made its practical implementation difficult. The second is the Malaysia-Thailand agreement over the sea boundary of February 1979 which created a joint development authority to administer the area where the claims overlapped. The third is the Timor Gap Treaty concluded by Australia and Indonesia in December 1989. This treaty created a joint development zone in the area where the sea claims overlapped. After East Timor gained its independence from Indonesia negotiations for a new treaty with Australia were initiated which resulted in the Timor Sea Treaty of May 2002. Finally, there is the Malaysia-Vietnam agreement on joint development of the area of overlapping claims to the continental shelf which was signed in June 1992.

There are various problems in applying this principle to the South China Sea, however. The examples above are cases of successful bilateral agreements and transferring this idea to a complicated multilateral situation is fraught with difficulty. It may be possible for two claimants to agree to a formula to apportion the revenue from a joint development area but agreement becomes exceedingly complicated when other parties are involved, and in the case of the South China there are seven parties with an interest in the dispute. This makes it more difficult for the claimants to share the resources of what they regard as their legitimate claim with others. Both Vietnam and Malaysia have little enthusiasm for this idea which is seen as favouring China above all. Critics see the Chinese proposal as a way of levering China into the area at the expense of the ASEAN claimants. One way of meeting these concerns would be to devise a proposal for joint development which would take cognizance of sovereignty. This was attempted the Ali Alatas “doughnut” proposal of 1994. This proposal allowed each state to claim a 320 km EEZ the boundaries of which would leave an inner hole. This inner area would then be subject to joint development and the revenue would be apportioned according to an agreed formula. This proposal was promoted by Ambassador Hasjim Djalal when he visited the ASEAN countries over May-June 1994 but with few results.¹⁴ The major difficulty with the “doughnut” proposal was that it directly opposed Vietnamese and Chinese claims and would reduce them to the 320 km limit as stipulated by UNCLOS-III. China, in particular, would be stripped of its claim to the entire area with little compensation.¹⁵ Moreover, the proposal did not identify how the overlapping claims between the ASEAN countries would be settled. In any case once the littoral states claimed the resources in their EEZs there would be little left in the doughnut hole to share with others as the major energy reserves were not found there. These were other reasons as to why this proposal made little headway.

¹⁴ Nayan Chanda, “Divide and Rule,” *The Far Eastern Economic Review*, 11 August 1994

¹⁵ Ji Guoxing, “Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement”, Institute on Global Conflict and Cooperation, University of California, October 1995, p. 26

A maritime regime

A variant legal-political approach is the idea of a maritime regime which would govern the South China Sea. One specific proposal is for a Spratly Resource Development Authority [SRDA] which could pool the financial resources of claimants into a common fund and would promote joint efforts to develop the area's resources.¹⁶ A maritime regime is based on an understanding of common need as an incentive to resolve the sea boundary disputes between claimants. Article 123 of UNCLOS-III stipulates that States "bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention." The article adds that they should do so "directly or through an appropriate regional organization." Mark Valencia has championed this approach arguing that regional maritime cooperation could proceed progressively from policy consultation to policy harmonization, coordination and national policy adjustments. While Article 123 may enjoin cooperation Article 56 gives the littoral states sovereign rights to natural resources in which case there is little reason to cooperate with others in the formation of a maritime regime.¹⁷ No doubt, an appropriate maritime regime for the South China would be the desideratum but it would demand multilateral negotiations between the claimant states which have been opposed by China. Its formation would be a political decision for which the claimant states are not yet prepared.

The workshop approach

The workshop approach to dispute resolution, often called interactive problem solving, may be utilized when the formal diplomacy reaches a stalemate and when the parties are searching for a way out of their predicament. It may be used as a means to generate proposals for the resolution of the dispute and as an informal testing ground as to their feasibility without the encumbrances associated with the regular diplomatic process. This approach was pioneered by John Burton who in 1966 established the Centre for the Analysis of Conflict in the University of London, which later moved to the University of Kent at Canterbury. It was also employed by Herbert Kelman of Harvard University and Leonard Doob at Yale University in a series of workshops dealing with Cyprus, Indonesia and Malaysia. Kelman organized a series of workshops over the Arab-Israeli problem beginning in 1971 which continued until after the Oslo agreement of 1993. The idea was to involve participants in the workshop who were linked with the leaderships of the conflicting sides and to give them an opportunity to identify ways and means of resolving the conflict. The lessons of the workshop would then be transferred to the diplomatic negotiations either by the participants or by the

¹⁶ Christopher C. Joyner, "The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation" in Ranjeet Singh [editor] *Investigating Confidence Building Measures on the Asia Pacific Region*, Henry L. Stimson Centre, Report No. 28, Washington DC. 1999

¹⁷ Mark J. Valencia, "Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia," *Ocean Development & International Law*, Volume 31, Issue 3, July 2000

organizers of the workshop who would have their own channel of communication with governments of one or both sides. Ambassador Hasjim Djalal conceived the idea of similar workshops on the South China Sea which were sponsored by the Indonesian Foreign Ministry funded until 2001 by the Canadian International Development Agency [CIDA]. They were entitled “Managing Potential Conflicts in the South China Sea” and were held annually beginning in Bali in January 1990. They involved government officials and technical experts on maritime cooperation resource development from 11 countries, the ASEAN six, Taiwan, Cambodia, Laos, and Vietnam; China and Taiwan joined in 1991.¹⁸ After CIDA ceased funding the workshops they have continued with funding on an ad hoc basis by participants.

There were several attempts to transform the second track workshops into first track diplomacy in a way which would be relevant for the South China Sea. Indonesian Foreign Minister Ali Alatas in 1992 claimed that after three workshops China had agreed to put its claim on hold and to seek “mutually beneficial cooperation with ASEAN.” He declared that “conditions were conducive” for ASEAN countries to forge some kind of cooperation over the Spratlys but he encountered resistance from the delegations.¹⁹ In 1994 Ali Alatas again thought that the workshops could be upgraded to track one level and claimed that they had reached a “decisive stage.”²⁰ He told the 27th ASEAN Foreign Ministers meeting in July 1994 that the workshop could be upgraded to include “formal intergovernmental discussions and cooperation.”²¹ At first Ali Alatas had hoped to invite ambassadors from the claimant countries to participate which would have converted the workshop directly into track one format. When this direct approach encountered opposition from the Chinese side he proposed an indirect approach which relied on functionalist assumptions. If government officials and their agencies were invited to participate in studies over functional issues such as marine pollution, biodiversity, navigation safety etc, habits of cooperation could be created which could be extended to the larger issues of the sovereign claims in a “spill over” effect. The workshop series continued with these studies and various committees were created for this purpose which reported to the workshop. Functionalist assumptions about the “spill over” effect, however, proved to be unsubstantiated as cooperation over these functional issues could continue without any appreciable impact upon the willingness of the delegations to discuss the larger issues. Ali Alatas also proposed to invite representatives from outside countries such as the US and Japan in the workshop which was strongly opposed by China.

What did the workshop achieve? Its proponents have justified the time and expense by claiming that the delegations got to know each other and their positions better, that

¹⁸ For details on the workshop series see *The South China Sea Informal Working Group* at the University of British Columbia, <http://faculty.law.ubc.ca/scs/>

¹⁹ Jakarta Post, 20 July 1992

²⁰ Straits Times, 23 July 1994]

²¹ Sunday Times [Singapore], 24 July 1994

the Chinese side was made more aware of the views of the other claimant countries. It was claimed that the 1992 “Declaration’ on the South China Sea” was earlier discussed in the 1991 workshop, and that the idea of a code of conduct was often discussed at workshop meetings before the DOC was signed. Nonetheless, whatever its merits, the workshop failed to achieve its primary goal which raises questions about the efficacy of the approach. One major criticism of the South China Sea workshop approach is that the representatives involved had little influence on their respective governments for the most part. Had the workshop involved high ranking representatives with close ties to their senior leaders, as did Harvard University’s workshop on the Arab-Israeli issue, perhaps it could have come up with better results. Claimant governments, particularly the Chinese, did not evince much interest in the workshop and the discussions continued without conclusion. In any case the involvement of senior representatives in a workshop does not necessarily result in a resolution as the Harvard series of workshops on the Arab-Israeli issue has demonstrated. In these workshops senior representatives could afford to display greater reasonability and understanding because they knew that the context was informal. Once they returned to their respective positions in government they reverted to their previous negotiating positions. From the beginning excessive hopes were placed upon the workshop approach which could not get very far while the claimant governments remained undecided.

Maritime energy cooperation

A resolution of the issue cannot be expected by resort to any of the approaches outlined above. While legality may dictate that the ASEAN countries sit on their claims and hope for the best this offers little prospect of a resolution. The longer a resolution is delayed the more likely it is that conflict would break out or that tensions would be stimulated as claimants attempt to exploit the energy resources of their respective zones. The immediate result of the current stalemate would be that exploration for energy resources would be delayed and actual production would be prevented. International energy companies require a stable and conflict free environment of their activities and would hesitate to get involved if this could not be assured. One possible way out would be to use cooperation over energy as a means to initiate a process of wider collaboration as the first steps towards a maritime regime. If ASEAN could promote energy cooperation in the South China Sea on a strictly commercial basis it could get the parties used to working each other. Vietnam, Malaysia and the Philippines have involved international oil companies in exploration, drilling and also production in the area. It would be a step forward if the national oil companies of the main claimants were involved in joint activity on a commercial basis and without infringing upon sovereign claims. Allowing Chinese energy companies access to the resources of the area on a commercial basis would give China a stake in the stability of the South China Sea and could create opportunities for the exploitation of the energy resources there. If Chinese oil companies, China National Petroleum Corp, China Petrochemical Corp. and China National Offshore Oil Corp [CNOOC] were involved in exploration

and drilling with PetroVietnam, Petronas of Malaysia and the Philippine National Oil Corporation [PNOC] there would be an incentive for the Chinese side to avoid disruptive activities which would jeopardize their interest. No doubt, difficulties would arise in apportioning shares of resources once the joint activity moves to production as claimants would press for particular benefits in recognition of their sovereign claims, but they need not be insurmountable.

There is the precedent of a Joint Marine Seismic Undertaking [JMSU], a 3 year tripartite agreement for joint exploration mainly in the Philippines claim zone which was signed in September 2004. At first it involved PNOC and CNOOC and, after the Vietnamese protested, PetroVietnam was included in March 2005. Criticisms of the agreement have been virulent both within and outside the Philippines for various reasons. The main objection was that it was unconstitutional as it infringed Article 12 [2] of the 1987 Philippine constitution or the national patrimony clause. This stipulates that coproduction agreements or joint ventures require a 60% stake for Filipino citizens and that the president is required to notify congress accordingly. JMSU was kept secret by the Manila administration and its terms were only revealed three years later. Philippine domestic critics accused Speaker Jose de Venecia Jr of negotiating the agreement in exchange for dubious loans from China which pointed to corruption. Critics claimed that by allowing China and Vietnam to operate within the Philippine EEZ the Philippine claim to the area was weakened and ASEAN solidarity over the South China Sea was broken.²² Yet another criticism was that the Philippines could not benefit from the agreement since the seismic data was taken by China and Vietnam. The JSMU, indeed, was faulty yet it pointed to possibilities that could be explored in the future but with multilateral or ASEAN endorsement. An agreement for exploration and drilling involving the national oil companies of the claimants would be an attempt to implement the idea of joint development in the context of a wider maritime regime. It would have to avoid the pitfalls of the Philippine-sponsored JMSU and should embrace all claim zones and should not be located in any one. No doubt there would be a host of issues to be resolved relating to rights to seismic data in the case of exploration agreements, and the apportionment of revenue in the case of production. Normally, the legal system of the claimant state would decide the rules for such commercial ventures and the surrender of this right to a cooperative enterprise would imply a violation of sovereignty and would be resisted. If the venture was promoted by ASEAN and received collective ASEAN endorsement an effective multilateral framework could be devised which could deal with these issues.

CONCLUSION

The proposal outlined in this paper is modest and practical and in view of the current deadlock in the South China Sea. Ambitious proposals that call for wide

²² Barry Wain, "Manila's Bungle in the South China Sea," *Far Eastern Economic Review* January/February 2008

sweeping agreements on a legal or political basis cannot make any headway in this dispute while the claimants insist on their sovereign claims. The stalemate may suit governments which are interested in demonstrating effective occupation of islands to support their legal claims, but it will not allow them to exploit energy resources without stimulating tensions and conflict. The positive incentive of maritime energy cooperation and all its benefits is required to move beyond the stalemate. This means building on existing efforts to exploit the resources of the area which have been undertaken by claimants separately and in their own claim zones. The extension of these efforts within a multilateral framework which could be coordinated by ASEAN is not impossible though it would demand a major change in ASEAN's attitude towards the issue. ASEAN's passivity towards the range of problems and issues it now faces is a barrier to its future development and it should take the initiative over an issue of vital importance to its future. ASEAN has the status to promote this this proposal and by doing so it would strengthen its role in the Asia Pacific region.

CAN THE DISPUTES OVER MARITIME DELIMITATION AND SOVEREIGNTY TO ISLANDS IN THE SOUTH CHINA SEA BE RESOLVED?

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ABSTRACT

The dispute over maritime delimitation and sovereignty to islands in the South China Sea is so complex that it is unlikely to be resolved for a long time. This makes it tempting for the claimant states to shelve the disputes and jointly explore for oil in disputed areas. However, joint exploration may be dangerous, since a major oil or gas find would escalate the conflict. This paper argues that a better choice is to make active use of the Law of the Sea as a basis for delimiting territorial waters, Exclusive Economic Zones and continental shelves, and that this could be possible even without resolving the question of sovereignty to the Spratly Islands. To negotiate an agreement on maritime delimitation on the basis of international law could also be in China's best interest. China is no doubt the key player, and the way forward is for the PRC and the ROC to agree on a joint platform for negotiations with the Philippines, Vietnam, Malaysia and Brunei - on behalf of one China.

MOST LIKELY DEVELOPMENTS

There are several reasons why the disputes in the South China Sea are unlikely to lead to any major armed conflict:

1. Any military clash would reduce the chance of exploring successfully for oil for a very long time.
2. All the main island features have already been occupied by one of the claimant states, and in the eyes of international law a military invasion of an already occupied islet would in no way strengthen the sovereignty claim of the new occupier.
3. The strategic value of the islets in the South China Sea is limited since they are virtually impossible to defend successfully against a determined invader.
4. More generally you cannot "occupy" the sea. You can just build naval forces that deter others from undesirable actions. What we see is therefore more of a naval

build-up meant to impress others through various kind of demonstrations. No actor is likely to move towards an armed clash.

On the other hand, the dispute in the South China Sea is so complex that it is unlikely to be resolved for a long time. This also has a number of reasons:

1. There are many states involved: China (PRC and ROC), the Philippines, Malaysia, Brunei and Vietnam.

2. The dispute is closely related to the Taiwan issue, since Taiwan occupies the largest island in the Spratlys (Itu Aba) and since base points in Taiwan must be essential for the establishment of China's EEZ claim.

3. Both the ROC and the PRC have long been claiming virtually the whole of the South China Sea within the so-called u-shaped line, a line that is impossible to reconcile with international law, and this claim was reinforced when the PRC joined a map with the u-shaped line to its recent protest against Malaysia and Vietnam's joint submission to the United Nations concerning the extension of their continental shelf.

4. The South China Sea dispute involves several inter-related elements:

a. Sovereignty to islands (Paracels, Scarborough Reef, the Spratlys),

b. The question of whether or not these islands and reefs can themselves generate their own exclusive economic zones and continental shelves,

c. The question of whether or not China can claim virtually the whole of the South China Sea as its own "historic waters" (the u-shaped line),

d. The question of whether or not the Philippines can claim an archipelagic Kalaya'an ("Freedomland") ,

e. The overlapping EEZ and continental shelf claims which need to be resolved through the drawing of median lines,

f. The question of whether or not the establishment of national EEZs and continental shelves in the South China Sea would in any way infringe upon the freedom of civilian and military shipping.

For all of these reasons it seems the most likely future development is status quo, with tension and incidents erupting from time to time in relation to fishery disputes, the establishment of tourist sites, exploration for oil and gas, and notably the ongoing process of calculating the outer limits of the surrounding countries' continental shelves.

This is an unfortunate state of affairs for many reasons. It could once more sour relations between China and ASEAN. It makes it extremely difficult to decide which state has the responsibility for establish fishery regimes that can protect the fish stocks and maintain the natural habitat of the rich marine resources in the South China Sea. And it makes it difficult to explore for oil and gas in the disputes areas.

One way out is the attempt that China, the Philippines and Vietnam have made to conduct joint scientific exploration of the seabed in a disputed area. Apparently, not much exploration has happened under the agreement, and if it had, it could easily have become dangerous. It is already problematic when two states establish a joint development zone in an area disputed among the two of them, since this makes it necessary to agree on all kinds of responsibilities in that disputed zone, not only concerning how to divide eventual revenues, but also on who shall be responsible for monitoring the area and protecting its environment. If three countries open up for joint exploration in areas that are contested among all three and also additional states, and then oil or gas is found, it could lead to a very dangerous situation. The widespread enthusiasm for joint oil exploration in disputed areas is thoroughly misplaced. To explore for oil without first establishing a clear legal regime is irresponsible behaviour, and not laudable in any way. The general idea of shelving disputes and establishing practical regional cooperation is good of course, but a much better and less risky joint activity than oil exploration would be to set up joint regulatory, monitoring and enforcement regimes for the protection fish stocks and for protecting coral reefs against further destruction. Unfortunately this does not seem to be in the cards.

The most likely future development is, it seems, a continuation of a strongly unsatisfactory status quo, albeit with no serious risk of any major conflict. Perhaps the most likely positive development would be a strengthening of the agreement between ASEAN and China to avoid conflict and new contentious initiatives by giving a new version of the 2002 Declaration on a Code of Conduct a legally binding form.

COULD THE DISPUTES BE RESOLVED?

That a resolution of the disputes is unlikely does not mean that it is impossible. It shall be argued here that a resolution of the South China Sea disputes is:

- a.** fully possible on the basis of international law,
- b.** with China holding the key,
- c.** and that a resolution of the dispute based is in China's best interest.

1. With regard to (a), let us return to the proposal presented by the present author

a little over nine years ago¹ The suggestion was made then that the conflict may be resolved in six stages:

2. China and Vietnam agree on the delimitation of the Gulf of Tonkin, and a regime to regulate fishing on both sides of the border. (This has since been accomplished.)

3. The PRC and ROC governments decide on a co-ordinated negotiation strategy vis-à-vis the Philippines, Malaysia, Brunei and Vietnam.

4. The PRC and ROC's joint Chinese negotiation team make a 'small bargain' with the Philippines over Scarborough Reef, which includes a rock ("Hyungan" or "Yellow Rock") that satisfies the condition for being an island and therefore has a right to 12 nm territorial waters, but cannot have a continental shelf or EEZ of its own. They shelve the sovereignty dispute to the rock and its territorial waters, and set a ban on any kind of economic or military activity inside Yellow Rock's territorial waters.

5. The 'small bargain' is used as a model for a 'big bargain' concerning the Spratlys and the Paracels: It is agreed that none of the Spratlys satisfy the conditions for having more than 12 nm territorial waters. (This seems to have been assumed in Malaysia and Vietnam's recent UN submission of their calculation of the extension of their continental shelves.) They shelve the sovereignty dispute to the islands and their territorial waters. Vietnam recognises Chinese sovereignty in the Paracels, and all agree that base points in the Paracels can be used as a basis for measuring China's EEZ and continental shelf.

6. All states around the SCS publish their exact EEZ claims (200 nm), measured from their baselines, and submit to the UN their calculation of the extension of their continental shelves (beyond 200 nm). Where the EEZ and continental shelf claims overlap, median lines are drawn up and agreed through a combination of bilateral and multilateral negotiations, or arbitration, or by referring decisions to the Law of the Sea Tribunal in Hamburg. Now only the sovereignty disputes concerning Yellow Rock and the Spratly islands, with their territorial waters, remain unresolved.

7. Regulatory regimes to protect fish stocks and the marine environment are set up, with each nation taking responsibility for monitoring its own EEZ. Exploration for oil can then be carried out under clear, national legal regimes and without any dispute over the revenue. A multilaterally managed nature park, with a ban on all economic and military activity, may be established for the Spratly Islands and their 12 nm territorial waters.

The big advantages of this solution are that it is based firmly in international law

¹ Stein Tønnesson, "China and the South China Sea: A Peace Proposal," *Security Dialogue* 31(3), September 2000: 307-326.

and that it does not require any solution of the highly contested question of sovereignty to the Spratlys.

The main difficulties with the solution are that:

1. The PRC and ROC must develop sufficient mutual trust to carry out a major international negotiation together,

2. China and the Philippines must define the “u-shaped line” and the line drawn around “Kalayaan” as indicating a claim to sovereignty over all islands within that line as well as the 12 nm territorial waters of those islands, and not as a claim to “historic waters”, continental shelf or EEZ. This may be psychologically difficult in view of the dissemination these lines have got on maps in China and the Philippines.

3. Vietnam must give up its long-held claim to the Paracels.

4. Even if the Paracels are acknowledged as Chinese, and with a right to an EEZ and continental shelf of their own, the overall solution does not provide China with a share of the South China Sea that is in proportion to the country’s size. China is simply geographically disfavoured since its coasts are too far away from the parts of the South China Sea that are most likely to hold exploitable reserves of oil and gas. This could tempt China to opt for status quo in the hope that the future will allow it to either disregard international law or obtain dramatic changes in the Law of the Sea, allowing a semi-enclosed sea with many countries around it to become the historic waters of the regional great power.

CHINA’S BEST INTEREST

Without China there can be no major resolution of the South China Sea dispute, only perhaps some piecemeal agreements between Malaysia, Brunei, Vietnam and the Philippines, in consultation with the UN, concerning how to measure continental shelves and EEZs. The question of what China is going to do in the South China Sea is a part of the larger question of how a rapidly rising China is going to define its role in East Asia and the world. The option to wait for a better chance to impose its “historic water” claim later, while seeking to persuade others to take part in joint exploration for oil, would make others suspect that China aims to re-establish a regional hegemony similar to the one the Middle Kingdom exerted in the pre-modern period. It would no doubt become a source of serious resentment if a part of the revenue from oil produced from areas that the Philippines, Malaysia and Vietnam considers their – with a strong basis in the Law of the Sea Convention – were to be collected by China. This could easily lead to tension that would make oil production in itself – and environmental protection – impossible.

A number of arguments can be made for saying that it is in China's best interest to avoid such resentment among its neighbours, and that it is in China's best interest to contribute to a multilateral solution of the South China Sea disputes, on the basis of international law. Here are some of those arguments:

1. As a global power depending on international trade and investments, and on provision of energy from far away, China depends on other states' respect for international law. Showing respect for international law in a case where this deprives China of some resources it had aimed to acquire for itself will make it much easier for China to demand respect for international law in all those cases where this works to China's benefit.

2. China seeks regional harmony and stability and has already benefitted much from having delimited and demarcated its land borders with all of its neighbours except India. A resolution of its sea borders based on international law would contribute further to a stable regional environment.

3. In terms of energy security, China's main need is not the revenue from the production of oil and gas in the South China Sea, but the oil and the gas itself. China has much money, but there is a sense of vulnerability if a major proportion of the oil and gas needed for the country's further development must be imported from insecure places far away, such as the Gulf. If the continental shelves in the South China Sea are defined and divided among the nations on the basis of the Law of the Sea, then the oil and gas that might be found and produced would contribute to China's energy security even though the revenue went to the Philippines, Malaysia, Brunei or Vietnam.

4. The PRC could see South China Sea as a test case for the ROC's commitment to a one-China policy. Successful cooperation between Beijing, Taipei and Haikou (Hainan) in establishing and negotiating a multilaterally agreed legal regime in the South China Sea could be a major step towards a larger resolution of Taiwan's status. It could also be rewarding for Taipei to have its representatives take part in a major international negotiation, together with compatriots from the mainland.

5. China is extremely concerned for its environment, and also for the marine environment in the South China Sea and the future of the fish stocks that China's fishermen depend on for their living and China's urban population for their protein and culinary needs. Only by agreeing to a clear legal regime in the South China Sea will it be possible to establish a robust regime for protecting the natural habitat that is necessary for fish to breed.

CONCLUSION

It does not seem realistic to see any major progress soon towards a resolution of the South China Sea dispute. The most realistic positive development would be a legally binding agreement between China and ASEAN on a code-of-conduct. But the role of researchers should not just be to analyze what has already happened, or point out the most likely scenarios for the future. Our role is also to point out opportunities. Therefore the main message in this paper is that it is fully possible to arrive at a comprehensive solution to the disputes in the South China Sea on the basis of international law, and that this would not just be in the interest of Malaysia, Brunei, Vietnam and the Philippines, but in the best interest of Taiwan and mainland China as well.

COOPERATION IN THE SOUTH CHINA SEA REGION: A WAY TO REGIONAL PEACE, STABILITY AND PROSPERITY¹

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ABSTRACT

Since the first multi-lateral regional document on the South China Sea—Declaration on the Conduct of Parties in the South China Sea—was signed in 2002, the relevant parties regarding the South China Sea issues have become more than ever integrated economically. Meanwhile, top leaders of these countries emphasized at various bi-lateral and multi-lateral occasions that the peace in the South China Sea is vital to the stability and prosperity of the region. Realizing the importance and urgency of cooperation in the South China Sea, joint efforts of cooperation have been explored in the fields of maritime security, marine environmental protection, marine scientific research, disaster prevention and marine resources exploitation and utilization. However, the scale of cooperation in the sea lags far behind the economic integration among these countries. Therefore, this paper continues to support the idea of a sub-regional organization which acts as the coordinating institution for all-round cooperation in the South China Sea region. Only in this way can all actions be coordinated and fully communicated to avoid potential conflicts and promote efficiency of cooperation.

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I. INTRODUCTION

Eight years has passed since the first multi-lateral regional document on the South China Sea issues—the Declaration on the Conduct of Parties in the South China Sea (The 2002 DOC)—was signed near the end of 2002. This document not only lays down the governing principles² concerning the South China Sea (SCS) issues but also spells out the scope of cooperation among the 11 signatories³, including maritime security, marine environmental protection (MEP) and marine scientific research (MSR). Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), all parties related to the SCS issues are also required to cooperate in the above areas as well as the management, conservation, exploration and exploitation of the marine living resources due to the characteristics of the marine resources and the semi-enclosed nature of the South China Sea. Realizing the importance and urgency of cooperation on maritime issues, the relevant parties have made joint efforts in exploring ways of cooperation in the SCS region. At the same time, economic integration among them has grown much faster during this period, which makes the efforts of cooperation over maritime matters lag far behind. To make the limited financial resources function more cost-effectively, the scattered efforts on maritime cooperation in the SCS region need more coordination while unilateral actions need to be avoided. It is time to evaluate the cooperating efforts made by the relevant parties for the purpose of promoting peace, security and prosperity in the SCS region.

It is for this purpose that the paper puts its layout. Following the Introduction, Part II analyses the basis for the coordinated cooperation in the SCS region. Part III explores various cooperation efforts made by relevant parties. Part IV concludes by raising the missing points in the current cooperation activities and further supporting the initiation of setting up a sub-regional SCS cooperation organization to coordinate various efforts for the common aim of turning the South China Sea into “a sea of friendship and a sea of cooperation”.

II. BASIS FOR STRENGTHENING COOPERATION

For the purpose of this paper, the SCS region refers to the following economies around the SCS. It includes the 9 southern provinces of mainland China⁴, Hong Kong,

² Article 1 of the 2002 DOC points out that the principles governing parties on dealing with the South China Sea issues include the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations. Meanwhile, Article 4 emphasizes the non-use of force and friendly consultation and negotiation.

³ The 11 signatories include China and all 10 ASEAN countries of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

⁴ The 9 southern provinces are Guangdong, Fujian, Jiangxi, Guangxi (autonomous region), Hainan, Hunan, Sichuan, Yunnan and Guizhou.

Chinese Taipei, Indonesia, Vietnam, Malaysia, Singapore, the Philippines and Brunei. It covers a total area of 9.4 million km², of which land comprises 4.9 million km² and sea 4.5 million km². Nearly 870 million people live in this area. In 2007 its annual GDP has reached USD 2,300 billion with a total foreign trade volume of USD 3200 billion⁵. Table 1 gives the general information of the relevant economies included in the SCS region. The rationale behind this choice is that the development of all these economies is closely linked to the South China Sea. Due to the following basis closer cooperation is necessary for regional prosperity and stability.

Table 1: Geography, population, GDP and trade of the relevant economies in the SCS region (2007)

Country or Region	Land Area (thousand km ²)	Population (million)	GDP (USD billion)	Volume of foreign trade (USD billion)
South China	2,003	457	707	765.9
Hong Kong	0.1104	6,88	205	720.4
Chinese Taipei	36	23	459.73	426.71
Indonesia	1,900	200	396	188.57
Malaysia	330	23	162	323.38
Singapore	0.683	3.4	141	562.65
Vietnam	330	75	71.3	109.2
Philippines	300	80	128.8	105.587
Brunei	5.765	0.32	12.4	9.886
Total	4,905.5584	868.6	2283.23	3212.283

Source: Various documents (2007) of the relevant economies (in Chinese)

1. Obligations under international law and regional agreement

The SCS issues involve six parties, namely, Brunei, Malaysia, the Philippines, Vietnam, China and Chinese Taipei. Since all the relevant State Parties have either ratified or acceded to UNCLOS, they are obliged to enter into temporary arrangements through mutual consultation and negotiation before the SCS issues are finally resolved.⁶

⁵ Calculated from provided figures in Table 1.

⁶ UNCLOS 74(3) reads, “Pending agreement as provided in paragraph 1 (refer to the delimitation agreement of the exclusive economic zone), the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” And UNCLOS 83(3) has the same wording regarding the delimitation of the continental shelf.

Dispute over resources is one key factor in the SCS issues regarding sovereignty and jurisdiction among the disputants around the South China Sea. Before the disputes over sovereignty and jurisdiction are properly resolved, the exploitation and utilization of immobile non-living resources depend on dialogues and cooperation among the littoral states concerned.

As living resources move across borders, their exploitation and utilization are largely not affected by the above-mentioned disputes. To make better use of such resources, an urgent and practical challenge is to facilitate regional cooperation. In fact, in order to achieve the preservation and sustainable exploitation of marine resources, relevant documents of international laws have provided for regulated marine resource exploitation, MEP and MSR as well as obligations for regional and sub-regional cooperation. In other words, cooperation among States in the SCS region regarding the preservation, exploitation and utilization of living resources as well as MEP and MSR has a sound legal basis.

The provisions contained in Part V of UNCLOS as well as the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) provide regulations on the exploitation of fish stocks by coastal States in their respective exclusive economic zones. Consequently, coastal States bear the duties for global, regional and sub-regional cooperation in terms of conservation and sustainable use of fish stocks, including those straddling and highly migratory species, as well as honoring the rights of developing or geographically disadvantaged States.

Part IX of UNCLOS serves as a direct legal basis for cooperation among the States bordering enclosed and semi-enclosed seas in the conservation and development of living resources, MSR and MEP. Article 123 provides that States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties as prescribed in UNCLOS. To this end they shall endeavour, directly or through an appropriate regional organization: a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

According to Article 197 (Part XII) of UNCLOS, States shall cooperate on a regional or sub-regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended

practices and procedures consistent with UNCLOS, for the protection and preservation of the marine environment, taking into account characteristic regional features.

It is also stated in Article 242 (Part XIII) of UNCLOS that States and competent international organizations shall, in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit, promote international cooperation in marine scientific research for peaceful purposes. The UNCLOS has pronounced the necessity to deal with maritime issues in the South China Sea in a cooperative manner.

In addition to the above binding legal provisions, there are international documents known as “soft law” related to the conservation and sustainable use of biodiversity. Though not binding, these soft laws, to some extent, are very important, as they influence the development of global and regional marine laws and policies. Moreover, regional organizations may require the implementation of certain parts of such documents by their member States. For instance, Chapter 17 of Agenda 21, adopted at the 1992 United Nations Conference on Environment and Development, contains provisions for the protection of sea and its living resources; the Plan of Implementation of the World Summit on Sustainable Development, adopted in Johannesburg in 2002, encourages countries to apply the ecosystem approach and promote integrated and multi-sectoral coastal and ocean management by 2010, including assistance to coastal States in developing integrated coastal and marine management policy and mechanism; the United Nations Millennium Declaration and the 2005 World Summit agree to improve cooperation and coordination at all levels, with a view to comprehensively responding to marine challenges and promoting integrated management and sustainable development of oceans; the FAO Code of Conduct for Responsible Fisheries and the four international Plans of Action set out principles and international standards for responsible fisheries in order to ensure effective conservation, management and development of marine living resources while preserving the ecosystem and biodiversity. In addition, at the regional level, there are international documents with soft-law nature that promote integrated ocean management and regional cooperation for this purpose.

As the State parties to UNCLOS, the relevant State countries over the SCS issues are obliged to engage in regional cooperation to conserve and exploit living resources in their exclusive economic zones, and safeguard the living standards of people, particularly those coastal residents with higher dependence on marine resources.

In addition to the provisions in the international law, the most important regional document concerning the SCS issues is the 2002 DOC, signed between China and the 10 ASEAN State members on 4 November 2002. All signatories emphasized the need to promote a peaceful, friendly and harmonious environment in the South China Sea for the enhancement of peace, stability, economic growth and prosperity in the region. For this aim, all members are committed to the confidence-building schemes and

cooperative activities through friendly consultations and negotiations. All unilateral actions which may escalate disputes and affect peace and stability are discouraged. Since the signing of the 2002 DOC, the relevant governments have showed strong willingness to take self-restraints and promote cooperation in various concerned fields to have the issues under control.

2. Political willingness

ASEAN and China have concluded a number of key documents for building up a long-term partnership. In addition to the early 1997 Joint Statement on ASEAN-China Cooperation Towards the 21st Century and the 2002 DOC, they signed the Joint Declaration of ASEAN and China on Cooperation in the Field of Non-traditional Security Issues in 2002, the Joint Declaration on Strategic Partnership for Peace and Prosperity in 2003, and Joint Statement of ASEAN-China Commemorative Summit in 2006. In these documents the related governments have expressed their intention to create a friendly cooperative environment in the region. The 2003 Joint Declaration promoted their “friendly neighbouring relations” into a “strategic partnership”.

Various regional forums such as ASEAN Regional Forum (ARF), ASEAN+China, ASEAN+3 (China, Japan and South Korea), East Asian Summit (EAS) and Asia-Pacific Economic Cooperation (APEC) have created frequent multi-lateral platforms for top leaders of relevant countries to meet frequently to discuss issues of mutual concern including the SCS issue. The Chairman’s statements at each ASEAN-China summit emphasized the importance of close ASEAN-China relations to peace, stability and prosperity in the region and expressed the intention to strengthen their cooperation, which is conducive to conflicts avoidance and confidence building.

At bilateral level, top leaders from relevant governments exchange visits more frequently. These visits have strengthened bilateral understanding and signaled to the world their intention to promote all-round cooperation and their determination to solve all problems by peaceful means. For example, during Vietnamese top leaders’ visits to China in 2008, two countries emphasized to develop the strategic relations under the guidance of “good neighbours, good friends, good partners and good comrades”⁷ and to handle problems including the SCS issues properly and strengthen cooperation in oil and gas exploration, MEP, MSR, search and rescue (SAR) and prevention of piracy attacks in the SCS.⁸ During Malaysian Prime Minister Najib’s visit to China early this year, both countries emphasized the importance of the strategic relations between the two countries and agreed to strengthen dialogue and cooperation to deal with the related issues properly to maintain peace and stability in the SCS region.⁹ This is in line

⁷ <http://chinaconsulate.khb.ru/chn/wjdt/1179/t442818.htm>

⁸ http://www.china.com.cn/international/txt/2008-10/23/content_16652370.htm

⁹ <http://www.bernama.com/bernama/v5/newsindex.php?id=416095> and http://chinese.cpiasia.net/malaysia_topics/najib_1Malaysia/najib_revolution/najib_visit_china/3161.html.

with the China-Malaysia joint communiqué issued in 2005.¹⁰ The Philippine President Arroyo met Chinese Foreign Minister Yang Yiechi's during the latter's recent visit to the Philippines. Both emphasized the importance of the strategic relations between the two countries to the regional peace and development.¹¹ Yang and his Filipino counterpart Romulo praised the good relations between the two countries and agreed to maintain peace and stability in the SCS by joint efforts.¹² The promotion of understanding and trust through these exchanges of visits is key to peace and security in the region.

3. Economic integration

Since 2003, economic integration among the ASEAN countries has developed rapidly as shown in the Tables 2 and 3. In 2003, the total trade volume is USD 820 billion, among which the intra-ASEAN trade volume is over USD 200 billion, one quarter of the total. In 2008 the two figures exceed USD1700 billion and USD 450 billion respectively, in which the intra-ASEAN trade occupies a similar ratio of 27% of the total. In 2003, the total foreign direct investment (FDI) inflow into the ASEAN countries is USD 24 billion and grows strongly in 2004 at a rate of nearly 50%. In 2005 the FDI inflow slows down at a rate of over 12%. Though in 2006 and 2007, the FDI inflow shows a strong growing trend (39% and 26% respectively), it dropped rapidly to -13% due to the world financial crisis. Though the total FDI inflow into ASEAN fluctuated during the period from 2003 to 2008, the inflow within ASEAN countries remains relatively constant at a rate of $\pm 13\%$. Though the total FDI inflow drops sharply in 2008, the inflow within the ASEAN countries grows relatively higher than the previous years. The world financial crisis might have reduced ASEAN investors' confidence in investing outside the region, so they turned back to their own region to extend business.

Table 2: Intra-ASEAN and extra-trade exports and imports 2003-2008
USD million

	2003	2004	2005	2006	2007	2008
TOTAL	824,538.7	1,071,847.8	1,224,889.4	1,404,805.7	1,610,787.5	1,710,371.7
Intra-ASEAN exports	115,601.0	141,116.3	163,862.5	189,176.8	217,334.2	242,460.4
Intra-ASEAN imports	91,130.6	119,581.2	141,030.7	163,594.5	184,586.1	215,579.8
Total intra-ASEAN trade	206,731.6	260,697.5	304,893.2	352,771.4	401,920.4	458,040.2
Extra-ASEAN exports	336,955.9	428,253.0	484,284.6	561,531.0	642,469.5	636,682.2
Extra-ASEAN Imports	280,851.2	382,897.3	435,711.6	490,503.3	566,397.6	615,649.3
Total Extra-ASEAN	617,807.1	811,150.3	919,996.2	1,052,034.3	1,208,867.1	1,252,331.5

¹⁰ In the joint communiqué, both countries reiterated their efforts to maintain the peace and stability in the SCS region and agreed to implement the follow-up action of the 2002 DOC. Both countries support the relevant countries in the SCS issue to “shelve the disputes and explore joint developments” in the disputed area in the SCS. <http://my.china-embassy.org/chn/zt/zmgxzywj/t299205.htm>.

¹¹ <http://news.eastday.com/c/20091030/u1a4770599.html>.

¹² <http://news.eastday.com/c/20091030/u1a4770599.html>.

Source: Compiled from the tables on p. 56 and p.65-65 of the ASEAN Statistics Yearbook 2008.

Table 3: Foreign direct investment and visitors arrivals, 2003-2008
USD million

Year	2003	2004	2005	2006	2007	2008
FDI into ASEAN	24,234.7 (45.8%)	35,342.2 (12.1%)	39,629.0 (38.7%)	54,967.2 (26.4%)	69,481.6 (-12.8%)	60,596.0
Intra-ASEAN	2,702.0	2,958.6	4,217.7	7,602.3	9,408.6	11,070.8
FDI(USD Million)	(11.1%)	(8.3%)	(10.6%)	(13.8%)	(13.5%)	(18.2%)
Visitors arrivals (thousand)	16,999	22,173	23,254	25,397	27,341	30,489

Source: ASEAN Statistics Yearbook 2008, p.129 and p.163.

Though China might have emerged as a competitor for some Southeast Asian countries due to the similarities of export products and markets, ASEAN began to consider the potential economic benefits of closer trade relations with China throughout the 1990s when a consensus was reached that they must “cultivate closer relations with Northeast Asian economies” to meet new economic challenges in a global economy.¹³ Closer economic relation is not a zero-sum game anymore but a win-win cooperation. As a scholar observes:

China’s stunning economic growth may also generate an investment creation effect. As China’s industrialization proceeds apace, it develops a huge appetite for minerals and raw materials—spurring inflows of FDI into countries with the resource endowment to feed this appetite, which, of course, includes several in ASEAN. ... the establishment of an increasingly sophisticated regional division of labor based on trans-border production networks that facilitate trade in components and their ultimate assembly may stimulate complementary investments in manufacturing elsewhere in the region.¹⁴

On the other hand, the stable and strong ASEAN economies are conducive to China’s development. Chinese President Hu Jintao highlighted this interdependence during his visit to Malaysia in 2002, “China’s development would be impossible without Asia, and Asia’s prosperity without China.” To respond to the newly developed interdependence, China and ASEAN promoted the Free Trade Agreement (FTA) fully taking into consideration of those concerns explicitly raised during the process. ASEAN and China are major trading partners with the total trade of up to US\$200 billion in

¹³ Alice D. Ba, “China and ASEAN: Renavigating Relations for a 21st-Century Asia,” *Asian Survey*, Vol. XLIII, No. 4, 2003, p.629,

¹⁴ John Ravenhill, “Is China an Economic Threat to Southeast Asia?” *Asian Survey*, Vol. Issue 5, 2006, p.664.

2008. This growth put China as ASEAN's third largest trading partner after Japan and European Union (EU). Comparing with the trade value of USD 60 billion in 2003, the trade value in 2008 is over 3 times that of 2003. China's export to ASEAN countries is growing very fast from 2003 to 2008, with the 2008 export value of over USD 100 billion, three times that of 2003 (USD 30 billion). This put China as a country whose export value to ASEAN is the second biggest after Japan (Table 4). Given the strong rate of expansion, economic and trade ties are expected to further intensify in the near future.

Table 4: ASEAN trade by country of destination, 2003-2008

USD million

Country of Destination	2003	2004	2005	2006	2007	2008
ASEAN	206,731.6	260,697.5	304,893.2	352,771.4	401,920.4	458,040.2
Major Trading Partners	617,807.1	811,150.3	919,996.2	1,052,034.3	1,208,867.1	1,252,331.5
USA	117,885.7	135,864.7	153,918.2	161,196.0	179,068.0	181,193.3
Japan	113,400.7	143,263.0	153,834.3	161,780.5	173,062.0	211,988.2
EU						
EU-15	98,329.1	127,544.7	136,459.9	154,791.3	177,968.0	194,020.5
EU-25	101,364.6	131,543.3	140,533.6	160,589.9	186,719.8	202,503.0
China	59,637.0	89,066.0	113,393.6	139,961.2	171,117.7	192,533.1
Republic of Korea	33,548.1	40,543.8	47,971.9	52,519.6	61,184.1	75,721.5
....						
World Total	824,538.7	1,071,847.8	1,224,889.4	1,404,805.7	1,610,787.5	1,710,371.7
Export						
ASEAN	115,601.0	141,116.3	163,862.5	189,176.8	217,334.2	242,460.4
Major Trading Partners	336,955.9	428,122.2	484,284.5	561,530.5	642,469.5	636,682.2
USA	69,674.2	80,157.9	92,941.9	96,943.4	106,375.9	101,457.5
Japan	53,198.0	67,227.6	72,756.4	81,284.9	85,138.1	104,871.8
EU						
EU-15	58,174.0	73,395.5	78,238.5	90,548.3	101,490.9	107,250
EU-25	60,116.8	76,087.8	80,847.9	94,408.5	107,992.1	112,948.3
China	29,059.9	41,351.8	52,257.5	65,010.2	77,945.0	85,556.5
Republic of Korea	16,941.8	19,810.9	24,362.3	27,176.4	29,486.5	34,937.5
....						
Total	452,556.9	569,238.4	648,147.0	750,707.4	859,803.8	879,142.6

Import						
USA	48,211.5	55,706.9	60,976.4	64,252.5	72,692.1	79,735.8
Japan	60,202.6	76,035.4	81,078.0	80,495.6	87,923.9	107,116.4
EU						
EU-15	40,155.1	54,149.2	58,221.4	64,243.1	76,477.1	86,769.6
EU-25	41,247.8	55,455.5	59,389.5	65,923.9	78,727.7	89,554.7
China	30,577.0	47,714.2	61,136.1	74,951.0	93,172.7	106,976.6
Republic of Korea	16,606.3	20,732.9	23,609.5	28,765.9	31,697.5	40,783.9
.....						
Total	371,981.8	502,365.7	576,742.3	654,097.6	750,983.7	831,229.1

Source: ASEAN Statistics Yearbook 2008, pp.78-79 and pp, 82-83.

Table 5 shows that from 2003 to 2008, China's investment in ASEAN increases rapidly. In 2003, China's investment in ASEAN countries is only USD 187 million, while in 2008 it has reached nearly USD 1.5 billion, 8 times that of 2003. This put China as ASEAN's 4th biggest investor after EU, Japan and the U.S.

Table 5: FDI inflows into ASEAN by source country, 2003-2008

Source Country	USD Million					
	2003	2004	2005	2006	2007	2008
ASEAN	2,702.0	2,958.6	4,217.7	7,602.3	9,408.6	11,070.8
Rest of the world	21,364.7	32,242.5	34,738.3	45,767.9	59,106.0	49,355
EU	6,679.2	11,270.2	10,015.6	10,672.2	18,383.5	12,445.3
Other Europe	1,862.5	1,641.8	4,269.7	5,340.9	3,293.5	2,553.2
Japan	3,908.4	5,667.4	6,655.0	10,222.8	8,382.0	7,653.6
USA	1,494.7	4,384.4	3,945.8	3,406.4	6,345.6	3,392.5
Hong kong	225.2	433.2	586.4	1,278.8	1,622.4	619.5
Republic of Korea	550.0	828.2	507.0	1,253.8	3,124.7	1,279.1
China	186.6	735.0	537.7	1,016.2	1,226.9	1,497.3

Source: ASEAN Statistics Yearbook 2008, p.134.

Since 2003, China is one of ASEAN's most important country where tourists come from and in 2007, China became ASEAN's biggest (Table 6) country of origin for tourist arrivals.

Table 6: Visitors arrivals into ASEAN by countries of destination, 2003-2008

(in thousands)

Country of Origin	2003	2004	2005	2006	2007	2008
China	2,393	3,181	1,605	3,335	3,926	4,487
Japan	2,797	3,520	3,650	3,368	3,701	3,631
Republic of Korea	1,716	2,350	2,645	3,353	3,539	3,252
Uk	1,380	1,647	1,784	1,129	1,975	2,026
USA	1,701	2,099	2,306	2,490	2,537	2,660
Australia	1,306	1,849	2,034	2,063	2,435	2,920

Source: ASEAN Statistics Yearbook 2008, p.134.

Bilateral cooperation between China and individual countries around the South China Sea has also been strengthened during the process of FTA. In 2008, the China-Malaysia trade is the most strongest in the SCS region with a volume of over USD 53 billion, with Malaysia having a trade surplus of over USD 10 billion. China's second trade partner is Singapore, with the total trade volume of USD 52 billion, among which USD 32 billion as China's export and USD 20 billion as China's import from Singapore (Table 7).

Table 7: Trade between China and countries in the South China Sea region

USD billion

Country	Total Trade Volume	Export	Import
Indonesia	31.5	17.2	14.3
Malaysia	53.5	21.4	32.1
Singapore	52.4	32.3	20.1
Vietnam	19.5	15.1	4.34
The Philippines	28.6	9.1	19.5
Brunei	0.22	0.13	0.09

4. Non-traditional security concerns

Non-traditional security threats have continuously haunted the SCS region. They include, inter alia, epidemic diseases, climate change and natural disasters resulted from climate change, piracy and terrorist attacks. It is still clear in our minds the fear that SARS brought to the region in 2003, followed by bird-flu and H1N1 flu. The fear comes from not only the human lives the diseases claimed but also the fast speed they

spread across the borders. Since this region consists of many low lying insular features facing the threat of sea level rise, the climate change issue has been given great attention to. For example, it was reported that by 2100, 90,260 km² of Indonesian costal land and small islands may disappear as a result of a 1.1-meter sea level rise.¹⁵ Currently the average annual sea-level rise of 3mm might be minor, but the horizontal impact is estimated at about 50-200 times. The devastation of 2004 Tsunami is one typical example. According to the report from the International Maritime Bureau, the cases of piracy dropped from the years 2000 to 2005. In the Malacca and Singapore Straits, though the proportion of ships attacked is estimated to range from 0.04% to 0.11% of the total number of ships transiting annually, what makes piracy dangerous is that these gangs appear to be better equipped and organised than most naval authorities and have demonstrated an increased propensity to use violence.¹⁶ The existence of mega-ports along the sea lanes in the South China Sea and of super-tankers passing through them makes any terrorist attack a possible disaster to the world economy.

All these non-traditional threats carry transboundary nature and pose risks to the countries of the SCS region. To handle all these issues effectively, individual countries' efforts are far from enough. Joint efforts are needed.

5. Regional integration trend

Transnational issues need to be resolved in a coordinated manner among countries concerned, which promotes integration. Integration is recognized as a win-win mechanism to fight against global or regional problems more efficiently. Economic integration is the basic trend for current global economic development, which includes, inter alia, globalization and regionalization. Globalization and regionalization push ahead the global economy in their own particular ways. Globalization covers a wide range of aspects. Different political systems and economic development levels may lead different countries to have their own priorities on integration, which makes it hard for them to form consistent views and also makes it difficult for production components to move freely across borders. To deal with such an issue, regionalization started being implemented in more and more areas as a way towards economic integration. Speedy regionalization is reflected by the rapid international cooperation in general and the appearance of regional organizations in particular. The success of ASEAN, ASEAN+1, ASEAN+3 and ASEAN Summits indicates the regional integration in the SCS region, which implies that strengthening economic cooperation therein is an irreversible trend. With the unresolved SCS disputes, the relevant parties may wish to strengthen cooperation for the sake of promoting regional peace and may also wish to set up

¹⁵ Hasjim Djalal, "Climate Change, Sea Level Rise, and Their Impacts on Indonesia," a paper delivered at the 19th Workshop on Managing the Potential Conflicts in the South China Sea, 11-14 November, 2009.

¹⁶ Joshua H. Ho, "Regional Responses to the Treat of Piracy and Maritime Terrorism in the Malacca and Singapore Straits," Maritime Security Conference paper, Haikou, China, 2005, p. 3.

functional regional organizations to promote economic development within the region for the aim of common prosperity.

In addition, UNCLOS and other relevant international legal documents emphasize the importance of international, regional and subregional cooperation on the exploration and exploitation of marine resources, particularly those in enclosed or semi-enclosed seas. For example, Articles 123, 197 and 242 of UNCLOS as well as Part III of UNFSA lays down obligations and requirements for regional and international cooperation.

III. JOINT EFFORTS

1. The integration of ASEAN

Since ASEAN was initiated in 1967, the economic, political and cultural integration was gradually expended among its member countries. The ASEAN Vision 2020, adopted in 1997, set the goal of building ASEAN into “a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies”.¹⁷ In December 2005, the member countries agreed to establish the ASEAN Charter by a joint declaration and at the 13th ASEAN Summit in November 2007, the ten countries signed the Charter, which came into force on 15 December 2008. The signing of the Charter is a milestone for the integration within ASEAN. The Charter serves as a legal and institutional framework, as well as an inspiration for ASEAN in the years ahead, with the aim of narrowing the development gap among its members and promoting ASEAN’s integration process through the creation of an ASEAN Community. Its basic principles include, inter alia, “respect for the principles of territorial integrity, sovereignty and non interference and national identities” and “promoting regional peace and identity, peaceful settlements of disputes through dialogue and consultation, and the renunciation of aggression”. The Charter has again shown to the world the determination of the ASEAN member countries for its integration.

The establishment of ASEAN did play a role among its member states on encouraging the peaceful settlement of disputes, even though it is the relevant countries that made a decisive role in choosing the peaceful means. For example, in 2002 and 2008 the territorial dispute over Sipadan and Ligitan between Indonesia and Malaysia and that over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore were resolved by the decision from the International Court of Justice (ICJ) respectively. It is after mutual agreements that the relevant cases were put to ICJ. Such a positive role by ASEAN may set a good example for certain mechanism in the SCS region to deal with the disputes among relevant parties.

¹⁷ http://www.aseansec.org/about_ASEAN.html

2. Strategic partnership between China and ASEAN

The 1997 financial crisis in Asia pushed ASEAN countries and China to a closer cooperation to override possible fluctuations in the current economic world. In 2001 China proposed the suggestion of China-ASEAN Free Trade Agreement (CAFTA) to emphasize the opportunities for cooperation and partnership, which was followed by the 2002 Framework Agreement on Economic Cooperation. In the process to FTA, it is noted that China is willing to accommodate ASEAN's most important concerns.¹⁸

2003 marks the important events between ASEAN and China, when China acceded to the Treaty of Amity and Cooperation in Southeast Asia, which demonstrated that the political trust between the two sides notably enhanced, and the Joint Declaration on Strategic Partnership for Peace and Security was signed between them. A five-year (2005-2010) Plan of Action to implement the Joint Declaration was adopted at the 8th ASEAN-China Summit in 2004 for the aim of strengthening the strategic partnership for regional peace, development and prosperity. Two agreements on trade in goods and trade in services were signed consecutively in 2004 and 2007.

In August 2009, the ASEAN-China Investment Agreement was signed. The conclusion of an Investment Agreement is timely as this provides an enabling environment that will lead to enhanced investment flows between both sides at a time when ASEAN and China are key emerging economies with strong economic prospects. To encourage investment in ASEAN countries, Chinese government set up the ASEAN-China Cooperation Fund in 2005. To further finance major ASEAN-China investment cooperation projects in infrastructure, energy and resources, information and communication technology and other fields, China unveiled a USD 10 billion China-ASEAN Investment Cooperation Fund in early 2009. All these agreements, declarations and following implementing actions expended the cooperation between ASEAN countries and China in general and economic cooperation in particular.

To peacefully manage the SCS issues, the ASEAN countries and China signed the 2002 DOC, followed by several ASEAN-China Senior Officials' Meetings on the Implementation of the DOC. These meetings provide a first-track platform for relevant countries over the SCS issues to exchange views on furthering cooperation for the aim of confidence building. However, it is up to the parties themselves to put self-restraint to regulate their behaviors. The lack of a binding mechanism may lead individual countries to take activities to maximize self interests.

3. MEP, MSR and resources exploration

Various cooperation in MEP, MSR and resource exploration have been carried

¹⁸ Alice D. Ba, "China and ASEAN: Renavigating Relations for a 21st-Century Asia," *Asian Survey*, Vol. XLIII, No. 4, 2003, p.639.

out in the South China Sea under different mechanisms. For example, under UNEP East Asian Seas Regional Programme and the Coordinating Body on Seas of East Asia (COBSEA), a project on “Reversing Environmental Degradation Trends in the South China Sea and the Gulf of Thailand” has been carried out and under the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA), various actions have been implemented in the chosen sites in the region¹⁹, including the integrated coastal zone management, managing subregional sea areas and pollution hotspots and other environmental issues, and scientific research. At the 11th ASEAN-China Summit in 2007, “environment” was included as the 11th priority area of cooperation and it was agreed to establish an ASEAN-China Ministerial process to discuss issues related to the environment; an ASEAN-China Environmental Protection Centre and an ASEAN-China Information and Network Security Emergency Response Cooperation Framework. Marine environmental issues are included in the cooperation scheme.

Under the Indonesia-hosted series of workshops on Managing Potential Conflicts in the South China Sea, several projects are underway. They are Regional Cooperation in the field of Marine Science and Information Network in the SCS including the Marine Database Information Exchange and Networking Project (China), Tides and Sea Level Change and the Coastal Environment in the South China Sea Affected by Potential Climate Change (Indonesia), Training Program for Marine Ecosystem Monitoring (the Philippines) and Search and Rescue and Illegal Acts at Sea including Piracy and Armed Robbery (Malaysia). At the 19th Workshop this year, China and Chinese Taipei jointly proposed the Southeast Asia Network for Education and Training Project, which will be implemented in 2010 and 2011. It is the aim of the Workshops that through these projects, scholars in the SCS region share their experience and available scientific research information. However limited financial resources have prevented some projects from moving ahead more efficiently.

The only joint cooperation on marine resource exploration is the seismic exploration agreement signed among the oil and gas companies in China, the Philippines and Vietnam in March 2005. According to the agreement, the three parties will jointly gather two-dimensional and three-dimensional seismic data and process two-dimensional seismic data within an area of 140,000 square kilometers in three years. It was hailed by related governments as a milestone for joint development in the SCS. It is unclear how the involved companies move ahead after the three years. Wisdom is needed for furthering cooperation in this area.

4. Maritime security (MS)

Maritime security has been a focal concern for the littoral states in the Southeast

¹⁹ PEMSEA Sites include, among others, Bali and Sukabumi of Indonesia; Batangas, Bataan and Cavite of the Philippines; Chonburi, Thailand; Danang and Quang Nam of Vietnam; Port Klang, Malaysia; Xiamen and Bohai Sea of China; Manila Bay; Gulf of Thailand; and the Malacca Straits.

Asian countries. A series of statements among the regional governments have shown the common determination on dealing with the security problems. These statements include, inter alia, the 2002 Statement on Cooperation against Piracy and Other Threats to Maritime Security; the 2005 Shangri-la Dialogue in Singapore; the 2005 Batam Joint Statement of the Fourth Tripartite Ministerial Meeting of the Littoral States on the Strait of Malacca; and the 2005 Jakarta Statement on Enhancement of Safety, Security, and Environmental Protection in the Straits of Malacca and Singapore.²⁰

Information sharing between intelligence and law enforcement and the ability for coordination are very important on attacking maritime terrorism and piracy. A trilateral political framework among Indonesia, Malaysia, and the Philippines under the Agreement on Information Exchange and Establishment of Communication Procedures was reached in May 2002. After the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) was established in 2001, its member nations²¹ agreed to set up an Information Sharing Center (ISC) in Singapore in 2004 to enhance the information exchange among Contracting Parties on incidents of piracy and armed robbery and to facilitate operational cooperation among them. The information sharing initiative has played an important role in recent captures of Islamic militants throughout Southeast Asia, such as the arrest of a JI bomb-maker in 2002 and the capture of JI cell leader bin Ali in 2003.²²

The littoral countries have carried out cooperation among their law enforcers. The first Malsindo²³ naval patrols were launched in July 2004 and carried out regularly thereafter. The Malsindo Patrols is part of the Malacca Straits Security Initiative, which encompasses the security arrangements between the three littoral states. The “Eyes in the Sky” Initiative is also part of the Initiative. It was launched in 2005 by Malaysia, Singapore, Indonesia and Thailand. Maritime issues were discussed at other regional forums resulting in agreements, such as the 2003 Bali Accord II by ASEAN and the Statement on Cooperation against Piracy and Other Threats to Maritime Security adopted at the 10th ARF Post-Ministerial Conference in June 2003.

Cooperation on security issues have also been promoted between China and ASEAN since 1997. They worked to actively implement the concept of enhancing mutual

²⁰ John F. Bradford, “Shifting the Tides Against Piracy in Southeast Asian Waters,” *Asian Survey*, Vol. 48, Issue 3, 2008, p. 482.

²¹ The seventeen member countries of ReCAAP include the People’s Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People’s Republic of China, the Republic of India, the Republic of Indonesia, Japan, the Republic of Korea, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, and the Socialist Republic of Viet Nam.

²² Andrew Chau, “Security Community and Southeast Asia: Australia, the U.S. and ASEAN’s Counter-terror Strategy,” *Asian Survey*, Vol. 48, Issue 4, p. 634.

²³ Malsindo refers to the three countries of Malaysia, Singapore and Indonesia.

trust through dialogue, resolving disputes peacefully through negotiations and realizing regional security through cooperation. The 2002 DOC was signed to deal with the South China Sea issues and in 2003 the two sides issued the Joint Statement on Cooperation in the Field of Non-Traditional Security Issues, under which active cooperation on transnational issues has been conducted. A MOU on Cooperation in the Field of Non-traditional Security Issues was signed by ASEAN and China in January 2004. ASEAN and China convened several Informal Ministerial Consultations on Transnational Crime from 2005. In the joint Statement of ASEAN-China Commemorative Summit in 2006, they announced their commitment on working together in ensuring maritime security in the region; and strengthening regional cooperation on disaster management and emergency preparedness, including post-disaster reconstruction and rehabilitation efforts, with ASEAN taking the lead. All these commitments laid solid foundation for the cooperation between China and ASEAN countries on security issues.

5. Available mechanisms

The existing mechanisms provide successful experience for strengthening cooperation in the SCS region. At present, the Forums on Circum Beibu Bay (the Gulf of Tonkin) Economic Cooperation Region and Pan Pearl River Delta Economic Cooperation Region, and the co-existing project of the Singapore-Johore-Riau Growth Triangle among Indonesia, Malaysia and Singapore, have laid the foundation for further development of regional economic cooperation. If the above three sections can be integrated while strengthening the cooperation between China and Vietnam and between China and the Philippines at the same time, the “triangular economic cooperation region” will take shape. With the planning and construction of the Pan-Asia railroads, the economic cooperation region could also be integrated into the Great Mekong Sub-region (GMS) Cooperation Zone, which would be a great contribution to the construction of CAFTA and would stimulate the economic and social development of countries and regions in the SCS Region.²⁴

IV. CONCLUSION

Joint efforts have been made for cooperation in various fields in the South China Sea region. However in addition to economic cooperation, the actions in other fields are to some extent scattered, with less communication of information even if there are any achievements, which reduced the effectiveness of all efforts. Meanwhile unilateral actions in the SCS create a noise for regional peace and security because they are against the will of all related parties as stated in the 2002 DOC, which goes, “The modalities, scope and locations, in respect of bilateral and multilateral cooperation, should be

²⁴ Shicun, Wu and Jianwei, Li, “Promoting Economic Cooperation in the South China Sea Region: China’s Perspectives,” Paper presented at the International Conference on “the South China Sea: Sustaining Ocean Productivities, Maritime Communities and the Climate”, Kuantan, Malaysia, 25-29 November 2008.

agreed upon by the Parties concerned prior to their actual implementation”. As a semi-enclosed sea, any actions in the South China Sea could influence the livelihood of people living around there. It is to all people’s benefits that before a final resolution is reached over the territorial disputes, cooperation under certain agreed scheme(s) among the relevant countries should be promoted to coordinate activities in the fields of MS, MEP, MSR and joint development of marine resources. To achieve the goal of turning the South China Sea into “a sea of peace and a sea of cooperation”, a sub-regional South China Sea cooperation organisation is proposed, under which further cooperation shall be encouraged and activities be coordinated.

Strengthening economic cooperation in the SCS Region is the backdrop to the development of the CAFTA and the China-ASEAN Mechanism, as well as having the aim of integrating the GMS Economic Cooperation Zone, Pan-Pearl River Economic Cooperation Zone and the Singapore-Johore-Riau Growth Triangle. Therefore, the economic cooperation in the SCS Region should be carried out in line with the China-ASEAN Mechanism for the purpose of enriching the content of the CAFTA. Strengthening cooperation can also function to weaken the SCS disputes, maintaining peace and maritime safety in the SCS Region to create favorable conditions for further cooperation.

China will always adhere to the principles of friendly consultation on an equal footing, reciprocity and mutual benefits, and common development in the process of participating and promoting economic cooperation in the SCS Region. Its diplomacy in relations with its neighbours is “to build friendly relationships and partnerships with its neighbors” while the starting point of its policy is “to implement the policy of creating an amicable, secure and prosperous neighborhood”. China will make joint efforts together with its neighbouring countries to raise the living standards and promote common development in the area to maintain the peace, security and stability of the region.

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PART IV:

**FRAMEWORK FOR COOPERATION
IN THE SOUTH CHINA SEA**



TOWARDS AN INTERNATIONAL LEGAL DUTY OF OCEAN COOPERATION?

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INTRODUCTION

This paper explores the rules of international law, as well as relevant state practice, pertaining to maritime cooperation. Its scope therefore includes formal and informal arrangements whereby states have decided to blur, or establish some alternative to, the usual rules pertaining to exclusive jurisdiction at sea. This can be done for a number of purposes: the joint exploration and exploitation of agreed areas for oil and gas activities, the cooperative development of individual oil or gas fields, joint fishing zones, or other areas within which a variety of activities by the authorities and/or nationals of the states concerned are envisaged. There are other types of arrangement, usually informal, whereby countries have agreed, de facto, to respect historically established boundaries for certain jurisdictional purposes, without prejudice to a final formal agreement. The emphasis in all cases is the same: not allowing differences concerning the extent of maritime jurisdiction to get in the way of exploration, exploitation, monitoring, enforcement: in short, the ensemble of rights and obligations that coastal states enjoy and are required to observe in the oceans.

It might be as well to say at the outset that this writer acknowledges that joint development of the petroleum resources of an area is not the same thing as the cooperative development of an individual field. But that difference is immaterial

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here: this paper seeks to draw legal conclusions from different manifestations of state behaviour – where two or more sovereign entities agree to cooperate.

It will be clear from the above that the impetus for such arrangements is almost entirely practical and functional. Having said this, it is true that states can and do establish legal relations almost on a pro forma basis—for the sake of establishing relations. This of course has its place in the establishment of a desirable degree of neighbourliness, be this on a bilateral, sub regional, or regional basis. But this is particularly required where there has been a history of tension between the actors concerned, or when a new entity has emerged, as was the case with Timor Leste in Southeast Asia.

The motive for entering into a legal agreement does not affect the validity of the measure, but this paper is less concerned with what I call pro forma treaties. Rather, its focus is on the contribution that cooperation arrangements which have a practical and functional purpose make to the development of international law in general, and in the specific context of the jurisdictional impasse in the South China Sea.

INTERNATIONAL COOPERATION AND INTERNATIONAL LAW

The concept of the sovereign equality of states lies at the heart of modern international law.¹ International lawyers, at least in western countries, agree that the concept derives from two treaties signed in 1648 that ended the Thirty Years' War, which are known collectively as the “Peace of Westphalia”. These treaties laid down, for the first time, the unshakable rule that states were sovereign within their own boundaries, and had the unimpeachable right to organize themselves (with respect to form of government, religion, etc.) in any way they chose, and without reference to any other country. As a corollary to this, no other country had a right to interfere with these decisions which, in the context of 1648, meant that one state could not use its disapproval of the “official” religion of another as a pretext for invasion, no matter how great the degree of divine justification or sanction it was claiming. From this we derive also the notion embedded in Article 2(7) of the Charter of the United Nations: no state has the right to interfere with matters which are essentially within the domestic jurisdiction of another.²

¹ Cf. Article 2(1) of the Charter of the United Nations: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles...(1) The Organization is based on the principle of the sovereign equality of all its Members. See also the elaboration in Article 1 of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV), October 24, 1970.

² The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles...(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

So far so good, but, arguably, the notion of precisely what Article 2(7) means in 2009, more than 60 years after the charter was drafted, is a matter for interpretation. At one end of the spectrum sit those countries which believe in undiluted sovereignty in virtually each and every circumstance. No matter what a state does within its boundaries, and no matter what the effects are on others (with particular reference to its neighbours), this exercise of rights is unimpeachable. At the other end of the spectrum are those who claim that, in a mutually interdependent world, and given the technological capacity of states to inflict serious and indeed permanent damage on others, e.g. resulting from certain environmental decisions such as the diversion of rivers and the like, states are entitled to speak out where they regard their vital interests as being, or potentially being, under attack. For countries which regard themselves as part of the Western tradition of law, some variation of this second option would come naturally. For common law countries, the applicable rule is summarized thus: no one can use their rights in a way that impacts materially on the rights of others. Civil law jurisdictions have a broadly similar principle, which one might claim to be one of the “general principles of law recognized by civilized nations” for the purposes of Article 38(1)(d) of the Statute of the International Court of Justice.³ If this view is correct, then the “absolute sovereignty” view cannot be sustained, or at least as literally as some countries maintain. In addition to any legal arguments that might be made, it may also be said that this view of state power derives from an essentially simplified view of international relations, one that would certainly appeal to nearly independent states keen to forge international ties for themselves and, where necessary, repudiate arrangements made on their behalf by colonial powers.

In addition, it is necessary to remember that the international legal landscape in 1945 bears little resemblance to that pertaining today. The extraordinary and intricate network of legal relationships that have built up in areas such as trade, banking and other aspects of the international financial system, human rights, the environment, the oceans, policing, anti-terrorism—this architecture evolved relatively quickly in the not too recent past. The specialized agencies of the United Nations had a lot to do with this. But the essential point here is that many of these agreements, most of which take the form of “law-making treaties”, dealt with areas for once considered to be the exclusive prerogative of domestic law. In other words, the members of the international community have decided to evolve an increasing number of international standards with the express intention of harmonizing domestic legal norms in these areas. This creates a mutuality of rights and obligations with respect to these agreements undertaking, which means that the “matters within the domestic jurisdiction” argument does not apply. When a country ratifies a treaty, it gives every other state party the right to observe and comment on the means it chooses to discharge its obligations to implement. Conversely, of course, that country has a similar right vis-à-vis other parties. Put this way, the modern international legal system seems designed to promote states keeping the activities of others under review.

³ Available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

Again, not all countries would agree with this view put as simply as it appears here. And it is important to stress that other countries have a right of being seen to interfere in the affairs of others only when a violation of an international norm is apprehended or has taken place. So long as countries remain true to the letter and spirit of their obligations, it is entirely their business as regards the means chosen to do so.⁴

In this writer's view, the international community has, over the past six decades, if not before, elected to develop an extensive network of international obligations which, at least for those states that participate therein, and nearly every state does, reduce the category of matters which are "essentially within the domestic jurisdiction of a state" not to extinction, but quite considerably. One of the effects of this is to shift the emphasis in the development of jurisdictional matters from unilateralism, to the point where, at very least, the views of other countries become important. This, in turn, leads to a new spectrum: at one end, countries that will admit that the "views" of other countries should be "considered" when a decision is being taken, and those that admit that other countries, such as neighbouring states, have rights with respect to the discharge of some of the functions of the state. One of the candidate topics for consideration and placement in this spectrum is the whole notion of international cooperation.

In the introduction, it was suggested that the most useful definition of international cooperation has to do with practicality and functionality. To expand on this, the thesis would be that, where a given activity either cannot be undertaken by one state acting alone, or where the concerted activities of states are either essential or merely preferable, issues of obligation might arise. Put broadly, the argument being advanced here is that some matters that fall within the jurisdiction of states cannot by their very nature be addressed successfully by unilateral action. The only alternative of this is some sort of harmonized action, brought about by mutual agreement.

International cooperation has a long history, though it took some time for the elusive element of legal obligation to be discernable. Indeed, the world's oldest surviving treaty, dating from the second millennium BCE, is what we would term a mutual assistance and defence pact, whereby the parties agreed that an attack on one was an attack on both, and assistance would be forthcoming accordingly. Cooperation in the broader sense was to be found elsewhere in the ancient world, for example, between countries which had adopted Islam.

⁴ There is a vigorous debate in scholarly circles arising from the fact that states take radically different views of what constitutes "implementation" of a provision, and this results from marked differences in the legal traditions and legal cultures of states. While a discussion of these matters is not relevant here, it should be noted that while the implementation of some provisions is relatively straightforward, and the room for interpretive maneuver nil, or virtually so, other matters are fraught with greater difficulty. Take, for instance, the difference of opinion worldwide as to what does, or does not constitute a "law".

In the more modern sense, the end of the Napoleonic Wars in 1815 marks as good a beginning as any. That year saw the meeting of the Congress of Vienna, where the leading European statesmen of the day met in order to determine how to deal with the conclusion of a war which had had unparalleled impact on the continent. This meeting in turn gave rise to an institutional form of security cooperation, the “Concert of Europe”. Under this system, the representatives of the leading powers would meet in an attempt to resolve, and if necessary, impose solutions on, matters thought to threaten continental security. The concert system came to an abrupt end with the Franco-Prussian War of 1870/1, and was not revived as such.

The 19th century did however see the inauguration of a well-established institutional phenomenon, the international organization. The first two were admittedly regional and sectoral, being concerned with rights over the Rhine and Danube Rivers. That being said, they offer us an excellent example of practical and functional cooperation: countries recognizing that not only was concerted action required to maintain the international navigability of these two rivers, but in order for this to be assured, a discrete body, a commission, had to be created to discharge these obligations on behalf of the riparians.

The First World War offered many opportunities for cooperation of different kinds, but for present purposes, the most telling was the Allied Maritime Shipping Council, a body that oversaw the coordination of the merchant navies of the countries opposed to Germany and its allies. The principle responsibility of this commission was to ensure the continuous movement of food, personnel, and ammunitions from North America to Europe. This, in effect, required the creation of a body that treated the merchant fleets of the allies as one force, and disposed them accordingly.⁵

There is no mention of international cooperation as such in the covenant of the League of Nations, the body intended to serve as a forum, *inter alia*, for international concerns over peace and security, established by the Treaty of Versailles, 1919. By contrast, the promotion of international cooperation is declared to be one of the “objectives” of its successor body, the United Nations.

The charter provisions on cooperation are somewhat brief, but the same might be said for other important elements of the proposed new world order that some thought it was ushering in. There was a clear need for the principles underlying the charter to be amplified, and this process eventually bore fruit in the 1970 Declaration of Friendly

⁵ This effort was highly successful. One of those primarily responsible for it was the young French businessman Jean Monnet, who was to use this experience, and that of early World-War II cooperation between France and Britain, in his designs for European unification, an effort that was to bear fruit in the Schuman Plan of 1950, which led to the establishment of the European Coal and Steel Community in 1951, and in 1957 with the creation of the European Economic Community and the European Atomic Energy Community, all collectively known today as the European Union.

Relations between States.⁶ This has a chapter devoted to the subject of international cooperation. It reads as follows:

The duty of States to co-operate with one another in accordance with the Charter

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;
(b) States shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

The declaration is precisely that—a declaration. It does not, in and of itself, have the force of law, and nor was it intended to do so. However, a document adopted by the general assembly and described as an elaboration of “principles of international law” cannot be said to be without significance. Accordingly, to measure the full impact of the declaration, it is necessary to undertake an analysis of cooperative agreements since its promulgation with a view to determining whether the states concerned can be said to have entered into the arrangement in question out of a sense of legal obligation, as opposed to functional necessity which suits their convenience.

International law – Treaty and custom

At this point, a brief discussion of the nature of customary international law might assist those who do not have legal training. International law derives from two sources, treaties, and custom. A treaty, sometimes known as convention, charter, covenant, agreement, is defined as an agreement concluded between two or more states in writing and intended to create legal relations between them. The law on treaties,

⁶ Declaration on Principles of International Law concerning Friendly Relations and accordance with the Charter of the United Nations, Resolution 2625 (XXV), October 24, 1970.

which includes provisions on conclusion, entry into force, interpretation, reservations, amendment, termination, having codified and developed by the Vienna Convention on the Law of Treaties, 1969.⁷

Insofar as there is a hierarchy of sources of international law, treaties appear to sit at the top of it. The reasons for this are not too difficult to see: a treaty is a most specific obligation, and because it is in writing, its liniments should be reasonably clear, particularly where the subject matter is complex. The essence of a treaty, of course, is the fact that it is an obligation undertaken voluntarily. Indeed, the Vienna Convention provides that agreements apparently entered into under force or duress are of no effect.

The second source of international law, and one which was of the greatest importance until the second half of the last century, is customary international law. While the definition of a treaty presents few problems, customary international law is another matter altogether. Put simply, this is law derived from custom, meaning, a constant uniform practice accepted as law. All elements of this definition are important. Consistency and uniformity alone will not create a rule of law. It may tell you that there is a generally accepted practice in a given area, but not necessarily that it is followed because the country concerned feels that it is under an obligation to do so. One of the leading textbooks on public international law gives the example of foreign naval vessels exchanging salutes when they meet on the high seas. This is of a custom or usage, but it is not one supported by law. In other words, a ship from State A which fails to salute a ship from State B is not involving its country in a dereliction of an international legal obligation. It might appear discourteous, or even insulting, but it is not a violation of a rule of law.

International lawyers call this legal element the *opinio juris*. This is a more elusive concept. In this paper, attention will be drawn to a number of international arrangements. Some of them can appear to conform with obligations in the Law of the Sea Convention, but are they intended to be perceived in this way? Are they examples of the discharge of an obligation, or merely an arrangement that two or more states wish to implement because it was convenient or advantageous for they do so? Similarly, as regards customary law, it can be argued that where two or more states have an interest in an oil and gas field that straddles a maritime boundary, good oilfield practice suggests that they should not undertake exploitation unilaterally, but rather cooperate according to established principles of the petroleum industry. Many coastal states have included provisions which are triggered by the discovery of such fields. For them, the

⁷ Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, in force January 27, 1980. This is neither the time nor the place to explore this point more fully, but international lawyers are continually cautioning colleagues trained in other disciplines to be aware of the fact that there are, perhaps unknown to them, rules on matters such as treaty interpretation, and the appropriate significance to attach to the fact that a matter is dealt with, or conversely ignored, by an international agreement. The freedom of manoeuvre as regards interpretation, in particular, is rather more constrained than many appear to think.

option of seeking some form of cooperative development does not exist. But what if a maritime boundary exists, but no such provision calling for discussions or negotiations on a mutually agreeable means of proceeding exists? Were the states concerned to enter into an agreement which instituted some form of cooperative development and, in some way or other, indicated that they were doing so because they believed unilateral exploitation of the field to be unlawful, then it could be said that they were recognizing the existence of not merely a custom, but a rule of customary law. Unfortunately, the states do not always clarify the rationale behind their acts to enable commentators to draw conclusions from them.

To conclude on the point of cooperation as a general rule of international law, it is suggested that the international community, in general, has become habituated to working with neighbours bilaterally, sub-regionally,

Zones of Cooperation in the Oceans

Maritime zones of cooperation have proliferated considerably since France and Spain led the way in 1975. What used to be called “joint development” arrangements, meaning agreements for the joint development of the petroleum resources of a disputed area, have been supplemented by others where the focus is either elsewhere, e.g. fisheries, or multi-purpose. Perhaps the important common element is the decision to set aside, or at least vary, the “exclusive jurisdiction” rule which lies at the heart of both the regimes of the Exclusive Economic Zone and the continental shelf – though, as will be seen, maritime cooperation is perfectly feasible where rigorous insistence on the enforcement of the boundary lies at the heart of the arrangement. There are an infinite variety of ways in which this can be done, and it might perhaps be said that more detailed categorisation is pointless until further agreements emerge. The common element of cooperation, no matter what form this takes, is sufficient for present purposes.

Much, but not all, of the current law of the sea is to be found in the United Nations Convention on the Law of the Sea of 1982.⁸ Articles 74(3) (delimitation of the EEZ) and 83(3) (delimitation of the continental shelf) provide as follows:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

⁸ United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, in force November 16, 1994, in UNTS vol 1833 p.3, also available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

The spirit and intention of these provisions is clear: differences regarding the course of a maritime boundary should not impede ocean development and management. Some states have crafted ways to surmount jurisdictional differences, but it might be too much to say that agreements entered into since 1982 have been in pursuance of a legal duty pursuant to the Convention. Regimes which provide for forms of maritime cooperation (with respect to petroleum exploration and production, unless otherwise noted) have been concluded between:

- France and Spain in the Bay of Biscay;⁹
- Japan and South Korea in the East China Sea;¹⁰
- Saudi Arabia and Sudan in the Red Sea (submarine minerals);¹¹
- Iceland and Norway in the North Atlantic between the Norwegian island of Jan Mayen and Iceland;
- Malaysia and Thailand (with the partial participation of Viet Nam) in the Gulf of Thailand;¹²
- Australia and Papua New Guinea in the Torres Strait (aboriginal fishers);¹³
- Malaysia and Viet Nam in the Gulf of Thailand;¹⁴

⁹ Convention between the Government of the French Republic and of the Spanish State on the delimitation of the continental shelves of the two states in the Bay of Biscay, Paris, January 29, 1974, in force December 12, 1975, Limits in the Seas No. 83.

¹⁰ Agreement between Japan and the Republic of Korea Concerning the Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Seoul, February 5, 1974.

¹¹ Agreement between Sudan and Saudi Arabia Relating to the Joint Exploitation of the Natural resources of the Sea-bed and Sub-soil of the red Sea in the Common Zone, Khartoum, May 16, 1974, ratified and in force August 26, 1974 (ST/LEG/SER.B/18, p.452).

¹² Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of the Joint Authority for the Exportation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, Chiang Mai, February 21, 1979, and Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia on the Constitution and Other Matters relating to the Establishment of the Malaysia- Thailand Joint Authority, Kuala Lumpur, May 30, 1990.

¹³ Agreement between the Commonwealth of Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters, Sydney, December 18, 1978.

¹⁴ Memorandum of Understanding between Malaysia and the Socialist Republic of Viet Nam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf involving the Two Countries, Kuala Lumpur, June 5, 1992.

- Australia and Timor Leste in the Timor Sea;¹⁵
- Jamaica and Venezuela in the Caribbean (multi-purpose, emphasis on fisheries);¹⁶
- Joint fisheries management zone between Trinidad and Tobago and Venezuela;
- Guinea and Guinea Bissau;
- Argentina and the United Kingdom in ocean areas around the Islas Malvinas/ Falkland Islands (another multi-purpose arrangement, possibly terminated by Argentina);¹⁷
- China and Viet Nam in the Beibu Gulf (fisheries);¹⁸
- Nigeria and Sao Tomé and Príncipe (not restricted to oil and gas); and
- Agreements to “unitize” oil and/or gas field straddling an agreed continental shelf or maritime boundary (of which there are several in the North Sea area).

These agreements vary widely as regards nature, scope, and purpose, governance, area of operation, and what one might term seriousness of purpose. Arguably, none of this matters: an agreement establishing a comparatively loose form of cooperation is no more or less legally binding than one setting forth a detailed regime. The important point to note is that the states concerned have agreed on a jurisdictional variation, one that is an exercise of sovereign rights, but which also appears to respect such rights on the part of another state with respect to an area, or a natural resource deposit.

¹⁵ See <http://www.austlii.edu.au/au/other/dfat/special/etimor/index.html>, which includes unitisation agreements for fields straddling the boundary of the joint development area. For a comprehensive overview see Schofield, *Blurring the lines: maritime joint development and the cooperative management of ocean resources*, *Issues in Legal Scholarship*, 8 (1) (2009).

¹⁶ *Maritime Delimitation Treaty Between Jamaica And The Republic Of Colombia*, Kingston, November 12 1993, in force March 14, 1994 in UNTS, 26 *United Nations Law of the Sea Bulletin* 50 (1194); *Limits in the Seas No. 125 Jamaica’s Maritime Claims and Boundaries*.

¹⁷ *UK-Argentina Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic* (see the *International Journal of Marine and Coastal Law*, Vol.11, No.1, Kluwer International, 1996).

¹⁸ The conclusion of a boundary agreement led to one on fisheries: *Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Beibu Gulf between the People’s Republic of China and the Socialist Republic of Vietnam*, Beijing, December 25, 2000, in force June 30, 2004; the *Fishery Agreement* was signed in June 2004, and ratified on 30 June 2004. See Zou Keyuan, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, *Ocean Development & International Law*, 36:13–24, 2005. The author’s translation of the boundary agreement is appended to the paper. See also the same author’s “*Sino-Vietnamese Fishery Agreement for the Gulf of Tonkin*,” *17 International Journal of Marine and Coastal Law*, 2002: 127–148.

It may perhaps be appropriate for me to note that, based on the near universality of provisions in boundary treaties which commit states to seek a consensual form of proceeding with a cross-boundary oil and gas field¹⁹, there is a rule of customary international law that prohibits the unilateral development of such fields. The 1982 Convention says nothing on this subject at all: a major omission, perhaps. Furthermore, the states concerned are under a duty to seek for an equitable means of exploiting divided oilfields: North Sea practice has shown that this can be done in a way that respects the correlative rights of interest holders, compromises no-one, and results in the optimum development of the resource. It is hard to see how such a result can be impeached.²⁰ Without a high level of cooperation not just between states but, and perhaps more importantly, their licensees, optimum production from the field might be impossible. It might not be possible to argue that the adoption of unitisation itself is a duty, but it has the virtue of practicality, and is well known within the oil industry.²¹

MARITIME BOUNDARIES - NOT THE FINEST HOUR FOR INTERNATIONAL LAW?

It can of course be argued that “provisional measures” that result in zones of cooperation (as opposed to divided oil and gas fields) would not be necessary if states could conclude the necessary boundary agreements. International law and practice has, arguably, developed reasonably clear rules and criteria which would facilitate this. But they are not, perhaps, clear enough, and some of the blame of this must be laid at the

¹⁹ E.g. Article 4 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Relating to the Delimitation of the Continental Shelf Between the Two Countries (1965) (551 U.N.T.S., 213; 1965 U.K.T.S.; Cmnd. 2757, in force June 29, 1965): “If any single geological structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned”. The 2000 Beibu Gulf boundary agreement between China and Viet Nam (supra, note 18) includes a simplified but effective version of this provision.

²⁰ The first such field brought to production was developed pursuant to the provisions of the Agreement between the Government of the United Kingdom of Northern Ireland and the Government of the Kingdom of Norway Relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas Therefrom to the United Kingdom, London, May 10, 1976. This Treaty was concluded pursuant to Article 4 of the 1965 continental shelf boundary agreement referred to in the previous note.

²¹ Unitisation requires that the field be treated as a single unit: the usual practice is for one company to act as “operator” on behalf of all the others, regardless of nationality, and wells are drilled according to the best judgment of engineers. The costs and proceeds are divided in accordance with the proportion of the field located within the jurisdiction of each state (or interest holder) as divided by the boundary, before production started. For a survey of how this was done as regards the first offshore field to be unitised internationally, with an account of the crucial role played by the licenses of Norway and the United Kingdom, see my paper “The Frigg Gas Field - Exploitation of an International Cross-Boundary Petroleum Field”, 1979 Marine Policy, p. 302.

door of international courts and tribunals.²² In the North Sea Continental Shelf Cases, the International Court of Justice appeared to suggest that the “natural prolongation of the seabed” might be an important factor in boundary delimitation. Shortly afterwards, Indonesia appeared to agree, allowing the Timor Trough to mark the seaward extent of its continental shelf opposite Australia – to the marked advantage of the latter.²³ The United States position on the maritime boundary with Canada in the Gulf of Maine was based on this notion: the Court rejected it in favour of a modified equidistance line.²⁴

Ideas and concepts come and go, but those which are unhelpful should be sent to the grave sooner rather than later, and in unambiguous terms. The years preceding the First United Nations Conference on the Law of the Sea of 1958 saw some discussion of the desirability of preserving the “unity of the deposit” – avoiding the division of oil or gas fields. This may have played a role in the Bahrain – Saudi Arabia continental shelf boundary treaty of February 1958.²⁵ But the notion is totally impracticable. Ascertaining the extent of a deposit takes time and a great deal of money – and then what? On what criteria would a field be allocated to one state or another? In any event, the technique of unitisation, developed by the oil industry in the producing jurisdictions of the United States in the early 1900s provides for the optimum development of a divided field, while preserving the rights of all interest holders – a fact that international lawyers of the 1950s did not seem to be aware of. This concept has definitely disappeared in general state practice.

My own view is that there is more certainty on the leading criteria governing lawful claims to maritime jurisdiction than some appear to believe. Arguably, efforts to forge a greater degree of consensus on this would promote international maritime boundary conclusion. This requires greater rigour on the part of states, and international

²² The 2009 judgment of the ICJ in *Romania v Ukraine* is, unfortunately, another somewhat unhelpful contribution to the jurisprudence, in that the applicable principles on which the Court relied are far from obvious.

²³ See, for example, the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries, Canberra, May 18, 1971, in force November 8, 1973 (ST/LEG/SER.B/18, p.433; *Limits in the Seas*, No. 87); the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of May 18, 1971, Jakarta, October 9, 1972, in force November 8, 1973 (ST/LEG.SER.B/18, p.441); and the Agreement between the Commonwealth of Australia and the Republic of Indonesia Concerning Certain Boundaries between Papua New Guinea and Indonesia, Canberra, January 28, 1973, in force November 8, 1973 (ST/LEG/SER.8/18, p. 444; *Limits in the Seas*, No. 87).

²⁴ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, 1984 I.C.J. Reports 246, also available at cij/icj.org.

²⁵ Agreement Concerning Delimitation of the Continental Shelf between the Kingdom of Saudi Arabia and the Government of Bahrain, Riyadh, signed and ratified February 22, 1958, provides not only for a continental shelf boundary, but also the sharing of net revenues from a disputed oilfield, worked by Saudi Arabia on behalf of both governments.

courts and tribunals.

The Elements of Maritime Cooperation

Ocean cooperation has many virtues, including that of confidence building. While this result is admirable, and possibly essential in many cases, it sometimes tends to obscure the fact that there are harder, more functional reasons, for two or more states to work together. This is recognised in the Law of the Sea Convention, especially as regards the littoral states of an enclosed or semi-enclosed sea. It is surely relevant to state that this writer is of the opinion that the South China Sea/Gulf of Thailand qualifies as semi-enclosed for the purposes of the Convention. The applicable rules are found in Part IX:

ENCLOSED OR SEMI-ENCLOSED SEAS

Article 122

Definition

For the purposes of this Convention, “enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Article 123

Cooperation of States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Enclosed and semi-enclosed seas are singled out in this way because they are likely to comprise one or more large marine ecosystems.²⁶ Ideally, the approach to management should be holistic and coordinated in other for the states concerned to discharge the responsibilities to areas subject to their jurisdiction, including making provision for the sustainable development of living resources, protection of habitat, and the preservation and protection of the marine environment. It should not be forgotten that obligations flow from other international instruments, such as the Convention on Biological Diversity, 1992.

The ecosystem management approach seems to challenge the rights states enjoy over marine areas subject to their jurisdiction, but the legal systems of the world accept that rights and obligations go hand in hand. It simply cannot be argued that exercises of sovereignty or sovereign rights are unlimited: the basic rules of state responsibility suggest otherwise. And, if experience in marine areas such as the Baltic, Mediterranean, Caribbean, and Black Seas is any guide, the approach passes the all important test: it works, it produces results. Some subjects – air traffic control is a very obvious one – simply require by their nature a cooperative approach.

In the South China Sea, attention tends to focus on the possibility of oil and gas resources. But there are many, many other issues, some of major concern today, with no element of the hypothetical present. The risk to the major source of protein for hundreds of millions of people, habitat destruction, the lacking of monitoring and enforcement as regards fisheries and marine pollution: the list is a long one. And it has to be addressed. The thesis presented here is that the semi-enclosed sea regime presents the littorals with a framework within which they can act. International practice furnishes many example of cooperative structure which have achieved a great deal in a comparatively short time-frame. It is a matter of establishing priorities: this presents challenges, but that alone cannot really excuse a failure to attempt to surmount the difficulties.²⁷

²⁶ There is a large scientific literature on marine ecosystems and their management: this writer, no scientist, found the following to be helpful: Sherman, *The Large Marine Ecosystem Concept: Research and Management Strategy for Living Marine Resources, Ecological Applications*, Vol. 1 No.4 (November, 1991), pp.350-360; and Gumbine, *What is Ecosystem Management? Conservation Biology*, Vol.8 No.1, March 1994, pp.27-38.

²⁷ Many of the problems, challenges, and opportunities in the South China Sea have been identified in the course of meetings held as part of the project *Managing Potential Conflicts in the South China Sea*. See Djalal and Townsend-Gault, “Managing Potential Conflicts in the South China Sea: Informal Mediation in a Complex World, Washington, D.C., United States Institute of Peace Press, 1999 pp. 107-134, *Diplomacy for Conflict Prevention*”, in Crocker, Hampson and Aall, eds., *Herding Cats: Multiparty Mediation in a Complex World, Washington, D.C., United States Institute of Peace Press, 1999 pp. 107-134.* ; Clive Schofield and Ian Townsend-Gault, “Brokering Cooperation Amidst Competing Maritime Claims: Preventative Diplomacy in the Gulf of Thailand and South China Sea”, in Chircop et al., eds, *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston*, Leiden, Martinus Nijhoff Publishers, 2009, pp. 643-671; and Ian Townsend-Gault, “The Contribution of the South China Sea Workshops – the importance of a functional approach”, in Bateman and Emmers, eds., *Security and International Politics in the South China Sea: Towards a cooperative management regime*, London and New York, Routledge, 2009, pp.189-206.

CONCLUSIONS: INTERNATIONAL COOPERATION – OPTION OR OBLIGATION?

I begin my concluding thoughts by remarking this I have sought to place maritime cooperation within the broader context of inter-state obligations. International law dealing with cooperation does not divide neatly into one set of rules applicable to the oceans, and another set relating to everything else. Rather, the sub-set of norms evolved by states in their maritime dealings both draws upon and contributes to the broader theme.

International law is not neutral: it both presumes and requires good faith on the part of states in their dealings with each other. To my mind, this would require abstention from the making of exaggerated claims to rights or jurisdiction, and an acceptance of the applicable norms and concepts which have been developed through state practice and agreements. Those states which have ratified the 1982 Convention should be required to live up to the letter and spirit of the obligations they accepted freely. Much is at stake in the South China Sea. The ecosystem is fragile, and vulnerable. The food security of hundreds of millions of people is dependent upon it. If the littoral states cannot or will not to the necessary measures, unilaterally and collectively, then that ecosystem will fail. The human consequences are incalculable, to say nothing to the betrayal of the inheritance of future generations.

These arguments should and must be set against those who insists that the only matters for serious discussion are sovereignty over islands and maritime jurisdiction. Important as they are, they must not obscure other items on the sub-regional agenda. International law and practice offers several ways forward: it is for the governments concerned to display the political will to fulfill their obligations with the enthusiasm that they claim their rights.

JOINT DEVELOPMENT IN THE SPRATLYS – A POSSIBLE OPPORTUNITY FOR CHINA TO TAKE THE LEAD

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In recent years, China has become more forthcoming in coming up with regional security cooperation initiatives. Notably, in the case of Northeast East, it has been instrumental in facilitating the convening of the six-party talks to deal with the denuclearization of the Korean Peninsula. For Central Asia, it is most supportive and active in the Shanghai Cooperation Organization. For Southeast Asia, the focus of this paper, Beijing was seen to be the first extra-regional power to accede to the Treaty of Amity and Cooperation (TAC) in Southeast Asia in 2003. More importantly perhaps, it was also the first extra-regional power to sign the Framework Agreement on Comprehensive Economic Cooperation for the establishment of the ASEAN-China Free Trade Area (ACFTA) with Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand by 2010 and with Cambodia, Laos, Myanmar and Vietnam by 2015. These endorsements and links with Southeast Asia no doubt had obvious demonstration effects in encouraging other powers to follow suit.

While there are many advances in Sino-ASEAN relations, the South China Sea territorial disputes remain to be one of the major, if not the major, sticky problems in the relationship, so much so that some analysts had called it the “time bomb” of Southeast Asian security. Even with the signing of the Declaration on the Conduct of Parties in

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the South China Sea (DOC) in 2002, resolution of the conflicts is nowhere in sight. As the largest state and the only major power claiming “indisputable” sovereignty over the South China Sea, China plays a decisive role in the search for conflict management and resolution. It is the intention of this presentation to scrutinize China’s attempts or initiatives in dealing with the South China Sea conflicts. In this regard, the presentation will also suggest what China could do to lessen the tension and preserve peace and stability in the South China Sea.

DENG XIAOPING’S SUGGESTIONS

While there is no lack of suggestions on how to resolve the disputes in the South China Sea, especially in track two or unofficial meetings in recent years, one of the first, if not the first, leading officials trying to put up a proposal to manage the issues came from China’s paramount leader, Deng Xiaoping. As documented by the author elsewhere, Deng had actually thought of different ways of resolving China’s territorial conflicts with other states, notably the ones with Japan in the East China Sea and the more complicated ones with some ASEAN states in the South China Sea.¹ His suggestion was basically shelving the disputes for the sake of peace, development and friendship as indicted to the outside world at a Tokyo press conference in late 1978. He further elaborated by indicating that the claimants of the disputes could jointly develop the disputed areas before discussing the question of sovereignty later on in 1984. In this regard, he formally proposed to the Central Advisory Commission of the Communist Party of China in October 1984 that in trying to resolve China’s international disputes, the policy of “one country, two systems” could be adopted in some cases and the policy of “joint development” in others. For the former policy, it would be applied to Hong Kong and Taiwan, and for the latter, the Spratly islands in the South China Sea. It should be noted that Deng was talking about the Spratlys but not the Paracels and other island groups as far as the South China Sea was concerned. Secondly, he insisted that the Spratlys belong to China but noted that Taiwan had occupied one and that the Philippines, Vietnam and Malaysia had taken a few. He indicated that China could use force to claim back all these islands, but he thought China should use peaceful means to resolve the disputes and that it would be better to shelve the sovereignty issue and jointly develop the area. Just like other major policy recommendations from China’s paramount leaders, Deng’s proposal of “shelving the disputes and conducting joint development” in the Spratlys has been adhered to essentially by subsequent leaders, namely Jiang Zemin and Hu Jintao.

¹ The following is extracted from Lee Lai To and Chen Shaofeng, “China and joint development in the South China Sea: An energy security perspective” in Sam Bateman and Ralf Emmers, eds. *Security and International Politics in the South China Sea*, Towards a cooperative management regime, New York: Routledge, 2009, pp. 155-157.

CHALLENGES TO THE DENG'S PROPOSAL

It remains to be noted that there are always reservations at home in accepting the proposal of promoting joint development with other claimants. With rising nationalism among the Chinese people, there are “ultra-patriotic” Chinese who feel that the other claimants are really taking advantage of China’s friendly policy towards Southeast Asia. One common view from these quarters was that while China had not extracted one drop of oil from its territories in the Spratlys, some ASEAN states were “stealing” away the energy resources from different parts of the waters.² At the elite level, there are the so-called hawks advocating the use of force to take back what “rightfully” belongs to China. Notably, within the ranks of the People’s Liberation Army (PLA), there are people who could hardly stand that other countries are extracting oil and gas resources from what they consider to be Chinese territories. In fact, when Liu Huaqing was the Vice Chairman of the Military Commission of the Central committee of the CCP, he wanted to develop the Chinese navy. Specifically, he stated in the early 1990s that for China, the most probable place to have a war was the South China Sea in the next ten years, and as such, it would be necessary for China to have an aircraft carrier battle group. He emphasized that by having an aircraft carrier battle group, it was not meant to compete with Washington or Moscow, but to perform missions to struggle against Taiwan, protect the claims in the South China Sea and safeguard the oceanic rights and benefits of China.³ With modernization of the PLA as exemplified notably by its military display at the 2009 National Day Parade and the public disclosure that China would indeed build its own aircraft carrier battle groups, it is obvious that China will be in a much better position to project its military might into the South China Sea and other coastal areas. The temptation to use force, an option mentioned even by Deng Xiaoping, to settle the territorial disputes in the Spratlys could not be ruled out.

MAJOR PROPONENTS OF JOINT DEVELOPMENT

In spite of the nationalistic desire to claim all the Spratlys, there is reason to believe that there are segments of the Chinese polity wanting to have joint development with other claimants provided China’s sovereignty claims are not in danger. One of the major “interest groups” in this regards is the Chinese oil companies. Thus the China National Offshore Oil Corporation (CNOOC) and more recently China National Petroleum Corporation (CNPC) and China Petrochemical Corporation (Sinopec) are interested in offshore oil and gas exploration and production (E & P) in the South China Sea. In fact, the lead oil company, the CNOOC, had decided to upgrade its technology

² See, for example, Cheng Bizhong, “Dong Meng mei nian dao cai nan sha shi you 5000 wan dun, Zhongguo reng wei kai fa (ASEAN stealing 50 million tons of oil from the Spratlys annually while China has not yet started oil exploration)” in <http://finance.sina.com.cn/chanjing/b/20060224/17592371401.shtml>.

³ Lee Lai To and Chen Shaofeng, *op.cit.*, p. 162.

in deepwater drilling.⁴

In the light of glowing Chinese reports about the oil and gas potentials in the South China Sea, Chinese oil companies no doubt would like to venture into the deeper Spratly waters. It is highly possible that they would like to collaborate with others in such a venture. Firstly, Chinese oil companies still do not have the deepwater technologies at this point. They will continue to rely on foreign companies if it wants to go for deepwater E & P. The problem is that no investors would invest in contested areas in the Spratlys unless there is an agreement of the claimants to jointly develop the waters. More importantly, it may not be a bad idea to collaborate with oil companies of other claimants so as to spread the investment and financial risk in deepwater E & P. Finally, since China has yet to get the first drop of oil from the Spratlys, any joint development could give it a chance to share the energy resources.

Another major supporter of joint development could be provinces bordering the South China Sea, particularly, Hainan and Guangxi Autonomous Region. Just like the ACFTA, local governments who can benefit from the proposal will give it their support. Thus both Hainan and Guangxi Autonomous Region are adjacent to the South China Sea. They are interested in preserving peace and stability in the South China Sea, or for that matter, Gulf of Tonkin, as any tension or disputes in the waters will not only restrain Beijing from approving their ambitious development plans but also scare away foreign investments. Both Hainan and Guangxi Autonomous Region have been trying to utilize oil and gas resources to upgrade their provinces in the economic ladder. As the province designated by Beijing to govern most parts of the South China Sea, Hainan will be the largest beneficiary if joint development projects manage to take off in the area. Likewise, Guangxi Autonomous Region is also very proactive in promoting joint development in the South China Sea as it is physically close to Southeast Asia. It is pushing for the formation of a Pan-Beibu Gulf (Gulf of Tonkin) Regional Economic Cooperation Scheme encompassing Guangxi, Guangdong, Hainan, Vietnam, Thailand, Cambodia, Malaysia, Singapore, Indonesia, the Philippines and Brunei. Guangxi's proposal is part and parcel of its drive to develop its coastal area into a new economic powerhouse of China and it banks on building up links and cooperation with ASEAN, particularly the South China Sea states.

CHINA'S COMMITMENT TO JOINT DEVELOPMENT

On balance, China, or for that matter, ASEAN, is level headed enough to understand that there is a lot of room for cooperation and that each side should not let the South China Sea disputes derail the cordial relations that have been built up over the years since the 1990s. While there are always forces at home pushing for the return of "lost territories" and establishing China's "indisputable sovereignty" over the

⁴ *Beijing Zaobao* (Beijing Morning Daily), 20 August 2007.

Spratlys as noted earlier, the leaders in Beijing are not likely to use force, at least in the near future, to support its claims as it would obviously strain its relationship with ASEAN and possibly draw in the other powers, notably, the US, to the quagmire. Besides, its first priority when coming to territorial integrity is not the South China Sea but the reunification of Taiwan with the motherland. As such, the Chinese official line would not allow the South China Sea to hijack the agenda of cultivating and maintaining cooperative relations with ASEAN. It would like to search for a “win-win” solution and adhere to the policy of “qitong cunyi (seeking common grounds while accepting differences). As stated by China’s Ministry of Foreign Affairs, China hoped to work with the concerned ASEAN states to change the South China Sea into a “sea of friendship” or a “sea of cooperation.”⁵ While continuing to endorse joint development with other claimants, it should be noted that China is basically talking about such ventures in contested areas in the Spratlys and not so much in the shallow waters near China nor the waters under its control like those near the Paracels. In addition, joint development will be conducted by shelving the sovereignty disputes as noted before. Any suggestions or models to carve up the sovereignty of the South China Sea among the claimants would not be acceptable to Beijing. In fact, once the sovereignty issues is raised, China would have no choice but to reiterate its sovereignty rights over the South China Sea.

NEED TO BE PRO-ACTIVE IN MAKING JOINT DEVELOPMENT A REALITY

While the intent seems to be for joint development, China has not really been successful in putting the proposal into practice. This no doubt is not just a problem of China alone. However, as far as China is concerned, perhaps it would be helpful if it could put in more effort to take the lead in promoting joint development. As the largest claimant state and a rising power in the Asia Pacific and the world, China will be able to exert much more influence if it is seen to be working hard on having joint development in the South China Sea. One may recall that when China made the strategic and political move to work with ASEAN on establishing the ACFTA, Premier Zhu Rongji, supported by President Jiang Zemin, was determined to push through the web of political and bureaucratic hurdles at home to make sure that the agreement in this regard, namely, the Framework Agreement on Comprehensive Economic Cooperation, could be signed in 2002.⁶ As noted earlier, this made China the first major power to sign such an agreement with ASEAN at a time when the latter was still trying hard to make a comeback in international and regional affairs after the Asian Financial Crisis.

⁵ Lee Lai To and Chen Shaofeng, *op. cit.*, p. 166.

⁶ For the internal politics leading to China’s decision to sign the ASEAN-China Framework Agreement on Comprehensive Economic Cooperation in 2002, see Du Ding Ding, *Foreign Economic Policy Formulation and Implementation in China: China-ASEAN Free Trade Agreement*, Ph. D dissertation submitted to the Department of Political Science, National University of Singapore, 2007, pp. 141-261.

Premier Zhu's vision, courage and the speed in pushing for such a collaborative project with ASEAN is no doubt critical for the eventual implementation of the FTA with ASEAN starting from 2010. It is also suggested that the Chinese leadership could have similar political will and vision when coming to joint development in the Spratlys, or for that matter, the South China Sea. Joint development should not be seen as a zero-sum game and there must be a spirit of give and take. With China doing well in the global financial crisis, it could actually afford to be more helpful to other regional states and to reassure its smaller neighbors of its good intentions. After all, there is still a distance between a rising China and a benighted China for historical, geopolitical, ethnic and other reasons. Smaller states still have its residual worries, spoken and unspoken, of the Dragon as demonstrated by their hedging strategy in dealing with the US and China. As such, China still has to do more to allay the fears and build up its goodwill in dealing with ASEAN, especially the South China Sea states in order to strengthen the latter's confidence in Beijing. Thus leading the way to find an acceptable project and acceptable area for profit sharing and mutual benefit with one or more claimants would reap not only economic but also political benefits for China. Of course, this is easier said than done. However, it could be cautiously optimistic to predict that if one or two projects manage to take off, then joint development begets joint development and cooperation begets cooperation because of the demonstration effect and the practical results. As a regional power and aspiring world power, it would help if China is seen to be not only talking about trade and investment, but also trying to win the hearts and trust of other states, particularly those in Asia. It remains to be said that it takes two to tangle. If and when China really wants to push for joint development in the Spratlys, it needs to attract or convince the other claimants to come on board for mutual benefit.

PROMOTION OF SECURITY COOPERATION IN THE SOUTH CHINA SEA ON INTERNATIONAL BASIS¹

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The South China Sea (SCS) is surrounded by 7 states including China, the Philippines, Malaysia, Brunei, Indonesia, Singapore and Vietnam. It is a narrow and semi-enclosed sea. The SCS has abundant resources, serving as an important route linking East Asia with the Indian Ocean and Europe, and possessing a strategic importance. For various reasons, there have emerged many conflicts among countries surrounding the SCS. The security protection in the SCS has become an issue of mutual concern of the SCS coastal states and even many countries in the world.

Against this background, it can be said that there are issues affecting security in the SCS, and the underlying reasons vary as follows:

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) approved the status of territorial waters, EEZs, continental shelf, common sea, international seabed, etc and accomplished the distribution of marine living and non-living resources on the world scale in practice. In the SCS, littoral states passed domestic legislations to declare the establishment of their territorial waters, EEZs and continental shelves, claiming rights to marine resources in the region. As states with opposite and adjacent coasts unilaterally set up the sea areas under their control, creating the overlapping areas while they have not reached any delimitation agreement on the sea. In these cases, any unilateral action taken by any claimant in natural resources exploration and exploitation would inevitably spark off conflicts with other parties involved.

In the SCS, the Spratlys are formed out of 97 scattering islands, reefs, shoals stretching over 1,000 km from the Southeast to the Northwest. In the 1950s and 1960s, the fact that the Spratlys were an integral part of the Chinese territory had never been seriously challenged. Today, many countries have claimed rights to entire or part of the Spratlys. Territorial disputes over the Spratlys constitute the main factor leading to the conflicts in the SCS.

Piracy has so far been a serious concern with regard to maritime security. In the 1990s, the rocketing cases of piracy in the SCS have drawn increasing attention from the international community. Since 2004, though the number has drastically dropped, the piracy issue should not be overlooked. This remained a factor frequently affecting the security of the SCS.

Non-peaceful moves on the sea have served as another factor endangering security in the SCS. The most recent case happened in March 2009 as the US warship

¹ Translated version

Impeccable entered into the outer of the EEZs near Hainan island, undertook exploration and reconnaissance activities without the Chinese government's permission and almost collided with Chinese ships. In the bilateral talks, the Chinese side insisted that the US military ship posed a threat to China's security, while the US held that the Chinese ship threatened the US military ship.

In 2002, following the signing of the China-ASEAN Declaration on the Conduct of Parties in the SCS, and thanks to numerous efforts by parties concerned, tension in the SCS has been much relieved, and security in the region has been fundamentally guaranteed. Yet, skirmishes have occurred now and then, and more importantly, the causes underlying confrontations have been out-rooted yet. For the sake of stability and security in the SCS, countries involved need to develop cooperative relationship and synergy. Cooperation would not be a success without good will of all parties concerned. In the meantime, it is necessary to establish an international cooperation mechanism satisfactory to all parties, of which the best choice is international law.

International law which is widely accepted by international community is legally binding and criteria for states to identify legitimate behaviors, contributing to reduction and prevention of conflicting behaviors among states. International law may guarantee legitimate rights of states. In case there is a dispute, international law may ensure a fair and justified resolution to related parties to the disputes. In principle, international law may ensure equal position and mutual respect among parties to the disputes, and appeal to negotiations and agreements to peacefully resolve disputes. Therefore, use of international law as basis to resolve international disputes is not only the common recognition of international community but also a legal principle enshrined in several international legal documents. For instance, the UNCLOS states clearly that "the delimitation of the EEZs and the Continental Shelf between states with opposite or adjacent coasts shall be effected by agreement on the basis of International Law" (Article 74, 83). In addition, I argue that most of principles to resolve the SCS disputes are very clear, and all parties concerned have no reasons not to resort to international law to resolve maritime disputes.

According to the stipulation of the UNCLOS, the coastal states have the rights to establish 200-mile exclusive economic zone, delineate the outer limits of its continental shelf throughout the natural prolongation of its land territory to the outer edge of the continental margin; and enjoy sovereignty rights over living and non-living resources; safeguard the maritime environment and conduct marine scientific research there. If there arise an overlap over EEZ and continental shelves between states with opposite and adjacent coasts, they have to negotiate to delineate the actual boundaries on the basis of international law and equity.

Islands are part of the land territory of a country. The sovereignty right over the island is commonly defined by international law regarding territory. The states respect

the principle of equal sovereignty and territorial integrity. The UNCLOS stipulates that the state who owns islands has the rights to establish territorial seas and contiguous zones around these islands. The island can sustain human habitation or economic life of their own shall have exclusive economic zone or continental shelf.

According to international law, piracy has long been considered a type of international crime. All the states have rights and obligations to cooperate to the fullest possible extent in the repression of piracy, exercising the rights to seize pirate ships or aircrafts, and arresting and taking measures to punish pirates. These measures are mainly taken against the act of piracy in the high seas. If one country wants to take action against an act of piracy happening within the territorial seas of or the sea under the others' jurisdiction, the former have to seek the approval of the latter.

Peaceful use of the seas has become a principle enshrined in the Convention. According to this principle, states parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State in conducting the passage on the sea. Article 301, the UNCLOS stipulates that foreign ship, including military one, in their innocent passage, shall not engage in acts, such as collecting information, conducting researches, which are prejudicial to the peace, good order or security of the coastal state . In accordance with Article 19, UNCLOS, in the exclusive economic zone of one state, all other States enjoy the freedoms of navigation and overflight which are required to comply with the relevant laws of the coastal country, respect the principle of peaceful use of the seas, and have no actions that threaten the peace and security of the coastal state.

It is optimistic that all parties concerned agree to use international law to resolve the disputes in the South China Sea. In the Declaration on the Conduct of Parties in the South China Sea, China and ten ASEAN members solemnly declared their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UNCLOS, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations. The parties concerned undertake to resolve their territorial and jurisdictional disputes on the basis of universally recognized principles of international law. The Declaration on the Conduct of Parties in the South China Sea is a document of political will, not a legally-binding code. However, it is of great importance since it represents the political aspiration and consensus among parties. It can be taken for granted that if all the parties act in the spirit of the declaration, i.e. working toward the adoption of a code of conduct in the South China Sea and voluntarily assume obligations to safeguard the stability and security of the sea, we can hope for genuine stability and security there.

LONG ROAD TOWARDS PEACE AND SECURITY IN THE EAST SEA

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I.

Despite the consequences of global crisis, forecast of scientists is confirmed by Asia-Pacific countries that the centre of economic and political world of the 21st century, as well as the of edge wars, even of confrontations which could occur between the leading countries and their allies, is moving to the Pacific region. It seems that the Pacific became the “Mediterranean of the future.” Thus, the stability and predictability of future development in the region is very important in maintaining peace and stability, not only of the region but also the world. It could be secured by a system of confidence-building measures and promoting cooperation among countries in all fields, especially in the field of exploitation of marine resources and the most important maritime transport routes.

Conflicts over sovereignty of islands in the South China Sea are relatively new types of conflicts that previously have been covered by the mechanism of the “Cold War”. Currently, in terms of a new world order is being formed, these conflicts are emerging on the frontline in the struggle and competition among ASEAN countries, as well as between some ASEAN member countries, and ASEAN as a unified block with powers outside the region in the triangular US-China-Japan.

Problems of increasing militarization around certain islands in the South China Sea led to the clashes, with the potential to turn into serious conflict with the imminent threat of expanding the number and size of parties as well as the scope of the conflict.

Despite series of dangerous clashes and even armed conflicts occurred in the Spratly Islands area in past 2-3 years, along with the increasing activities and strong actions of China, in fact, until now, an awareness of the increasing threats to peace and international security has not gone beyond the boundary of specialists, and not known

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to the world public opinion, especially the West, where many people had previously expressed doubts on the warn of the known American political researcher S. Huntington about a future scenario of “the clash of civilizations”, which can easily occur in the South China Sea region.

Situation mounting tensions in the South China Sea started not long ago (approximately only 30-40 year ago), after China occupied the Paracel Islands in 1974 and then consecutively occupied many islands in the Spratly Islands. Since then, efforts of Vietnam and other relevant countries of ASEAN, as well as the signing of many bilateral and multilateral documents or statements of behaviour of parties in the South China Sea, or the participation in the UN Convention on the Law of the Sea in 1982, or the Declaration of 2002 which China signed, and countless joint statements through summits and high-level exchanges between the Communist Party of Vietnam and the Communist Party of China - have been yet far from improving the “frozen” disputes situation.

The bitter conflicts over territorial sovereignty of the islands, surrounding waters and resources remain unresolved and become increasingly severe. The actual risk of competing for ownership of energy and fish resources in the South China Sea will make serious conflicts that could cause explosion of nationalism in China as in other countries in that region, which go beyond the control of the governments. In China, Taiwan, Philippines and Vietnam, the laws have put the islands to be a part of the national territory and the spiritual life of the nation, and the islands have become national symbols and even a condition for ensuring the legitimacy of the government, for whom the islands must be protected “at all costs.” That makes the situation becoming unstable, difficult to solve and unpredictable.

II.

China is the most important player in the issues. If one is able to convince Chinese leaders to resolve the conflict peacefully, then we will soon see the light at the end of the tunnel.

We know that the foreign policy of China in the short term depends on the decisions of the 16th and 17th Congress of the Communist Party of China. It is based on national interests of the Chinese people as interpreted by current generation of Chinese leaders . They concentrate all efforts of the country to solve the complex problems arising from high economic growth. To do that, China needs a long period of peace, political stability in the international environment.

China’s Policy in the Asia Pacific aimed at two main directions: east and south. East, including Taiwan and Japan, as priority. In the south, will China tend towards longer-term prospects? According to some analysts, China will implement the strategy of stable relations with neighbouring countries and establish peaceful environment

surrounding China, emphasising on diplomacy, and finding solutions to solve the political problems of marine resources through mutually beneficial cooperation based on the win-win principle.

Military resolution is not profitable and not necessarily for China in the present situation. But it is still unknown what the position of the new generation of Chinese leaders who will come to power in 2012 will be like. So far, China's leaders have not accepted any concession to their "strategic partners" in the issue of sovereignty in the South China Sea.

In its military doctrine, China does not exclude the possibility of using force or threatening to use force to protect its sovereignty and territorial integrity. According to the leading expert on China, Director of Russian Far East Institute, Academician M.L. Titarenko, the military-political direction of China in the near future is clear and predictable, which is aimed at time-buying strategy for accumulating force, to finally turn China into regional power, and later the leading power of the world. The specific objectives of China include the unconditional recognition of the world community of the territorial integrity and sovereignty of China on Taiwan, Tibet, Xinjiang, and China's privileges in South China Sea. According to Titarenko, there is little possibility of China deploying troops to achieve that goal.

It is clear that along with economic growth, China's role will increase not only in the region, but also in the world. We, in both Russia and Vietnam and ASEAN in general, are aware that China has important interests in the region. In this case, I would like to quote former President of the Philippines F. Ramos, who recently wrote: "We must accept the reality that we must live with a powerful China in all areas", and to ensure long term stability in the Asia-Pacific, "we need to move from "Pax Americana" which was secured by a powerful military presence of America, to "Pax Asia Pacific" in which major countries and sub-regional groups could contribute to and share responsibility in ensuring peace and stability in the Asia Pacific region".

The greatest risk for China as well as for all the neighbouring countries is Chinese people's euphoria because of the undeniable success and strong upraise of nationalism and Chauvinism. It is important that Chinese political leaders must understand that danger. Chinese President Hu Jintao repeatedly mentioned it in speeches on the occasion of the 60th anniversary of the founding of the People's Republic of China. Chinese leaders recognize that China's development not only causing concerns for the neighbours, but also the West, where people see China as a significant competitor, primarily in the commercial-economic field. Considering China as a threat may negatively affect the modernisation program and hinder the implementation of reforms and opening up of China.

Chinese officials have increasingly expressed serious interest in public opinion

in the country and the world. Therefore, all those who desire a reasonable political solution to resolve conflicts must promote the establishment of a proper informed public opinion in most important countries. It requires no little effort: means and time. Reasonable proposals and cooperative projects will have more chance of success if they receive support of large sections of the public opinion in countries, which would also help isolate the hardliners.

One is still capable of finding a “win-win” political solution of mutual benefits. If political will can be high enough to achieve a solution through negotiation, the situation will have the opportunity to progress. Armed conflict would threaten the interests of all parties to the dispute, since the cost of politics and economics for the military escalation will be great that neither side wanted to take. Currently, no country in the region has the necessary military capacity to assert and maintain its claims, the relationship between the parties is generally cooperative, and no claimant discovered any oil and natural gas reserves intended for trade. However, with time these situations can change, especially if China or a party that claims to be military power allows themselves to impose their claims through the threat or use of force.

Since late last century scientists have calculated the growing possibility of South China Sea becoming a flashpoint of dangerous international conflicts, and they began to calculate the possible alternatives to solve the problem. Initiatives to reduce tensions have continued to be made. Among other initiatives, I can take for example the non-militarisation of the disputed islands, the organization of multilateral summits of the countries concerned, the setting of the matter on the agenda of the UN General Assembly, the establishment of joint exploitation of natural resources, or the appointment of senior representatives of claimed or unclaimed countries to prepare for official negotiations in the future. Also there have been many proposals to negotiate through third party or even to bring to trial at the International Court of the United Nations. All this possibly reasonable projects have a weakness: they all are against the official policy of China which is clearly illustrated in the so-called “three no”: no internationalisation of the conflict, no multilateral talk, and no thanks to a special body to solve the problem. The only acceptable way for China is to maintain unofficial bilateral negotiations with individual claimants. All parties are much weaker than China and they have varying degrees of bilateral relations with China. As a result we can see a total standstill.

Unfortunately, among the ASEAN claimants there is no common viewpoint. Until now, ASEAN still has no mechanism for resolving conflicts. The ASEAN Regional Forum ARF can perform such tasks in future. But the current conflict management is done not by the famous “ASEAN way”, but by the “Chinese way”. For many years the management of conflict is completely dependent on China’s diplomacy.

Based on analysis of the actual situation of the ASEAN and ARF, some experts have concluded that it is impossible to find a proper solution within the framework of ASEAN or ARF. So the best choice for all is to maintain the military and diplomatic

status quo. But in fact there is no status quo at all. The situation became increasingly dangerous with the growing arms race in the region. Therefore what necessary here is not discouraging suspicions of experts, but new constructive initiatives. Clearly the drafting of an acceptable treaty requires time for many years, and much patience and effort at all levels and measures. We should recall that both Vietnam's and China's talks on border demarcation lasted for 20 years. But such talks between the USSR and then Russia and China lasted for 40 years.

A series of mechanisms and methods of preventive diplomacy can be used to reduce tensions, to prevent the outbreak of conflict in the South China Sea, and to develop a basis for a political solution. Some specific objectives can be achieved here. The claimants can build a code of conduct in the South China Sea and follow its rules. They can dismiss nationalistic arguments and non-legal-based claims. They can build a cooperative management Website in the field of marine environment protection, marine scientific research, maritime safety, and search and rescue. They can also negotiate to reach voluntary principles of military activities in the disputed area.

ASEAN Regional Forum ARF remains a relatively new institution, and gradually became an important tool in order to maintain harmony and stability in Asia-Pacific. ARF's efforts to building and applying a system of confidence-building measures in the region are very important. In this regard, the Black Sea countries' experience on the establishment of a special mechanism called "Blackseafor" - naval cooperation agreement on the Black Sea - is very useful.

We all know that the ARF and the ASEAN summits are more effective thanks to the increasing activities known as the unofficial "track 2" of research centres and nongovernmental organisations. Workshops on Management of potential conflict in the South China Sea hosted by Indonesia created opportunities for cooperation on important technical issues, but these meetings did not generate meaningful discussions about sovereignty, which is still controversial. One should therefore try to upgrade informal meetings in order to solve the problem of sovereignty or establish other mechanisms for joint exploitation of natural marine resources. Also, it is necessary to overcome the boundary of specialists and collaborate again with non-governmental organisations aimed at creating peace, and with entities known as leaders of public opinion, to build a widely informed and influential movement for peace and security in the region.

III.

Here, I would like to have some words about Russia's official viewpoint.

South China Sea is located relatively far from Moscow and the problems in the South China Sea seem not to be priority of the foreign policy and the interests of Russia. But it is not necessarily so because Russia will remain a power in the Pacific ocean and our country is deeply concerned with maintaining a stable international environment in

the region to ensure freedom of navigation and sea communication.

Asia-Pacific region is important for Russia's vital interests. Russia has close links with the region through strategic partnerships with both China and Vietnam. These partnerships are an framework for certain common activities of countries in basic fields, and plans for long-term prospects based on mutual recognition, respect and interests.

Therefore, Russia and other countries in the region are keen to the situation changes in the South China Sea towards carrying out peaceful talks between the involved parties on the disputes, on the basis of mutual respect, creating an atmosphere of peace, stability, trust and mutual cooperation in this dangerous region.

Russia has repeatedly expressed its position that ASEAN is one of the influential centres of the world, and looked forward to a strong and stable growing Association of Southeast Asian Nations. In Russia's academics, many argue that the deep integration process in the East Asia region and the strengthening of interdependence among countries in the region will surely lead to solutions that the parties can accept on the existing problems in the South China Sea towards a joint exploitation of rich natural resources in the region.

The establishment of the East Asian community is still a unidentified target in the future. However, during the current phase of community building, logical questions about the participation of Russia are being made. Unfortunately, this issue raised by the Russian president in 2005 in Kuala-Lumpur remains yet unanswered. In current conditions, efforts of some countries to prevent Russia to fully participate in the process of regional integration cannot be regarded as reasonable. It can cause serious consequences for Russia if it leads to the formation of a closed trade bloc and a separate coalition of countries under the control of one or two dominant powers. It is clear that Russia cannot passively observe the deep economic and geopolitical transformation near its eastern border.

The Second ASEAN-Russia high-level meeting could be held here, in Hanoi next year, can change this very unusual situation. The agenda will include all the links between Russia and ASEAN, and the results of the high-level meeting could be the adoption of common political documents reflecting the general lines of the parties with respect to the architecture of security and cooperation in the Asia-Pacific region in the future. So, it is hard to underestimate the significance of the upcoming summit.

During the ARF meetings and in speeches at the University of Bangkok in July 2009, Russian Foreign Minister S. Lavrov said: "Our countries have a broad space for common actions for strengthening peace, stability and security in APR. Russia always stands for equal and transparent architecture of security and cooperation in the APR, based on collective effort, recognized norms and principals of International Law and using only dialog, consultations and negotiations as instruments for solution of all

complex problems. This is just what we call “ASEAN Way.” For this Way it is no need any military supremacy, no arms build up, no damage for security of other states, no building military bases in APR, and military alliances, deployment of regional AMD systems capable to destroy the strategic balance. Such architecture may only be set up by the development of multilateral diplomacy, contacts between regional organizations and forums and what is most important – through mutual respect and consideration of each others interests”.

It is indeed difficult to say something more clearly.

Thank you for your attention.

PART V:

**COOPERATION IN THE SOUTH CHINA SEA:
EXPERIENCES AND PROSPECTS**



Prof. Hasjim Djalal, Director, Centre for South-East Asian Studies, Indonesia:
“SOUTH CHINA SEA – 2ND TRACK DIPLOMACY”

THE SINO-VIETNAMESE APPROACH TO MANAGING BORDER DISPUTES – LESSONS, RELEVANCE AND IMPLICATIONS FOR THE SOUTH CHINA SEA SITUATION ¹

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ABSTRACT

The paper has two main aims. First, to outline and examine the Sino-Vietnamese

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¹ This paper forms part of the author's on-going research on relations between China and Vietnam. The sections dealing with developments up to mid-2004 are partly derived from early publications primarily Ramses Amer, "Sino-Vietnamese Relations: Past, Present and Future", in *Vietnamese Foreign Policy in Transition*, edited by Carlyle A. Thayer and Ramses Amer (Singapore: Institute for Southeast Asian Studies; and, New York: St Martin's Press, 1999), pp. 74-94 (hereafter Amer, *Sino-Vietnamese Relations*); and, Ramses Amer, "Assessing Sino-Vietnamese Relations through the Management of Contentious Issues", *Contemporary Southeast Asia*, Vol. 26, No. 2 (August 2004), pp. 321-323 (hereafter Amer, *Assessing Sino-Vietnamese*). Information is also derived from two papers from 2008: Ramses Amer, *Vietnam's Relationship With China – Examining Existing and Potential Challenges*, paper prepared for the Panel on: "International relations between Vietnam and the other regional countries", The Third International Conference on Vietnamese Studies (VNS2008), Organised by Vietnam Academy of Social Sciences and Vietnam National University, Hanoi 4-7 December 2008 (hereafter Amer, *Vietnam's Relationship with China*); and, Ramses Amer, *Sino-Vietnamese Relations – Issues of Contention and Approaches to Management*, paper prepared for the International Workshop on "Viet Nam, East Asia, & Beyond", Organised by Southeast Asia Research Center (SEARC), City University of Hong Kong, Hong Kong, China, 11-12 December 2008; and, from a paper from 2009: *The China-Vietnam Relationship – An Update*, paper prepared for the International Workshop on "Refugee Politics and the Chinese / Vietnamese Diaspora - 30 Years after the 'Vietnamese boatpeople' in Hong Kong", Organised by SEARC, City University of Hong Kong, Hong Kong, China, 16-17 October 2009.

approach to managing border disputes. Second, to assess the lessons, relevance and implications of the Sino-Vietnamese approach on the South China Sea situation. The paper provides an overview of the Sino-Vietnam approach to managing border disputes in the period since full normalization between China and Vietnam in late 1991. This overview includes both progress made in terms of conflict management and challenges faced in terms of tension. The lessons drawn from the Sino-Vietnamese approach and experience are derived from the overview. This is followed by a discussion relating to both the relevance and the possible implications of the Sino-Vietnamese experience and the lessons drawn from it on the situation in the South China Sea. The paper is concluded by a summary of the main findings and some concluding remarks.

PURPOSE

The paper has two main aims. First, to outline and examine the Sino-Vietnamese approach to managing border disputes. Second, to assess the lessons, relevance and implications of the Sino-Vietnamese approach on the South China Sea situation. The paper provides an overview of the Sino-Vietnam approach to managing border disputes in the period since full normalization between China and Vietnam in late 1991. This overview includes both progress made in terms of conflict management and challenges faced in terms of tension. The lessons drawn from the Sino-Vietnamese approach and experience are derived from the overview. This is followed by a discussion relating to both the relevance and the possible implications of the Sino-Vietnamese experience and the lessons drawn from it on the situation in the South China Sea. The paper is concluded by a summary of the main findings and some concluding remarks.

THE SINO-VIETNAMESE APPROACH TO MANAGING BORDER DISPUTES

Border and territorial disputes

During the process leading up to the full normalisation of relations border and territorial disputes were not resolved. If a resolution of the territorial disputes had been a precondition for full normalisation of bilateral relations then the later would not have been possible back in 1991.² Thus, to put the territorial disputes aside and aim for a resolution in the longer-term perspective made full normalisation a reality in early November 1991. Thus, after full normalisation of relations in early November 1991 China and Vietnam had to deal with the following border and territorial disputes: overlapping sovereignty claims to the Parcel and Spratly archipelagos; overlapping claims to water and continental shelf areas in the South China Sea and in the Gulf of Tonkin; and disputes relating to some areas along the land border.

² For details on the territorial disputes during the normalisation process see Amer, *The Sino-Vietnamese Approach*, pp. 7-8.

An overview of developments since full normalisation of relations in late 1991

Sharp differences relating to all the territorial disputes were prevalent from May to November 1992. Differences relating to oil exploration in the South China Sea and the signing of contracts with foreign companies for exploration were prevalent during the periods April-June 1994, April-May 1996, and March-April 1997. In 1998 there was no extended period of tension relating to the border disputes but shorter periods can be noted such as in January along the land border and in the South China Sea in April, May, July, and September. In 1999 focus was on reaching a settlement of the land border dispute and this resulted in the signing of a Land Border Treaty on 30 December 1999. In 2000 focus was on settling to Gulf of Tonkin disputes and this resulted in the signing of the Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin on 25 December 2000. During both these years there was no noticeable tension relating the disputes in the South China Sea.³ Developments in the 2000s displays that this pattern of interaction relating to the disputes in the South China Sea has continued to prevail with continued dialogue and only limited period of tension caused by the disputes in the area. In addition the Land Border Treaty was ratified in 2000 while the Tonkin Gulf agreement was ratified in 2004.⁴ The demarcation process of the land border was completed at the end of 2008.⁵

Management through negotiations

In order to manage their territorial disputes China and Vietnam have initiated a system of talks and discussions which was both highly structured and extensive and from bottom to top it looked as follows: Expert-level talks; Government-level talks, i.e. Deputy/Vice-Minister; Foreign Minister-level talks, and, High-level talks, i.e. Presidents, Prime Ministers, and Secretary-Generals of the Chinese Communist Party (CCP) and the Communist Party of Vietnam (CPV).⁶

³ For a more detailed analysis of the events relating to the territorial disputes in Sino-Vietnamese relations from late 1991 to the end of 2000 see Amer, *The Sino-Vietnamese Approach*, pp. 8-35 and 49-58. Unless otherwise stated information is derived from *Ibid.*, pp. 8-58.

⁴ Information derived from Ramses Amer and Nguyen Hong Thao, "Vietnam's Border Disputes: Legal and Conflict Management Dimensions", in *The Asian Yearbook of International Law*, Vol. 12 (2005-2006), General Editors, B.S. Chimni, Miyoshi Masahiro and Thio Li-ann (Leiden and Boston: Martinus Nijhoff Publishers, 2007), pp. 117-121 (hereafter Amer and Nguyen, *Vietnam's Border Disputes*).

⁵ "Joint Statement: On the completion of the demarcation and markers placement on the entire land border line between Vietnam and China" (http://www.mofa.gov.vn/en/cn_vakv/ca_tbd/nr040818094447/ns090106100042) (accessed 8 January 2009). See also "China-Vietnam, Land Boundary Survey Work Completed 2008/12/31". From the website of the Ministry of Foreign Affairs, People's Republic of China (<http://www.fmprc.gov.cn/eng/zxxx/t530192.htm>) (accessed on 8 January 2009); and, "Vietnam and China fulfil land border demarcation". From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/life/010109/life_biengioi.htm) (accessed on 8 January 2009).

⁶ See Amer, *The Sino-Vietnamese Approach*, pp. 9-141 and 50-58; Amer, *Assessing Sino-Vietnamese*, pp. 329-331; Amer and Nguyen, *Vietnam's Border Disputes*, pp. 118-122; Ramses Amer and Nguyen

The talks at the expert- and government-levels deserve further attention in order to ascertain the progress made up to the end of 2000. Talks at the expert-level were initiated in October 1992; up to late 1995 the talks focused mainly on the land border and the Gulf of Tonkin issues. The talks at the government-level began in August 1993 and the thirteenth round of talks was held in January 2007.⁷ The first achievement was the signing of an agreement on 19 October 1993 on the principles for handling the land border and Gulf of Tonkin disputes. It was further agreed to set up joint working groups at the expert-level to deal with the two issues. The joint working group on the land border held sixteen rounds of talks from February 1994 to the signing of the Land Border Treaty in December 1999. The joint working group on the Gulf of Tonkin met seventeen times from March 1994 to the signing of the Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin in December 2000. Talks at the expert-level on the disputes in the South China Sea proper, the so-called “sea issues”, were initiated in November 1995 and the eleventh round of talks was held in July 2006.⁸

Hong Thao, “The Management of Vietnam’s Border Disputes: What Impact on Its Sovereignty and Regional Integration?”, *Contemporary Southeast Asia*, Vol. 27, No. 3 (December 2005), pp. 433-434; and, Ramses Amer and Nguyen Hong Thao, “Vietnam’s Border Disputes - Assessing the Impact on Its Regional Integration”, in *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam*, Edited By Stéphanie Balme and Mark Sidel (Houndmills, Basingstoke, Hampshire and New York: Palgrave Macmillan, 2007), pp. 74-76.

⁷ On 12-14 August 2009 Government-level talks were held in Hanoi. Reports do not indicate which round this corresponds to. ‘Vietnam, China hold government-level border talks’ (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns090814100851>) (accessed on 25 August 2009); and, “Heads of Chinese Vietnamese Government Delegations on Border Negotiation Hold Consultation on Maritime Issues”. From the website of the Ministry of Foreign Affairs of the People’s Republic of China (<http://www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb//2792/2794/t578647.htm>) (accessed on 25 August 2009)). Previously, the thirteenth round of government-level talks we held in Beijing on 19-20 January 2007 (“Vietnam and China issue joint press communiqué”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/190507/domestic_pr.htm) (accessed on 26 September 2007), and, “Viet Nam, China hold government-level border negotiations”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns070122102447>) (accessed on 3 June 2008)). At a meeting in Hanoi on 27-29 November 2007 between the Vietnam and Chinese delegations to the ‘Sino-Vietnamese Government Border and Territory Negotiation’ it was agreed that the fourteenth round of talks at the government-level would be held in 2008 (“Viet Nam, China: early completion of border demarcation”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns071130094901>) (accessed on 26 May 2008)).

⁸ The eleventh round of talks on “sea issues” was held in 10-12 July 2006 (“Vietnam and China show goodwill on sea issues”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/130706/domestic_vn.htm) (accessed on 8 August 2008)). At a meeting in Hanoi on 27-29 November 2007 between the Vietnam and Chinese delegations to the “Sino-Vietnamese Government Border and Territory Negotiation” it was agreed that the twelfth round of talks on the ‘Sea Issues’ would be held in 2008 (“Viet Nam, China: early completion of border demarcation”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns071130094901>) (accessed on 26 May 2008)).

The negotiation process resulting in the signing of a treaty relating to the land border on 30 December 1999 reflected the substantially higher degree of progress made in negotiations on the land border as compared with talks on other border disputes up to the end of 1999. In 2000 the negotiations on the Gulf of Tonkin issue was stepped up with a view of reaching an agreement within that year. This goal was reached on 25 December 2000. Thus, the deadline for resolving the land border and the Gulf of Tonkin issues, were met in 1999 and 2000, respectively.

Less progress has been achieved with regard to the disputes in the South China Sea proper, i.e. the competing sovereignty claims to the Paracel and Spratly archipelagos as well as the overlapping claims to waters and continental shelf areas to the East of the Vietnamese coast. Talks have been initiated but the parties have yet to agree on which disputes to include on the agenda, with Vietnam pushing for the inclusion of the Paracels as an issue alongside that of the Spratlys, whereas China only wants to discuss the latter issue. To further complicate matters, China seems to view the disputes over water and continental shelf areas as part of the Spratly conflict or at least as overlapping with areas within the so-called “nine-dotted lines” claim as displayed on China’s official maps, whereas Vietnam views them as separated from the conflict over the Spratlys. It seems as though Vietnam does not want to initiate talks relating to the areas of overlapping claims in the South China Sea proper as it would be interpreted as giving legitimacy to China’s claims to those areas, in other words Vietnam rejects the claims made by China’s through its “nine dotted lines”.⁹ Thus, of the three South China Sea issues to be addressed by the two countries there is only agreement on putting one on the agenda for talks, namely the Spratly archipelago, which is a multilateral conflict situation involving other claimants as well.

The Land Border

The Land Border Treaty was the first major achievement in the overall process of managing and eventually resolving the border disputes between China and Vietnam. The negotiation process with regular rounds of talks of the joint working group on the land border did not differ much in frequency up to 1998. During 1999 the joint working group on the land border met on four occasions, i.e. four round of talks, and the duration of each round was no shorter than two weeks on any of these occasions. This increase in the number and in the duration of the round of talks can be attributed to the political pressure to reach a common understanding and to provide the political leaders with the basis on which to sign a treaty on the land border issue.

Reaching an agreement was by no means a simple task given the geographical characteristics of the border areas which encompasses both mountainous terrain which

⁹ Author’s discussions with Vietnamese officials in Hanoi in September and November 1997, in December 1998, and in May 1999.

are not easily accessible and other parts are made up of rivers which present their own sets of issues to be settled. Adding to the natural difficulties are the movements of border marks over the decades and activities carried by the population and local authorities in the border area that have impinged on the borderline. This was clearly displayed by incidents and the tension they caused in late 1997 and early 1998.¹⁰ Also the military clashes along the border during the second half of the 1970s – in particular in connection with the Chinese attack on Vietnam in February and March 1979 – had left some areas in dispute along the border. Among the more notable such areas were some 300 meters between the provinces of Guangxi and Lang Son, which prevented the re-opening of the railway between the two countries during the first half of the 1990s, eventually an agreement was reached to do so in February 1996.¹¹ The area had been under Chinese control since early 1979 and Vietnam had accused China of occupying it, including Vietnam's pre 1979 end-station.

The Land Border Treaty was ratified in 2000. First, the Standing Committee of the National People's Congress in China ratified the Treaty on 29 April and then Vietnam did likewise on 9 June through a decision by the National Assembly. This was followed by the exchange of letters of ratification in Beijing and the Treaty took effect on July 6.¹²

As the Treaty did not encompass any demarcation such a process had to be carried out. Consequently, the two countries established a Joint Committee for the demarcation of the land border. It held its first meeting in Beijing between 19 November and 1 December 2000. The Joint Committee would work with the demarcation of the border and with the plating of "landmarks".¹³ The demarcation process was initiated and the

¹⁰ Information about serious tension relating to an area along the land border suddenly surfaced in an interview by Vietnam News Agency with Ngo Dinh Tho, Deputy-Chairman of the People's Committee of Quang Ninh Province, aired in a broadcast by Voice of Vietnam on 22 January 1998. According to the Vietnamese official, in May 1997 China built a one kilometre long stonewall in a river which is shared by Dong Mo in the district of Binh Lieu in Quang Ninh Province on the Vietnamese side, and the district of Fangcheng in Guangxi Province on the Chinese side. (BBC/FE/3133 B/8-9 (24 January 1998)). The Chinese response came on 24 January when a spokesman for the Ministry of Foreign Affairs stated that the "truth of the matter" was that since August 1997, the Vietnamese had been building an embankment and increased the height and consolidated a check dam in the area and by so doing artificially changed the alignment of the boundary river (Ibid., 3134 G/1 (26 January 1998) report carried by Xinhua News Agency).

¹¹ The agreement on opening the railway links between the two countries related to two links linking Dong Dang and Lao Cai on the Vietnamese side with Pingxing and Shanyao respectively on the Chinese side, thus connecting the provinces of Lang Son and Guangxi, and the provinces of Lao Cai and Yunnan, respectively (BBC/FE 2477 B/3; 2494 B/5 (23 December 1995); and, 2524 B/1 (1 February 1996)).

¹² For details see Amer, *The Sino-Vietnamese Approach*, pp. 27-35.

¹³ BBC/FE/4016 G/3 (6 December 2000). Report carried by the website of the Voice of Vietnam (in Vietnamese). See also "Viet Nam and China meet on borderline demarcation" (1 December 2000). From the website of Vietnam News Agency (VNA) (<http://www.anagency.com.vn/Asp/Readnews4.asp?FileN=>) (accessed on 2 December 2000).

first “double markers” along the border were “planted” on 27 December 2001 and the first “single marker” was “planted” on 4 January 2003.¹⁴ The demarcation process was officially concluded at the end of 2008.¹⁵

Of considerable interest in the context of the Land Border Treaty is that in August 2002 Vietnam published the text of the Treaty although it did not include any maps.¹⁶ In September 2002 one of Vietnam’s Vice-Foreign Ministers Le Cong Phung provided information about the Treaty. He outlined the background to the negotiation process, the process itself, and the mechanisms and principles used in settling disputed areas along the border. The core disputed areas – referred to as “Areas C” – encompassed 164 areas covering 227 km². Of these areas some 113 km² were defined as belonging to Vietnam and around 114 km² as belonging to China. He stated that the outcome of the negotiations “conformed” with principles agreed upon thus “ensuring fairness and satisfaction for both side”.¹⁷

The Gulf of Tonkin¹⁸

The negotiation process on the Gulf of Tonkin with regular rounds of talks of the joint working group did not differ much in frequency on a yearly basis up to 1999. The developments during 2000 displayed that an increase occurred with five rounds of expert-level talks held during that year, in March, May, June, September, October-November, and late November, respectively, as compared to only one round of talks during the whole of 1999. The Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin signed on 25 December

¹⁴ “First single marker planted on Vietnam-Chinese border line” (4 January 2003). From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn:8080/Web%20server/ForeignPolicy.nsf/f6f55a44edc7e3b4c7>) (accessed on 4 April 2003).

¹⁵ See note 4.

¹⁶ The full text of the Land Border Treaty without maps has been published as “The Land Border Agreement between the Socialist Republic of Vietnam and the People’s Republic of China”, in *Công Báo / Official Gazette of the Socialist Republic of Vietnam*, No. 41 (25 August 2002), pp. 3- 16. According to the text of the Treaty reproduced in the Official Gazette it was signed on 12 December 1999.

¹⁷ The Vice-Minister also gave a detailed response to the accusations by overseas Vietnamese that the Vietnam had given up large areas of land to China as part of the Land Border Treaty. He refuted the accusations as “untrue and groundless”. The full interview with Vice-Foreign Minister Le Cong Phung is published as “Vice-Foreign Minister on Vietnam-China Land Border Treaty”, *Vietnam Law & Legal Forum*, Vol. 9, No. 97 (September 2002), pp. 21-23. Vietnamese officials also refuted such accusations in discussions with author in Hanoi in July-August and in November 2002.

¹⁸ On the management of the Gulf of Tonkin dispute and related developments in the context of Vietnam’s other maritime disputes see Nguyen Hong Thao and Ramses Amer, “The Management of Vietnam’s Maritime Boundary Disputes”, *Ocean Development and International Law*, Vol. 38, No. 3 (July 2007), pp. 305-324.

2000¹⁹ differs from the Land Border Treaty in that it does stipulate the coordinates for the tracing of the maritime boundary between the two countries in the Gulf of Tonkin while the later only sets the stage for a demarcation process that had to be carried out.

The crucial issue was how to reach an agreement on a mutually acceptable framework or model for dividing the Gulf. As displayed by the outcome of the negotiations, once such an agreement was reached the tracing of the maritime boundary would not be problematic as it connects the specific coordinates agreed upon.

The core issue to be settled in the Gulf of Tonkin was which principle should be used in order to divide the Gulf. In this context the impact of islands was of crucial importance and in particular the Vietnamese controlled Bach Long Vi Island. The first question was whether or not it qualifies as an island according to the provisions of the 1982 United Nations Law of the Sea Convention (UNCLOS). If it did, as argued by Vietnam, then it was entitled to full maritime zones and more importantly would it impact on the tracing of a line of equidistance if this principle was applied in the Gulf of Tonkin.

Logically Vietnam would take the position that Bach Long Vi Island should have its full impact in any agreement on how to divide the Gulf. On the other hand China had an interest in minimising the impact that the Island would have on any agreed delimitation. This could be done by either arguing that Bach Long Vi is not an island in accordance with the provisions of UNCLOS or by arguing that its impact should be minimised and possibly even be disregarded.²⁰ For China to argue that it was not an island would have been counterproductive as China had earlier controlled the island and has claimed that the island was inhabited before it was handed-over to Vietnam in the late 1950s.²¹

An assessment of the agreed coordinates indicates that the impact of Bach Long Vi was not “valued” fully in the delimitation. However, Bach Long Vi was given a

¹⁹ For detailed analyses see Nguyen Hong Thao, “The Gulf of Tonkin: A case Study of Dispute Settlement”, in *Management and Resolution of Inter-State Conflicts in Southeast Asia*, Edited by Kamarulzaman Askandar (Penang: Southeast Asian Conflict Studies Network, 2003), pp. 207-214 (hereafter Nguyen, *The Gulf of Tonkin*); and, Nguyen Hong Thao, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf”, *Ocean Development and International Law*, Vol. 34, Issue 1 (January-March 2005), pp 25-44 (hereafter Nguyen, *Maritime Delimitation*). See also Zou Keyuan, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin”, *Ocean Development and International Law*, Vol. 34, Issue 1 (January-March 2005), pp. 13-24.

²⁰ The legal terminology used in this context is derived from Zou Keyuan, “Maritime Boundary Delimitation in the Gulf of Tonkin”, *Ocean Development and International Law*, Vol. 30, Issue 3 (1999), p. 246. Information pertaining to possible impact of Bach Long Vi Island on boundary delimitation is also derived from *Ibid.*, pp. 245-247.

²¹ Information derived from *Ibid.*, pp. 245-246 and 253.

quarter of impact, i.e. 15 nautical miles from the island.²²

Another potentially complicating factor in the negotiations was the status of the Sino-French Agreement of 1887. Vietnam would probably have favoured using it to delimit the Gulf of Tonkin since it would generally be to its advantage. China would have opposed using it and argue that the 1887 Agreement was only intended to determine the administrative control over the islands in the Gulf and did not apply to the water and the seabed in the Gulf.²³ The agreement reached indicates that if the status of the Sino-French Agreement of 1887 was brought up during the negotiations, both sides eventually agreed that it would not have an impact on the delimitation of maritime zones in the Gulf of Tonkin.

The increased number of rounds of expert-level talks and indeed of government level talks in 2000 is evidence of the complexities involved in reaching a mutually acceptable compromise in order to sign the delimitation agreement by the end of 2000. The political pressure to reach an agreement before the end of the year did generate increased activity to reach this goal. The agreed co-ordinates indicate that the two sides ended up with an agreement on a line of equidistance, albeit modified, having sorted out their differences relating to the question of how islands should impact on the delimitation, in particular Bach Long Vi Island.²⁴

Although the issue of fishing in the Gulf of Tonkin is not directly linked to the question of border disputes it is still relevant. It is therefore interesting to note that the two countries held six rounds of talks between April and December 2000 on the issue of fishing. The Agreement on Fishing Cooperation in the Gulf of Tonkin signed on 25 December 2000 included regulations for the establishment of joint fishing areas, cooperation in preserving and “sustainably” exploiting the aquatic resources in the Gulf and regulations for fishing cooperation and scientific research.²⁵

²² Nguyen, *The Gulf of Tonkin*, pp. 210-213.

²³ For an argument along similar lines with a parallel being drawn to the “Breviée Line” drawn in 1939 in the Gulf of Thailand see Zou, *op. cit.*, pp. 238-240.

²⁴ For an argument relating to the fairness of the outcome see Nguyen, *The Gulf of Tonkin*, p. 210.

²⁵ Information derived from: “Bac Bo Gulf Demarcation Agreement Satisfies both Viet Nam and China, Says Foreign Ministry Spokeswoman” (4 January 2001). From the website of Vietnam News Agency (VNA) (<http://www.anagency.com.vn/Asp/Readnews4.asp?FileN=frac0401.012>) (accessed on 5 January 2001); and, “L’accord de délimitation du Golfe du Bac Bo est une solutions equitable et satisfaisante” [The Agreement on the Delimitation of the Gulf of Tonkin is an Equitable and Satisfactory Solution] (4 janvier 2001). From the website of Agence vietnamienne de l’information (AVI) (<http://www.anagency.com.vn/Asp/Readnews4.asp?FileN=frac0401.011>) (accessed on 5 January 2001). See also “Bac Bo Gulf demarcation agreement satisfies both Vietnam and China: FM spokeswoman”, *News Bulletin*, No. 409 (5 January 2001) (English language bulletin). From the website of Nhan Dan (<http://www.nhandan.org.vn/english/20010105/bai-news1.html>) (accessed on 30 January 2001). On the fishery agreement see also Zou Keyuan, “Sino-Vietnamese Fishery Agreement for the Gulf of Tonkin”, *The International Journal of Marine and Coastal Law*, Vol. 17, No. 1 (January 2002), pp. 127-148.

In order for the two agreements – signed on 25 December 2000 – to enter into force it was necessary to complete talks on a Supplementary protocol to the agreement on fishery co-operation. At the tenth round of Government-level talks held in Hanoi in January 2004 it was reported that the two sides had “appreciated” the progress made in the settlement of technical issues relating to fishery. Furthermore, the two sides “showed their determination to complete the subsequent work in order to put the Agreement on Delineation and the Agreement on Fishery Co-operation in the Tonkin Gulf into reality in the first half of 2004.”²⁶ The progress in the talks on the Supplementary protocol on fishing was publicly displayed in reports from the ninth round of talks at vice-ministerial level on the issue held in Hanoi on 21-24 February 2004.²⁷ The agreement on the additional protocol was eventually signed in Beijing on 29 April.²⁸ This paved the way for the ratification of the Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin. It was ratified by the National Assembly of Vietnam on 15 June 2004²⁹ and ratified by the 10th Standing Committee of the National People’s Congress of China at its tenth meeting held from 21 to 25 June 2004.³⁰ Both the boundary agreement and the fishery agreement entered into force on 30 June 2004.³¹

²⁶ The tenth round of government-level talks were held in Hanoi on 9 January 2004 (“Vietnam, China hold border talks and political exchanges”, News Bulletin, No. 1500-1501 (10-11 January 2004) (English language bulletin). From the website of Nhan Dan (<http://www.mofa.gov.vn/en/nr04087104143/nr040807105001/ns050627151155>) (accessed on 24 July 2005).

²⁷ “Vietnam, China continue fishing co-operation talks”, News Bulletin, No. 1546 (25 February 2004) (Section on Economy) (English language bulletin). From the website of Nhan Dan (<http://www.nhandan.org.vn/english/20040225/economy.html>) (accessed on 15 September 2004).

²⁸ “Protocol on China-Vietnam agreement on fishery cooperation in Beibu Bay signed”. From People’s Daily Online (English version) (http://english.people.com.cn/200404/30/eng20040430_142001.html) (accessed on 4 October 2004); and, “Viet Nam, China ink deal on fisheries in Tokin Gulf” (1 May 2004). From the website of Vietnam News Agency (<http://vietnamnews.vnagency.com.vn/2004-04/30/Stories/07.htm>) (accessed on 1 May 2004).

²⁹ “NA endorses landmark Tonkin Gulf agreement”, (17 June 2004). From the website of Vietnam News Agency (<http://vietnamnews.vnagency.com.vn/2004-06/16/Stories/05.htm>) (accessed on 3 October 2004).

³⁰ “China’s legislature approves Beibu Gulf demarcation agreement between China, Vietnam”. From People’s Daily Online (English version) (http://english.people.com.cn/200406/26/eng20040626_147587.html) (accessed on 4 October 2004).

³¹ “Vietnam, China exchange documents ratifying Tonkin Gulf demarcation agreement”. From the website of Nhan Dan (http://www.nhandan.org.vn/english/news/010704/domestic_vietnamchina.htm) (accessed on 19 July 2004); and, “Two China-Vietnam Beibu Gulf agreements take effect”. From the website of the People’s Daily Online (English version) (http://english.people.com.cn/200407/01/eng20040701_148157.html) (accessed on 3 October 2004). See also “VN – China gulf pact to enhance relations”, Vietnam Law & Legal Forum, Vol. 10, No. 118 (June 2004), pp. 8-10. For an analysis of the implications of the entry into force of the two agreements see Nguyen, Nguyen, Maritime Delimitation, pp. 25-44.

The completion of the ratification process has been followed by the initiation of expert-level talks on the delimitation of the area out of the entrance of the Gulf of Tonkin – also referred to as the mouth of the Gulf of Tonkin. The first meeting of the expert-level working group was held in January 2006 in Hanoi and the fifth meeting was held in Hanoi in January 2009.³²

Despite these positive developments there have been a few incidents in the Gulf of Tonkin that have caused tension. The first was a shooting incident that led to the death of at least eight Vietnamese in the Gulf of Tonkin in January 2005. This highlighted the need to enhance the collaboration between the countries in managing the situation in the Common Fishery Zone.³³ This process is well underway as indicated in the Joint

³² On the initiation of talks see “Vietnam and China hold talks on sea delineation”, From the website of Nhan Dan (<http://www.nhandan.com.vn/engligs/news/200106/domestic-vnandchin.htm>) (accessed on 23 January 2006); and, “Viet Nam, China meet for talks on shared sea border” From the website of Vietnam News Agency (<http://vietnamnews.vnagency.com.vn/showarticle.php?num=01POL200106>) (accessed on 22 January 2006). On the most recent round of talks see “Vietnam, China discuss water demarcation off Tonkin Gulf”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns090108101946>) (accessed on 8 January 2009).

³³ In January 2005 Vietnam’s Ministry of Foreign Affairs issued official statements in reaction to the shooting and killing of Vietnamese fishermen in the Gulf of Tonkin. The first statement was made 13 January and stated that Chinese vessels had shot dead nine Vietnamese fishermen, injured “many” others and damaged their equipment. Furthermore, Vietnam had requested China to take “active measures” to prevent and put an end to such activities as well as the carry out and investigation and “severely punish the killers” (“Concerning the fact that the Chinese vessels shot to dead Vietnamese Fishermen. Answer to Correspondent by Mr. Le Dzung, the Spokesman of the Vietnamese Ministry of Foreign Affairs on 13th January 2005”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050120164827) (accessed on 22 March 2005). In another statement by Le Dzung on January 20 he specified that the incident had occurred on January 8 and apart from the nine deaths and the injured, China had captured “a number” of Vietnamese fishermen. He reiterated the earlier Vietnamese demands. He also demanded that the Vietnamese who were being held be allowed to return to Vietnam, that Vietnamese officials be allowed to visit the injured and detained fishermen, and, that a meeting be held the Sino-Vietnamese Joint Fishery Committee to discussion measures to stabilise the situation (“Chinese coastly guards’ killing of innocent Vietnamese fishermen violates international law”, (20 January 2005). From the website of Nhan Dan (<http://www.nhandan.com.vn/englig/news/200105/china.htm>) (accessed on 11 March 2005)). China had a diametrically different view on the course of events. On 18 January, in response to a question relating to the events of 8 January the Spokesman of China’s Ministry for Foreign Affairs Mr. Kong Quan stated that several Chinese fishing boats had been had been “robbed and shot at by three unidentified armed ships”. This occurred on the Chinese side in the Gulf of Tonkin. When China dispatched “police ships” they were shot at and this compelled the Chinese maritime police to “take necessary actions”, which resulted in the death of “several armed robbers”, one “pirating” ship and eight “robbers” where captured and their weapons confiscated. During interrogations the captured “robbers” had disclosed that they were Vietnamese and confessed to have carried the robberies. Finally, he stated that China was ready to collaborate with Vietnam in order to both take “concretely effective measures” and strengthen co-operation in “combating the maritime crimes” in order to jointly safeguard security and stability in the Gulf of Tonkin. (“Foreign Ministry Spokesman Kong Quan’s Comment on the Case of Armed Robbery in the Beibu Gulf”, (18 January 2005). From the website of the Ministry of Foreign Affairs of the People’s Republic of China (<http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t180157.htm>) (accessed on 22 March 2005)).

Communiqué issued in connection with President Tran Duc Luong's visit to China in July 2005. In the Communiqué it was stated that the two countries would "exert joint efforts to ensure marine security and order in fishery development" in the Gulf. Furthermore they agreed to "conduct joint patrol between the two countries' naval forces".³⁴ This commitment was realised on 28 April 2006 by the first joint patrol exercised by the Chinese and Vietnamese navies.³⁵ A second incident occurred in early January 2008, but it was of a less serious nature than the one in 2005.³⁶

The South China Sea

If attention is turned to the situation in the South China Sea proper it can be noted that talks were initiated at a later stage than in relation to the land border and Gulf of Tonkin issues, respectively. It can also be noted that much still remains to be achieved before the disputes in the South China Sea can be resolved. In view of the reoccurring periods of tension relating to actions carried out in the South China Sea during the 1990s, the two parties needed to strive for the establishment of mechanisms and principles regulating their behaviour in the South China Sea that would prevent the re-occurrence of periods of tension.

The initiation of expert-level talks in 1995 was the first obvious move towards an institutionalised form of conflict management of their disputes in the South China Sea. The noticeable shift in how to deal with actions taken by the other party in the South China came in relation to a dispute in May 1998 relating to the activities of a Chinese exploration ship in areas of the South China Sea claimed by Vietnam. This issue was

³⁴ "Vietnam and China issue joint statement". From the website of Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns050726144049>) (accessed on 26 July 2005).

³⁵ "Vietnam, China make first joint navy patrol". From the website of the Communist Party of Vietnam (http://www.cpv.org.vn/details_e.asp?topic=68&subtopic=167&leader_topic=282&id=BT3040634973) (accessed on 4 August 2006). See also "Vietnam, China make first joint navy patrol". Article carried in the Shanghai Daily on 29 April 2006 and reproduced on the website of the China Internet Information Center (<http://www.china.org.cn/english/2006/Apr/167254.htm>) (accessed on 4 August 2006).

³⁶ China's Foreign Ministry announced on 7 January that Chinese fishing boats had been "robbed by Vietnamese armed ships" in the common fishing waters in the Gulf of Tonkin. ("Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on January 17, 2008" (17 January 2008). From the website of the Ministry of Foreign Affairs of the People's Republic of China (<http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t401163.htm>) (accessed on 4 June 2008)). In Vietnam's response it was highlighted that "there were no Vietnamese armed ship attacking Chinese fishing vessels". According to Vietnam it had only been a "clash" between four Chinese and three Vietnamese fishing vessels caused by the fact that their "fishing net sets got intertwined" and after they had "successfully separated their sets, all the vessels resumed their normal fishing activities." It is also notable it was stated that: "Vietnam consistently pursues the policy of cooperating with China in handling all arising matters to maintain peace and stability in the Tonkin Gulf" ("Vietnam advocates cooperating with China to maintain peace and stability in the Tonkin Gulf. Ministry of Foreign Affairs' Spokesman – Mr. Le Dzong Answers Question on 17 January 2008". From the website of Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns080118114339) (accessed on 26 May 2008)).

settled without leading to the deep tension that characterised an incident which was also caused by the activities of a Chinese exploration ships in March-April 1997.³⁷ As the public statements were fewer in connection with the May 1998 incident it is difficult to fully assess how the more successful management of the incident was brought about. Obviously less public rhetoric and more restraint by the two parties were a contributing factor. Judging from the Vietnamese official explanation, its approach by “diplomatic negotiations” and patience in dealing with China did bear fruit in connection with the May 1998 incident.³⁸

An additional observation that can be drawn from the developments in 1998 is that both China and Vietnam were more reluctant to engage in longer periods of accusations and counter-accusations in connection with incidents in the South China Sea that caused tension in bilateral relations. However, this did not imply that either side refrained from publicising their discontent or from protesting against actions carried out by the other party. The difference in 1998 as compared to earlier years was that the official complaint or accusation was stated on a limited number of occasions and then no further public statement on the incident in question was made. This prevented an escalation in accusations and counter-accusations from taking place and thus tension did not appear to have been as deep as for example in connection with the 1997 incident.

The developments in 1999 were further indications of the progress made in the management of the disputes between China and Vietnam in the South China Sea. The assessment that progress was made is based on the level of tension in the area in 1999, i.e. public protests or criticism of the actions taken by the other country. The only

³⁷ On 15 March 1997 the Voice of Vietnam announced that China had sent “Kanta Oil Platform No 3” together with two “pilot ships Nos 206 and 208” to carry out exploratory oil drilling in areas lying within Vietnam’s continental shelf (BBC/FE 2870 B/4 (18 March 1997); and, 2871 B/4 (19 March 1997)). The first official Chinese reaction came on March 18 when a Spokesman of the Ministry of Foreign Affairs said that China’s “normal operation” within its EEZ and continental shelf was “indisputable” (Ibid. 2872 G/1 (20 March 1997)). The bilateral dispute continued throughout March. Then, according to information carried by the Voice of Vietnam on 9 April, quoting a Vietnamese expert, the Chinese “rig” and its “tugboats” had been withdrawn from Vietnam’s EEZ and continental shelf since 1 April (Ibid., 2889 B/3 (10 April 1997)).

³⁸ On 20 May 1998 a spokesperson from the Vietnamese Ministry of Foreign Affairs stated that the Chinese ship “Discovery 08” was operating in the Spratly archipelago and even “deeply” into Vietnam’s continental shelf and that this was a violation of Vietnam’s territorial sovereignty (Ibid., 3233 B/11 (22 May 1998)). The Chinese response came on May 21 when a spokesman for the Ministry of Foreign Affairs stated that China had “indisputable” sovereignty over the Spratly islands and their surrounding waters and that the presence of Chinese ships in these waters “for normal” activities was within China’s sovereign rights (Ibid., 3235 G/1 (25 May 1998)). On May 22 the spokesperson for Vietnam’s Foreign Ministry said that the ship and two armed fishing vessels had withdrawn from Vietnam’s “sea area”. The Vietnamese approach to the problem was said to have been in line with the “persistent” policy of settling disputes through diplomatic negotiations. In this spirit Vietnam had “patiently” maintained contact with China on the operation of the Chinese ships in Vietnam’s “sea territory” (Ibid., 3236 B/12 (26 May 1998)).

public protest was made by Vietnam in late March in response to a Chinese decision to temporarily ban fishing in the South China Sea.³⁹ This state of affairs could be explained in two ways. First, the two sides respected the status quo and refrained from actions that could have led to protest by the other side and consequently there was virtually no tension. Second, actions were carried out which may have caused tension but both sides opted to deal with the incidents without resorting to public protest or criticism against the other side. If the second line of explanation is pursued it would be an indication that the two sides took further steps to contain and defuse situations which could lead to tension during 1999.

This is in line with the provisions of the Joint Declaration of 27 February 1999, issued in the connection with the visit to China by the Secretary General of the CPV, relating to the mode of behaviour to be implemented in order to solve “any differences” in the South China Sea. According to Section 3 the two sides agreed to maintain the “existing negotiation mechanism on the sea issues”. They would try to find a “basic long-term solution” through negotiations. Pending a solution they would discuss the possibility of engaging in bilateral co-operation in such areas as “protecting the sea environment, hydro-meteorology, and natural calamity prevention and control”. They also agreed to refrain from “any actions” that could “further complicate or widen the dispute”, they agreed to refrain from the use or the threat of use of force, and to “promptly” conduct discussions and “satisfactorily” solve differences so that they would not affect the “normal development of bilateral ties”.⁴⁰

During 2000 no incidents relating to the South China Sea caused tension in bilateral relations. In fact the two countries moved to put greater emphasis on conflict management in the South China Sea through continued talks, by exploring potential co-operation in certain fields and by exercising mutual self-restraint. This was most evidently displayed in the Joint Statement for comprehensive cooperation signed on 25 December 2000 by the two Foreign Ministers. Section IX is devoted to the South China Sea and the two sides agreed to: “maintain the existing negotiation mechanisms on marine issues and to persist in seeking a fundamental and everlasting solution acceptable to both sides through peaceful negotiations.” Pending a solution the two sides would actively explore possibilities of cooperating in “environmental protection, meteorology, hydrology, disaster prevention and mitigation.” They agreed not to take “actions to complicate or aggravate disputes” and not to resort to force or its threat. Finally, they would consult each other in a timely manner if a dispute occurs and adopt a constructive attitude when handling disputes in order to prevent them from impeding

³⁹ Ibid., 3496 B/4 (30 March 1999). Report carried by Voice of Vietnam.

⁴⁰ “Vietnam-China Joint Declaration”, reproduced in Vietnam Law & Legal Forum, Vol. 5, No. 54 (February 1999), p. 13.

the development of bilateral relations.⁴¹

During the period 2001-2009 some incidents can be noted. During 2001 there were official statements by either side on four occasions – one by China and three by Vietnam – protesting about actions carried out by the other side. However, the complaints were limited to one statement and no further tension has officially been caused by the actions leading to the protests.⁴² In 2002 Vietnam protested against a Chinese fishing ban in the South China Sea from 1 June to 1 August. Vietnam also protested against China's "imposition of a sea ban" for firing exercise in maritime areas that included "sea and continental shelf" areas belonging to Vietnam.⁴³ This ban was enforced for about five days in June 2002. In 2003 Vietnam protested against a new Chinese "fishing ban" in the South China Sea for the period 1 June to 1 August.⁴⁴ Of a more serious nature was an incident in 2004 related to activities carried out by China in areas of the South China Sea that Vietnam considers to be part of its continental shelf. According to Vietnam, China dispatch "KANTAN3" and oil drilling platform to start operation on 19 November 2004. Vietnam officially requested China not to dispatch the oil-drilling platform.⁴⁵ China refuted the Vietnamese request stating that the oil exploration was taking place within China's "territorial waters"⁴⁶. Eventually, China withdrew its drilling platform from the area.⁴⁷ In February 2005 Vietnam reaffirmed

⁴¹ "Declaration Vietnam-Chine sur la coopération au nouveau siècle" [Vietnam-China Declaration on the Co-operation in the New Century] (25 décembre 2000). From the website of Agence vietnamienne de l'information (AVI) (<http://www.vnagency.com.vn/Asp/Redanewse4.asp?FileN=frac2612.001>) (accessed on 27 December 2000); and, "Joint Viet Nam-China Statement for Comprehensive Cooperation (take two)" (26 December 2000). From the website of Vietnam News Agency (VNA) (www.vnagency.com.vn/Asp/Redanewse4.asp?FileN=frac2612.004) (accessed on 27 December 2000). See also "Vietnam, China sign joint statement", News Bulletin, No. 399 (26 December 2000) (English language bulletin). From the website of Nhan Dan (<http://www.nhandan.org.vn/english/20001226/bai-news2.html>) (accessed on 28 December 2000).

⁴² For details relating to these four incidents see Amer, *The Sino-Vietnamese Approach*, p. 35.

⁴³ "Answers by MOFA's Spokeswoman Phan Thuy Thanh to Journalists on 31 May 2002". From the website of the Ministry of Foreign Affairs of Vietnam (<http://www.mofa.gov.vn:8080/Web%20server/Press.nsf/3d74812854f0209480256889...>) (accessed on 2 January 2003).

⁴⁴ Vietnam's position on China's announcement of an on fishing in the South China Sea from 1 June to 1 August 2003 can be found in "Answer by the MOFA's Spokeswoman Phan Yhuy Thanh to Correspondent on May 16 2003". From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn:8080/Web%20server/Press.nsf/3d74812854f0209480256889...>) (accessed on 31 July 2003).

⁴⁵ "Nanhai 215 Vessel has hauled oil drilling platform KANTAN 3 of China to the continental shelf of Vietnam". From website of Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns041119160109) (accessed on 22 March 2005).

⁴⁶ "China rejects Vietnam's request to cease oil exploration". From the website of China Daily (http://www2.chinadaily.com.cn/english/doc/12004-11/23/content_394139.htm) (accessed on 10 January 2005).

⁴⁷ In recent years China has sought to influence foreign oil companies not to work with Vietnam in exploring and exploiting oil resources in maritime areas of the Southeastern coast of Vietnam. For details see Nguyen Hong Thao and Ramses Amer, "The South China Sea: Seeking a New Legal Arrangement for Promoting Stability, Peace and Cooperation", in *The Place of International Obligations in the*

its sovereignty claim to the Paracel and Spratly archipelagos in response to reports that China had launched a “large-scale research on coral reefs” in the Paracels.⁴⁸ In late December 2006 Vietnam reaffirmed its sovereignty over the two archipelagos in response to information that China had “constructed sovereignty markers at some basepoints of territorial waters including those in Hoang Sa archipelago of Vietnam”, i.e. the Paracels. It was also stated that these activities “violates the sovereignty of Vietnam and therefore is completely invalid”.⁴⁹ In August 2007 Vietnam reasserted its sovereignty claims to the Paracels and Spratlys in reaction to a report that a “tourism development plan” that included visits to the Paracels had been approved in China.⁵⁰ In late 2007 two events led to Vietnamese official responses. First, on 23 November – in response to a military exercise by China in the Paracels – Vietnam reiterated in sovereignty claims to both the Paracel and Spratly archipelagos.⁵¹ Then On 3 December Vietnam protested and once reiterated its sovereignty claim to the two archipelagos in response to the establishment by China – of what the Vietnamese called “San Shan city” – on Hainan Island to administer the Paracel and Spratly archipelagos.⁵² On 12 March 2009 Vietnam once again reiterated its sovereignty claims to the Paracels and Spratlys in response to the announcement that “Zhou Jiang International Travel Agent”

Domestic Order of States, IOES Monograph Series 7 (Kuala Lumpur: Institute of Ocean and earth Sciences, Universiti Malaya, 2008), p. 236; and, Nguyen Hong Thao and Ramses Amer, “A New Legal Arrangement For the South China Sea?”, *Ocean Development and International Law*, Vol. 40, Issue 4 (November 2009), p. 339.

⁴⁸ “Vietnam has sufficient evidence to affirm its sovereignty over the Paracel and Spratly. Answer to Correspondent by Mr. Le Dzung The Spokesman of the Ministry of Foreign Affairs on 17th February 2005”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050217172425) (accessed on 3 June 2008).

⁴⁹ “Vietnam once again reaffirms its sovereignty over Hoang Sa and Truong Sa archipelagos. Statement by Mr. Le Dung, Spokesman of the Ministry of Foreign Affairs of Vietnam on 28 December 2006”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns061229101042) (accessed on 26 May 2008).

⁵⁰ “Vietnam reasserts its sovereignty over Hoang Sa and Truong Sa archipelagos. The Spokesman of the Ministry of Foreign Affairs Le Dzung on 15th August 2007”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns070816153712) (accessed on 3 June 2008).

⁵¹ “China’s military exercise in the Hoang Sa archipelago is a violation of Vietnam’s sovereignty”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns071126152905) (accessed on 4 September 2009).

⁵² “Vietnam objects to China’s establishment of San Sha city on the Hainan Island. Ministry of Foreign Affairs’ Spokesman – Mr. Le Dzung Answers Questions on 3rd December 2007”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns071204135539) (accessed on 25 May 2008). In an unprecedented development protests were held outside the Chinese embassy in Hanoi and the Chinese consulate in Ho Chi Minh City prompting an official response by the Chinese Foreign Ministry stating that China was “deeply concerned over the recent developments in Vietnam” and warning that they could undermine bilateral relations (“Foreign Ministry Spokesperson Qin Gang’s Regular Press Conference on December 11, 2007”. From the website of the Ministry of Foreign Affairs of the People’s Republic of China (<http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/389216.htm>) (accessed on 3 June 2008)).

would start operation of tours to “Phu Lam Island” in the Paracels.⁵³ In early May 2009 Vietnam’s submitted a “Partial Submission” relating to Vietnam’s extended continental shelf in the “North Area”⁵⁴ as well as a “Joint Submission” together with Malaysia to the Commission on the Limits of the Continental Shelf.⁵⁵ Both submissions prompted China to protest and to reiterate its claims in the South China Sea.⁵⁶ In August 2009 the Vietnamese fishing boat “QNg 95031TS” and its crew were seized by China in the Paracels.⁵⁷ Vietnam requested their release through a diplomatic note to the Chinese Embassy in Vietnam. On 11 August China informed the Vietnamese Embassy that the boat and the crew had been released.⁵⁸ On October 21 Vietnam protested against the “inhumane acts by the Chinese armed officers against Vietnamese fishermen” who had sought “refuge” in the Paracel archipelago.⁵⁹

⁵³ “Vietnam’s response to Zhou Jiang International Travel Agent’s announcement of the opening of a tour to Phu Lam Island of the Paracels. Ministry of Foreign Affairs’ Spokesman Mr. Le Dzung answers question on 12 March 2009”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns090313185303) (accessed on 8 July 2009).

⁵⁴ “Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982. Partial Submission in respect to Vietnam’s extended continental shelf: North area (VNM). Part I – Executive Summary. VNM-N-ES-DOC April 2009”. From the website of the United Nations (http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf) (accessed on 14 July 2009).

⁵⁵ “Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect to the southern part of the South China Sea. Part I: Executive Summary. Malaysia, Socialist Republic of Vietnam, May 2009”. From the website of the United Nations (http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf) (accessed on 14 July 2009).

⁵⁶ China’s reaction to the Joint Submission was through a Letter from the Permanent Mission of the People’s Republic of China to the Secretary General of the United Nations, 7 May 2009, CML/17/2009 (in both Chinese original and English translation). From the website of the United Nations (http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) (accessed on 14 July 2009). China’s reaction Vietnam’s Partial Submission was through a Letter from the Permanent Mission of the People’s Republic of China to the Secretary General of the United Nations, 7 May 2009, CML/18/2009 (in both Chinese original and English translation). From the website of the United Nations (http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf) (accessed on 14 July 2009).

⁵⁷ “Requesting the Chinese side to immediately release 13 fishermen and their boat QNg 95031TS. Ministry of Foreign Affairs’ Spokesman Mr. Le Dzung answers question on 5 August 2009”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns090805154551) (accessed on 25 August 2009).

⁵⁸ “China announced the release of ship QNg 95031 and all Vietnamese fishermen. Ministry of Foreign Affairs’ Spokesman Mr. Le Dzung answers question on 11st August 2009”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns090812104005) (accessed on 25 August 2009).

⁵⁹ “Vietnam’s Reaction to Inhumane Acts by Chinese Armed Officers toward Vietnamese Fishermen. Ministry of Foreign Affairs’ Spokeswoman Nguyen Phuong Nga Answers Question on 21st October 2009”. From the website of the Vietnam Ministry of Foreign Affairs (http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns091022101747) (accessed on 12 November 2009).

Although the two countries have not agreed on a formal ‘code of conduct’, nor that one necessarily will be agreed upon, it is evident that fundamental principles that are essential parts of such a scheme had been agreed upon and are being implemented by China and Vietnam. The provisions relating to the South China Sea in the Joint Declaration of 27 February 1999 and in the Joint Statement of 25 December 2000, respectively, indicate that China and Vietnam have gradually agreed on an increasingly sophisticated and detailed conflict management scheme to be applied and observed in the South China Sea. The South China Sea situation has also featured prominently in the high-level meetings and talks during the 2004-2008 period.⁶⁰ The decrease in tension that has been evident since 1999 indicates the agreements and the mechanisms therein are in fact being implemented and respected by the two sides. Thus, despite the lack in progress in the bilateral expert-level talks on “maritime issues”, the two sides have made some progress in terms of conflict management of their disputes in the South China Sea.

Lessons from the Sino-Vietnamese Approach

The Sino-Vietnamese approach to managing border and territorial disputes displays that it is possible to both resolve border issues through negotiations, i.e. land border and Gulf of Tonkin, and to considerably reduce tension caused by other disputes, i.e. in the South China Sea.

⁶⁰ The following key documents have been consulted: The Joint Communiqué from Prime Minister Wen Jiabao’s visit to Hanoi on 6-7 October 2004 (“China-Vietnam Issues a Joint Communiqué”. From the website of the Ministry of Foreign Affairs of the People’s Republic of China (<http://www.fmprc.gov.cn/eng/wjb/zzjg/gjlb//2792/2793/t163759.htm>) (accessed on 3 June 2008)). The Joint Statement issued in connection with the visit of the then President of Vietnam Tran Duc Luong to China on 18-22 July 2005 (“Vietnam and China issue joint statement”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns050726144049>) (accessed on 26 July 2005)). The Joint Communiqué issued in connection with the visit by Nong Duc Manh Secretary General of the CPV to China on 22-26 August 2006 (“Vietnam-China joint communiqué”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/250806/domestic_commu.htm) (accessed on 26 June 2008)). The Joint Statement issued in connection with the visit to Vietnam by China’s President Hu Jintao on 15-17 November 2006 (“Vietnam-China Joint Statement”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/171106/domestic_vnchi.htm) (accessed on 26 September 2007)). The Joint Press Communiqué issued in connection with the visit by Vietnam’s President Nguyen Minh Triet to China on 15-18 May 2007 (“Vietnam and China issue joint press communiqué”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/190507/domestic_pr.htm) (accessed on 26 September 2007)). The Joint Statement issued in connection with the visit to China by the General Secretary of the CPV Nong Duc Manh on 30 May to 2 June 2008 (“Vietnam and China issue joint statement”. From the website of Nhan Dan (http://www.nhandan.com.vn/english/news/020608/domestic_vn.htm) (accessed on 4 June 2008)). The Joint Statement issued in connection with the visit to China by Vietnam’s Prime Minister Nguyen Tan Dung on 22-25 October 2008 (“Vietnam, China reach awareness to enrich partnership”. From the website of the Vietnam Ministry of Foreign Affairs (<http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns081027154132>) (accessed on 27 October 2008)).

The two countries have actively sought to address the border and territorial issues and thus they have not avoided dealing with them. This is reflected in the fact that such issues have been on the agenda at high-level meetings since full normalisation of relations in late 1991. The establishment of the extensive system of talks at Expert-level; Government-level; Foreign Minister-level; and, High-level, displays both the importance of dealing with the border and territorial issues and the evident political ambition to address these issues.

The agreements relating to both the land border and the Gulf of Tonkin, respectively, are the end result of both political priorities and expert-level talks. Deadlines agreed by the leaders of the two countries served as necessary pressure in order to reach negotiated settlements at the expert-level.

The fact that China and Vietnam have been so active in trying to both settle and manage their border and territorial issues is not unique to their bilateral relationship. In fact Vietnam has been very active in settling border and territorial disputes in the 1990s and 2000s. China has also been active in settling its land borders disputes with several neighbouring countries. It is notable that the agreement of 2000 relating to the Gulf of Tonkin was China's first relating to maritime delimitation.

The approach of China and Vietnam to manage relations relating to the South China Sea has been fairly successful over the last decade. To gradually agree on increasingly sophisticated measures and mechanisms for enhancing stability and collaboration in the South China Sea is one dimension of the Sino-Vietnamese approach. Another dimension is that the two sides have agreed on measures to regulate behaviour and courses of action in order to reduce the risk that tension will occur, to avoid actions that might cause such tension and to manage tension if such situations occur. These agreements imply that China and Vietnam have developed the elements of a 'code of conduct' in practice although it is not formally labelled as one. In other words there are alternative strategies to formal 'code of conducts'.

Relevance for the broader South China Sea situation

Given that China and Vietnam have extensive claims in the South China Sea area – including both the Paracel and Spratly archipelagos – their policies and actions relating to the South China Sea are of considerable relevance to the overall situation in the area.

Consequently, the Sino-Vietnamese approach to managing border and territorial issues is of relevance for the broader South China Sea situation. In particular the bilateral talks between China and Vietnam relating to the South China Sea are of considerable relevance.

The Sino-Vietnamese approach does display that border and territorial issues can be dealt with through formal negotiations. Furthermore, the bilateral relationship has been strengthened not weakened by the fact that dealing with such issues is firmly on the agenda at High-level meetings. The latter has of course been facilitated by the progress made in relation to the land border and Gulf of Tonkin issues as well as through the reduction in tension caused by the South China Sea disputes. Thus, the Sino-Vietnamese approach is highly relevant to examine also by other countries including other claimants in the South China Sea.

The Sino-Vietnamese approach adjusted to the specific conditions of other bilateral disputes in the South China Sea as well as to the multilateral dispute over the Spratlys could prove to be the most effective conflict management strategy in the current situation.

Implications for the broader South China Sea situation

Through their policies and actions China and Vietnam, respectively, do have considerable impact on the South China Sea situation and to the developments in the area. Thus, the bilateral approaches and talks between China and Vietnam do have implications for the broader situation in the South China Sea. Less tension between China and Vietnam does contribute to peace and stability in the area.

Interestingly, the fact that the on-going talks on the so-called ‘South China Sea issues’ or ‘Sea issues’ between China and Vietnam do not indicate that the two parties have moved any closer to accepting the claims and the positions taken by the opposite side does contribute to alleviate fears among other claimants to the Spratlys that China and Vietnam might strike a bilateral deal to the detriment of the other claimants.

The broader implications of the peaceful management of the border and territorial disputes between China and Vietnam is that it creates favourable conditions for expanding economic interaction and co-operation in the field of regional security in the wider Pacific Asia, i.e. East- and Southeast Asia. A more specific positive impact on regional stability can be seen in the South China Sea where bilateral talks between China and Vietnam contributes to a more stable situation in the volatile area with bilateral and multilateral territorial disputes. Peaceful management also contributes to facilitating the interaction and on-going dialogue between the Association of South-East Asian Nations (ASEAN) and China.

CONCLUSIONS

This paper has established that there are lessons to be learned from the Sino-Vietnamese approach to managing border and territorial issues. It has also been argued that the Sino-Vietnamese approach is both relevant and has implications for the broader situation in the South China Sea area.

A summary of the main achievements by China and Vietnam displays that the demarcation of the land border has been completed and is essential for the long-term stability in bilateral relations as well as for the continued expansion of the multifaceted co-operation between the border provinces of both countries. In the Gulf of Tonkin both the boundary agreement and the fishery agreement have entered into force. Ongoing talks and discussions on the remaining territorial disputes in the South China Sea is a further indication of the importance placed on managing and avoiding tension.

However, continued efforts are needed. In the Gulf of Tonkin successful completion of the negotiations on the delimitation of the so-called mouth of the Gulf is important. The continued implementation of the fishery agreement is essential. The collaboration relating to the maintenance of order in the Gulf through joint-patrols needs to be expanded. In the South China Sea it is essential to avoid future confrontation in the area, not only for bilateral relations but also for the stability in the region. It is also necessary to move both the bilateral and multilateral conflict management process forward. Although formal settlements of the disputes are unlikely in the current situation there is room for further progress both bilaterally and multilaterally in managing both disputes and the broader security situation in the South China Sea.

At the bilateral level if China and Vietnam could agree on the scope and the issues that are disputed it would be an important step forward as this would create a realistic agenda for expert-level talks and it would also contribute to the multilateral efforts. This should not be interpreted as an argument that either side should abandon their sovereignty claims to the Paracel and Spratly archipelagos, but rather that they should recognise that they have overlapping claims and that such situations need to be addressed.

At the multilateral level both countries are parties to the Declaration on the Conduct of Parties in the South China Sea (DOC) adopted by ASEAN and China on 4 November 2002.⁶¹ Both China and Vietnam can positively contribute to the successful implementation of the DOC and also contribute to the process of further developing the conflict management mechanisms needed to maintain stability and avoid tension and confrontation in the South China Sea.

Stockholm, November 2009

⁶¹ The full text of the “Declaration on the Conduct of Parties in the South China Sea” can be found on the website of the Association of Southeast Asian Nations (ASEAN) (<http://www.aseansec.org/13163.htm>, (printable version) <http://www.aseansec.org/13165.htm>) (accessed on 28 October 2008).

SOUTH CHINA SEA – 2ND TRACK DIPLOMACY

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South China Sea workshop process: Some backgrounds

1. There were already armed conflicts between China and Vietnam before 1990.
2. There were a number of bilateral, trilateral, and multilateral territorial disputes.
3. There was rush to seek resources, either living or non-living/minerals.
4. Some historical confrontation and conflicts between the countries in the area, including between China and Southeast Asia.
5. The interest of outside powers on South China Sea, particularly in terms of navigation and over flight.

Indonesian position

1. Indonesia borders on the South China Sea but not a participant in the multiple disputes over Spratly Islands group.
2. In the 1980's Indonesia was worried that the South China Sea may become new flash points of conflicts in the area that may affect peace and stability in Southeast Asia.
3. At that time ASEAN did not have any perspective on the South China Sea. In fact, there are a lot of disputes between the ASEAN countries themselves.
4. At that time ASEAN did not yet include Indochina (Cambodia, Laos, and Vietnam).

Indonesian informal initiatives

In view of difficulties in taking formal initiative, I traveled across the other 5 ASEAN countries at that time to discuss what could be done. I found out that:

1. Practically everybody thought that we should do something.

2. There was apprehension that territorial disputes could pose major difficulties in developing cooperative efforts.

3. It would be better if the approach was informal, at least at the initial stage.

4. There was some opinion that ASEAN members should coordinate their views first before engaging non-ASEAN states in the process. (I did not share this opinion).

In attempting to manage the potential conflicts in the South China Sea, I developed 3 objectives:

1. To devise cooperative programs in which everyone could participate, no matter how small or insignificant it may appear in the beginning.

2. Promote confidence building process.

3. Encourage dialogue between the parties to seek solutions to their problems.

Seeking cooperative programs

1. The first meeting of the workshop in 1990 (in Bali) was attended only by the Six ASEAN Countries.

2. I devised six topics for discussion, on which each ASEAN country was requested to take the lead:

- Territorial and sovereignty issues: Malaysia
- Political and security issues: Singapore
- MSR and environmental protection: Indonesia
- Safety of navigation: Philippines
- Resources management: Thailand
- Institutional mechanism for cooperation: Brunei Darussalam

In the subsequent meetings of the workshop, we were able to bring in China, Taiwan (Chinese Taipei), Vietnam, Laos, and Cambodia, particularly after the achievement of peace in Cambodia, and the entry of the Indochinese countries into ASEAN.

It was not easy to bring in China into the workshop process, perhaps because of:

1. its dislike to “regionalize” or “internationalize” the South China Sea problems;
2. the inclusion of Chinese Taipei in the process;
3. China regarded that whatever problems it had with the other countries, China would solve it directly and bilaterally.

The workshop process has continued annually in Indonesia since 1990 and the 19th workshop is now being planned in November 2009. In addition, the workshop process also worked through various Technical Working Groups (TWG's) and Group of Expert Meeting (GMS) and Study Groups (SG) in various places around the South China Sea Area, hosted by their respective countries.

There are five TWG's, namely on (1) Marine Scientific Research, (2) Resource Assessment, (3) marine environmental protection, (4) safety of navigation, shipping and communication, and (5) on legal matters.

The cooperation on MSR is perhaps the most advance, particularly after the bio- diversity expedition around Anambas Islands. Now we are actively preparing and developing cooperation on how to deal with sea level rise as the result of global climatic change.

During the last meeting (18th Workshop in Manado in November 2008), China and Chinese Taipei agreed for the first time to submit a joint proposal before the next meeting (November 2009) combining the Chinese concept on Education, Training Course and Exchange of Marine Science and Technology in the South China Sea, and the Chinese Taipei proposal on “Southeast Asia Network for Education (SEA – ONE)”. Hopefully the Joint proposal would soon be approved and implemented, thus becomes another milestone in building up peace and cooperation in the South China Sea.

Confidence building process

1. After several meetings, discussion on territorial and sovereignty issues as well as on political and security issues have stalled, mainly because of the reluctant of the parties to go on. Yet, the discussions have brought better understanding of the problems involved.

2. Discussion on confidence building had brought some results:

- No major expansion of military presence in the disputed area recently

- No major occupation of the reefs and the banks
- It appears that more contact and transparency have developed between the authorities concerned.

3. More Codes of Conducts between the parties have developed, such as:

- The China-Philippines Code of Conduct (1995)
- Vietnam-Philippines Code of Conduct
- ASEAN-China Code of Conduct (2002)
- China-Vietnam Delimitation Agreement in the Gulf of Tonkin (2002)
- Some joint development/cooperation, such as between Malaysia with Thailand, and Malaysia with Vietnam; and China and Vietnam in the Gulf of Tonkin on fisheries

Some lessons for 2nd track diplomacy/informal process

1. Some conditions for successful efforts:

- Realization by the parties that the outbreak of conflicts will not settle the disputes and therefore will not be in their interests
- The existence of political will to seek and solve the problems peacefully
- Not galvanizing public opinions, because it may solidify positions rather than enabling compromise or solution to take place
- Need for transparencies in national policy and legislation
- Need to take into account the interest of the non parties that maybe interested in the peaceful solution of the issues

2. Some basic principles:

- Use an all inclusive approach
- Start with less sensitive issues
- Involve senior government officials as much as possible

- The process should be flexible and do not necessarily being institutionalized.
- Do not magnify differences but emphasize similarities
- Follow step by step approach, perhaps begins with technical issues
- Lack of immediate results should not be cause for despair
- Keep the objective simple
- The roles of initiator or conveners are important.

The South China Sea Workshop process was supported by CIDA through the University of British Columbia in Vancouver for 10 years. Now the workshop process continues on its own, supported by all the participants. Certain participants who financially can not attend meetings, are supported by Special Fund which was established by voluntary contributions from the participants.

In conclusion, after many years of managing potential conflicts in the SCS, now the spirit of cooperation has emerged in the area. There has been no eruption of conflicts or armed conflicts since 1988. In fact, the friendly relations between China and the Southeast Asian Countries have developed considerably. Yet, the prospects for conflicts in the SCS continue to exist in the future if the countries concerned do not persist in managing them carefully. Therefore, the informal efforts to manage potential conflicts in the South China Sea should continue, while the formal efforts by the countries concerned to settle bilateral issues should also be encouraged. It is expected that counties concerned should not take action that may complicate the issues.

ASEAN AND THE PROSPECT FOR SOLUTION TO DISPUTES IN THE SOUTH CHINA SEA¹

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1. OVERVIEW OF THE SOUTH CHINA SEA

The South China Sea, a semi closed sea, is one of the most strategically important regions in the world. The sea water stretches from 30 North latitude to 23o South latitude bordered by China (including Taiwan), Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, Brunei and the Philippines. South China Sea is also one of the world largest seas with the surface area of roughly 1.148.500 square nautical miles (3.939.245km²).

Figure 1: The South China Sea region



Source: South China Sea-Reference Map-US CIA; available from <http://community.middlebury.edu/~scs/maps/South%20China%20Sea-reference%20map-US%20CIA.jpg>.

¹ Translated version

The South China Sea has some of the world's busiest sea lanes, which link Northeastern Asia and Western Pacific with Indian Ocean and the Middle East. There are more than 41,000 ships passing through the South China Sea a year.² Tanker traffic through the Strait of Malacca at the Southwestern end of the SCS is more than three times greater than that of the Suez Canal and well over five times of the Panama Canal.³ More than 80% of the oil imported by Japan from the Middle East, Brunei, Malaysia and Indonesia transits through this region.⁴ The SCS is also an important body of water that provides fish resources for Japan, China, Taiwan, Vietnam, Cambodia, Indonesia, Malaysia, Brunei, Singapore and Thailand.

Apart from having vital sea lanes, the SCS is rich in fish resources and potentially rich in oil. Chinese experts estimated that the SCS may have a reserve of as much as 225 billion barrels of oil and natural gas⁵.

At the present, Brunei, Malaysia and Vietnam are all oil exporters, whereas, China has been one of the world's greatest importers since 1993. China consumes about 7.85 million barrels per day and by 2010, the figure is expected to go up to 10 – 12 million barrels, 53% of which are imported.⁶ In May 2008, China became the second largest oil importers after Japan. 46% of China's imported oil is from the Middle East, 32% from Africa and 5% from East Asia. More than 80% of the oil transits through the Strait of Malacca⁷. Advanced technology and the big oil reserves on the continental shelf and the other sea areas will make the South China Sea strategically important to any country in the region, and particularly China, a country with ambition to spread influence over the world. If the full extent of its claims over the territorial waters is accepted by other nations, "China's jurisdiction will be extended some one thousand nautical miles from its mainland so as to command the virtual Mediterranean, or maritime heart of Southeast Asia with far reaching consequences for the strategic environment".⁸ The presence of China Navy in the region will not only threaten Philippines and Vietnam, but also Brunei, Indonesia and Malaysia. Additionally, China's control over the South China Sea also threatens security of Japan, the United States or any country transiting through the region.

² Ji Guoxing, "Rough Water in the South China Sea: Navigation Issues and Confidence – Building Measure", East – West Center, 2001.

³ Christopher C. Joyner, *Toward a Spratly Resource Development Authority: Precursor Agreements and Confidence Building Measures*, ed. Myron H. Norquist and John Norton Moroe, *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation* (1997).

⁴ Scott Snyder, Brad Glosserman and Ralph A. Cossa, "Confidence Building Measures in the SCS", (2001), No.2, *Issue and Insights*, at 10.

⁵ Bruce and Jean Blanche, *Oil and Regional Stability in the South China Sea*, *Jane's Intelligence Review*, No. 1995, at 511 – 514.

⁶ *Annual Report to Congress, Military Power of the People's Republic of China, 2009*, Office of the Secretary of Defense, Department of Defense, United States of America, p. 3.

⁷ *Annual Report to Congress, Military Power of the People's Republic of China, 2009*, Office of the Secretary of Defense, Department of Defense, United States of America, p. 4.

⁸ M. Leifer, *Chinese Economic Reform: The Impact on Policy in the South China Sea*, in G. Segal and R. H. Yang (eds) *Chinese Economic Reform: The impact on Security*, London: Routledge, 1996, p. 142.

Even though its naval power is not really strong, China never conceals its ambition to dominate the South China Sea. To date, China does not possess any aircraft carrier, however, they have planned to build two carriers in the years ahead. In February 2009, China sent some warships to Aden Bay and built a nuclear submarine base in Hainan. China has openly stated their intent to implement Mahan's doctrine⁹ with a view to turn China into a regional naval power that can dominate the world.

In China's scheme, the South China Sea is of great strategic importance. China, with an ambition toward the seas has envisioned the two main island chains¹⁰, the first serves as a gateway to the second one, through which China could gradually control the Pacific Ocean and the Indian Ocean; thus fulfill China's dream of being a naval power.

Figure 2: The first island chain and the second island chain in the seaward strategy of PRC.



Source: Annual Report to Congress, Military Power of the People's Republic of China, 2009, Office of the Secretary of Defense, Department of Defence, United of States of America.

⁹ James Holmes , Toshi Yoshihara , A Chinese Turn to Mahan? In China Brief, http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=35172&tx_ttnews%5BbackPid%5D=414&no_cache=

¹⁰ The first island: in 1985, the PLA worked out a sea defense strategy, which stated the offshore operation capability and domination in the area of two island chains: The first island chain is usually described as a line through the Kurile Islands, Japan, the Ryukyu Islands, Taiwan, the Philippines, and Indonesia (Borneo to Natuna Besar). The second island chain runs along a north-south line from the Kuriles through Japan, the Bonins, the Marianas, the Carolines, and Indonesia. Together, they encompass maritime areas out to approximately 1,800 nm from China's coast, including most of the East China Sea and East Asian SLOCs. <http://www.globalsecurity.org/milita...e-offshore.htm>

2. OVERLAPPING CLAIMS IN THE SOUTH CHINA SEA

The dispute in the South China Sea has impacted on regional bilateral relations and continues to trouble ties between the People's Republic of China (PRC) and the Association of Southeast Asian Nations (ASEAN).

The Paracel Islands is now a subject of dispute between Vietnam and China (Taiwan included). China has controlled the Islands through the use of force since 1974. The Spratly Islands is the territory in dispute among Brunei, China (also include Taiwan), Malaysia, the Philippines and Vietnam. The dispute has been heavily influenced by a wide range of intertwined factors such as economy, legal matters, strategic diplomacy and other geopolitical interests.

The dispute in the South China Sea may be examined in the context of the Third United Nations Convention of the Law of the Sea (UNCLOS III). The UNCLOS III was approved by the United Nations on 30th April 1982 and came into force on 16th November 1994. All the ASEAN members and China have become state members of the Convention.

The Convention provides legal jurisdiction over territorial waters of coastal states. The convention governs internal water, archipelagic water, territorial sea, contiguous zone, exclusive economic zones, continental shelves and high seas. It provides coastal states with the authority to extend their sovereignty jurisdiction under a specific set of rules. It also provides for the extension of territorial sea to 12 nautical miles and limits the contiguous zone to 24 nautical miles from the baselines. The sovereignty rights of a coastal states over the Exclusive Economic Zone are limited to the exploration and exploitation of its living and non-living resources. Continental shelves may not be extended beyond a limit of 350 nautical miles from territorial baseline. Sovereignty rights of coastal states over the continental shelves are reduced to the exploration and exploitation of non-living resources.

It is debatable, however, whether most of the Spratly islands can generate maritime zones. Article (1) 121, UNCLOS III defines an island as “a naturally – formed area of land, surrounded by water, which is above water at high tide”. An island is capable of naturally supporting life. Reefs in contrast cannot sustain human habitation or economic life and “have no exclusive economic zone or continental shelf”¹¹. Features that cannot sustain human life and artificial islands are only entitled to 12 nautical mile territorial sea and 500 meter safety zone respectively. Therefore, most islands in the Spratly Islands only feature 12 nautical miles territorial sea.

The claims made by the parties involved in the South China Sea dispute can

¹¹ UNCLOS, Article (3) 121

be categorised into historical claims of discovery and occupation of islands in the Paracels and Spratlys, and claims that rest on the extension of sovereign jurisdiction under interpretations of the provisions of the UNCLOS 1982. The People's Republic of China views the South China Sea as an exclusive Chinese sea and claims nearly 80% of the sea within "U-shaped line"¹². Its claims are based on the discovery and occupation of the territory. Since the ratification of the UNCLOS in May, 1996, PRC has claimed a straight base line around the Paracel Islands while under the UNCLOS only archipelagic states could exercise the rights to such a straight line, and Indonesia and the Philippines are the only two archipelagic states in the region.

Relying on similar legal arguments, Taiwan has claimed same territorial sovereignty. Since 1956, Taipei has occupied the island of Itu Aba, the largest feature in the Spratly group. The People's Republic of China has supported Taipei's territorial claims in the dispute.¹³

Vietnam's claims (including the claims indicated by the government of the Republic of Vietnam) are based on historical claims of discovery and occupation.¹⁴

The original ASEAN members¹⁵ involved in the dispute make their claims basing on the extension of the continental shelf rather than on historical evidence. The Philippines claims the largest area of the Spratlys – an area referred to as Kalayaan (a land of freedom in the Philippine language). First officially proclaiming in 1971, then a 1978 presidential decree declared Kalayaan as part of the Philippines' national territory.¹⁶ The Philippines have also established a 200- nautical-mile Exclusive Economic Zone. Malaysia extended its continental shelf in 1979 to include features of the Spratlys.¹⁷ Brunei has established an exclusive economic zone of 200 nautical miles that extends to the south of the Spratly Islands and comprises Louisa Reef.¹⁸ Finally, Indonesia is not a party to the Paracel and Spratly dispute; however, the Natuna gas fields, currently exploited by Indonesia, are within the extension of Chinese claims with the U-shaped line.¹⁹

¹² Daniel Dzurek, *The Spratly Islands Dispute: Who's on first?*, International Boundary Research Unit, Maritime Brief, Volume 2, Number 1, p. 12

¹³ Mark J. Valencia, John M. Van Dyke, and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, Martinus Nijhoff Publishers, 1997, p. 30

¹⁴ Ministry Of Foreign Affairs, Socialist Republic Of Vietnam, *The Hoang sa (Paracel) and Truong sa (Spratly) Archipelagoes and international law*, Hanoi, 1988.

¹⁵ The original ASEAN members include Indonesia, Malaysia, The Philippines, Thailand, Singapore and Brunei (admitted in 1984).

¹⁶ Greg Austin, *China's Ocean Frontier: International Law, Military Force, and National Development*, Allen & Unwin, 1998

¹⁷ Greg Austin, cited.

¹⁸ Daniel Dzurek, cited, p.22

¹⁹ Greg Austin, cited.

3. ARMED CONFLICTS AND STATUS QUO IN THE SOUTH CHINA SEA

China's naval power and ambitions to dominate the region have posed challenges to ASEAN. With the exception of Vietnam and the Philippines, who feel threatened by China's actions, the problem of sovereignty in the SCS is not regarded as a direct threat to the national security of other ASEAN countries.²⁰ It seems that all states have maintained a dispute status quo for different calculations. China and ASEAN countries have been negotiating for years for a code of conduct in the South China Sea. Beijing does not want to be bound by a multilateral commitment which limits its ambition in the Spratlys to dialogue. Furthermore, there exists a division in ASEAN, specially differences in points of view by Malaysia on the one side and the Philippines and Vietnam on the other side regarding the Code of Conduct in the South China Sea.

The People's Republic of China on many occasions has used its superiority of military strength to gain footholds in necessary positions. In January 1974, China succeeded in driving out the military forces of the Republic of Vietnam from the Paracels and quickly gaining control of the islands. This military action was a part of the Sino-Soviet struggle, but reinforced China's influence in the South China Sea. The PRC remained absent from the Spratly Islands until the second half of the 1980s although claiming the entire Islands. China urgently needed to secure a military presence in the Spratlys through the use of force. Most claimants maintained their forces in reefs in the Spratlys. A naval confrontation with Vietnam on 14 March 1988 led to Chinese seizing some features of the Spratlys. Yet the issue was overlooked in most ASEAN countries due to their focus on the ongoing Cambodian conflict (1978-1991). Moreover, the People's Republic of China did not act aggressively against any of the ASEAN claimants during that period.²¹

After the resolution to the Cambodian conflict by the signing of the Paris Accords in October 1991, the territorial dispute over the Spratlys drew more attention.

In February 1992 Beijing passed the Law of China on the Territorial Waters and Contiguous Areas.²² It reiterated China's claims in the South China Sea and stipulated the right to use force to protect islands, including the Spratlys, and their surrounding waters. The law blatantly challenged the peaceful resolution of the territorial dispute enshrined in the UN charter and could be regarded as a direct military provocation to ASEAN.

²⁰ Ralf Emmers, "Maritime disputes in the South China Sea Strategic and diplomatic status quo", in *Maritime Security in Southeast Asia*, Routledge Security in Asia Series, 2007, pp 49 – 61.

²¹ ASEAN at that time just have 6 members: Indonesia, Malaysia, Singapore, Philippines, Thailand and Brunei. Vietnam gained accession to ASEAN in 1995.

²² Jing-dong Yuan, *China-Asean relations: Perspectives, prospects and Implications for u.s. interests*, October 2006, <http://www.StrategicStudiesInstitute.army.mil/>, p. 9.

On 8 February 1995, the Philippines detected Chinese military forces occupying the Mischief Reef, which locates in Kalayaan which is considered by the Philippines a part of their territory. Conflict between the two sides broke out. This was probably the first time China directly came into conflict with a member of ASEAN on the issue of maritime territory.

The Mischief Reef incident occurred against a special background of the withdrawal of the US from Subic Naval Base and Clark Air Base in the Philippines in 1992, leaving a power vacuum in the South China Sea which made an opportunity for China to assert its military presence in the Spratly, following the 1988 incident. Then Philippine President Fidel Ramos briskly condemned China's action. Manila responded to the discovery of the Chinese occupation by seeking multilateral support and taking retaliatory measures that included the destruction of Chinese territorial markers and arrest of Chinese fishermen in March 1995.²³ The Philippines also announced a defence modernization programme. China and the Philippines eventually signed in August 1995 a bilateral agreement that rejected the use of force and called for the peaceful resolution of their bilateral disputes in accordance with the principles of the 1982 Convention on the Law of the Sea.

Since the Mischief Reef incident, it looks like that China has considered a "status quo" and moved on to respect international norms and standards rather than undermining the international order. One scholar stated that "Beijing's diplomacy has been remarkably adept and nuanced, earning praise around the region".²⁴

This has been proved by its actions in the South China Sea as well as its attempt to expand the presence in the Mischief Reef. Even though it expanded its military bases on the Reef in November 1998, Beijing's policy towards the South China Sea has recently been developed toward dividing the ASEAN countries. China's willingness to give economic assistance to ASEAN countries can be explained by its attempts to seek other sources of support to compensate for the loss resulting from the Sino-Japanese tensions and the re-establishment of U.S military bases in Southeast Asia after the 1 September 2001 incident.

The use of military force to take control of the reefs has led to friction over the disputed territories. Tension has surged between the Philippines and Malaysia, Malaysia and Vietnam, and Vietnam and the Philippines. In March 1999, Malaysia's seizure of Navigator Reef, claimed by the Philippines. The incident strained Manila's relations with other claimants and was condemned by Vietnam, Brunei and China. In August 2002, Vietnamese troops based on one islet fired warning shots at Philippine

²³ Daniel Dzurek, *The Spratly Islands Dispute: Who's on first?*, International Boundary Research Unit, Maritime Brief, Volume 2, Number 1, p. 39

²⁴ D. Shambaugh, *China engages Asia: Reshaping the regional order*, International Security, Vol. 29, No. 3, Winter 2004/05, p. 64.

military planes flying overhead.²⁵ Additionally, some claimants have also used non-military means to advance their interests. In May 2004, Vietnam started re-building a runway on the disputed island of Truong Sa Lon (Big Spratly) with the purpose of sending of Vietnamese tourists to the South China Sea. China condemned the Vietnamese actions and claimed that Vietnam must abide by the Declaration on the Conduct of Parties in the South China Sea.

Most of the reefs in the Spratly Islands are too small for building military bases and carrying out military activities. At present, China still has not acquired sufficient conditions to control the entire Spratly Islands by military means. However, China naval forces have been modernized and become more powerful than those of any country in the region.

China's power as well as its military operations in the Spratly Islands worry the concerned disputants, especially Vietnam and the Philippines. Vietnam is deeply aware of the antagonism between itself and China from millennium-old history; the conflict in the Spratly Islands is just an extension in a series of events related to the relationship between the two countries.

However, Vietnam does not possess sufficient military strength to oppose Chinese increasing military actions in the South China Sea. To defend itself against the Chinese influential naval power in the South China Sea, Vietnam should seek support from the outside, yet Vietnam still has no military relations with the U.S even though two sides established official relations on 11 July 1995. Furthermore, the U.S. has clearly expressed that it will not involve in the dispute in the South China Sea.

The Mischief Reef incident also showed how disadvantageous the Philippines were when their military forces were not sufficiently strong. In addition, the Philippines were unable to involve the United States in the dispute, except for a statement on the freedom of navigation on international sea lanes. Instead, The United States reminded Philippines that their territorial claims were not covered by the Mutual Defence Treaty of 30 August 1951²⁶ between the two sides. The U.S. unwillingness to get involved in the territorial dispute may result from a desire not to further complicate its relations with China. In that context, the Philippines agreed to sign a Visiting Forces Agreement with the United States in February 1998²⁷ to strengthen its deterrence against China.

²⁵ Chin Yoon Chin, Potential for conflict in the Spratly islands, Naval Postgraduate School, Monterey California, 2003, p. 53.

²⁶ Ralf Emmers, The De- Escalation of the Spratly Dispute in Sino – Southeast Asian Relations, S. Rajaratnam School of International Studies, Singapore, 6 June 2007, p. 16

²⁷ Jing-dong Yuan, China-ASEAN relations: Perspectives, Prospects and Implications for U.S. interests, October 2006, <http://www.StrategicStudiesInstitute.army.mil/>, p. 11

Vietnam and the Philippines cannot rely on ASEAN for security. The Association is unable to provide any support in the South China Sea dispute. ASEAN does not have any military agreement and is not able to build military alliance. Therefore, ASEAN members are confronted with a permanent threat. All ASEAN members are concerned about China's increasing influence, but there are so many ties of races, economic and external matters between them. In addition, ASEAN countries feel that they do not benefit from military confrontation with China in the South China Sea. Briefly, ASEAN has no power to deploy military activities because it is neither a defence community nor any of its members wants to form an allignments.²⁸

3. THE IDEA OF A CODE OF CONDUCT IN THE SOUTH CHINA SEA.

The Mischief Reef incident worried ASEAN and required immediate action. The Philippines and Vietnam with weak military capabilities, especially the naval forces, had to find external support. They can not rely on ASEAN as a military block or military alliance, but through ASEAN they could use diplomatic measures in multilateral negotiations to innitiate a Code of Conduct in the South China Sea which helps maintain their position in the South China Sea against a stronger competitor. Prior to the incident in 1995, ASEAN made no public statement regarding any non-member in the issue of South China Sea. ASEAN hoped that China and ASEAN would jointly approve a Code of Conduct in the South China Sea which could restrain China from the use of military strength to resolve this maritime dispute .

A multilateral dialogue to resolve sea disputes between China and ASEAN was firstly established through a workshop called "Managing Potential Conflicts in the South China Sea". This Workshop was conducted in Indonesia with the financial sponsorship of Canada, It focused on confident building among the parties before the dispute being resolved. The Workshop avoided the issue of sovereignty and concentrated on cooperation. The workshops taking place during the 90s always encouraged multilateral dialogues to control conflict as well as promote the use of peaceful measures to resolve conflicts. In January 1990, a small seminar was held in Bali to prepare for a preliminary meeting among the ASEAN members. The next seminar was held in July 1991 in Bandung, including members of ASEAN and China, Taiwan, Vietnam and Laos. In his inaugural speech, Indonesian Foreign Minister, Ali Alatas stated: "Our attention and efforts have been and should continue to be directed towards to transform potential sources of conflic into constructive forms of co-oporation for mutual benefit".²⁹ However, the seminar ended with no result as expected.

²⁸ M. Leifer, ASEAN as a model of a security community, in H. Soesastro (ed) ASEAN in a Changed Regional and International Political Economy, Jakarta: Center for Strategic and International Studies, 1995, p. 141.

²⁹ Ali Alatas, Address Opening the Second Workshop on "Managing Potential Conflicts in the South China Sea", Bandung, Indonesia, 15 July 1991.

In July 1992, ASEAN Foreign ministers signed the ASEAN Declaration of Conduct in the South China Sea in Manila - Philippines in line with the idea of the Bandung seminar earlier. The Manila Declaration publicly stated ASEAN position for the first time, however, it did not deal with the problem of sovereign jurisdiction but instead attempted to promulgate an informal code of conduct based on self-restraint, the non-use of force and peaceful resolution of disputes. All these principles were based on the norms and basic principles initially introduced in the ASEAN Treaty of Amity and Cooperation (TAC) in 1976. This was the fore-runner of a Code of Conduct in the South China Sea which was based on the notions of conflict management rather than conflict resolution. Despite overlapping claims, the member states shared an interest in promoting regional stability and avoiding any confrontation with China.

However, the success of the Manila Declaration was belittled by the lack of support by parties directly involved. While Vietnam supported the Declaration, China refused to recognize the Manila Declaration and its principles. Beijing has repeatedly stated its preference for bilateral dialogue rather than multilateral solution for the dispute in the South China Sea. Meanwhile, the U.S does not seem to support the Declaration, retaining a neutral position and avoiding being involved in the dispute.

At the first ASEAN Regional Forum (ARF) meeting in July 1994, China's Foreign Minister Qian Qichen repeated Beijing's peaceful intentions and rejected the use of force as a means to solve the dispute.³⁰ Yet China refused to discuss the question of sovereign jurisdiction in a multilateral forum. By limiting negotiations to bilateral level, China aimed to dominate the discussions. After some difficult negotiations, an idea of a Code of Conduct in the South China Sea was developed. Prior to the second ARF meeting in August 1995, China's Foreign Minister Qian Qichen made some concessions to the ASEAN members. He declared that China was prepared to hold multilateral discussions on the Spratlys, rather than bilateral talks, and to accept the 1982 Convention on the Law of the Sea as a basis for negotiation.³¹ These concessions resulted from a need to accommodate the Southeast Asian countries in light of the Mischief Reef incident, as well as from a deterioration of Chinese relations with the United States and Japan. Yet they did not alter China's territorial objectives in the South China Sea, as Beijing was still unwilling to address the question of sovereign jurisdiction and repeated its territorial claims over nearly the entire area.

At the informal ASEAN Summit of November 1999, the Philippines, supported by Vietnam, proposed a draft of a Code of Conduct. The draft contained provisions based on the ideas of peacefully manage the South China Sea by preventing a deterioration

³⁰ Ralf Emmers, "Maritime Disputes in the South China Sea Strategic and Diplomatic Status Quo", in *Maritime Security in Southeast Asia*, Routledge Security in Asia Series, 2007, pp 49 – 61, cited, p. 55

³¹ S. W. Simon, ASEAN Regional Forum, in W. M Carpenter and D. G. Wiencek (eds) *ASIAN Security Handbook: An Assessment of Political – Security Issues in the Asia – Pacific Region*, New York: Me Sharpe, 1996, p. 47.

of the situation. In particular, it aimed at preventing an additional occupation by the claimants of disputed but still unoccupied features. The initiative seemed more feasible than the 1992 Manila Declaration. It tried to move beyond simple assertion of standard principles and proposed joint development of the Spratly Islands. The Philippine's draft was rejected by both China and Malaysia.³² Malaysia had until the 1990s been critical of China's actions in the Spratly Islands but its diplomatic stand on the South China Sea gradually changed over subsequent years and came closer to the Chinese position. Malaysia refused to address the question of sovereignty. It favoured bilateral negotiations with China and preferred to avoid a binding regional code of conduct or external mediation. At the ASEAN Summit in 1999, the Chairman declared that the Heads of State and Government "noted the report of the Ministers that ASEAN now has a draft regional code of conduct, and further consultations will be made on the draft with a view of advancing the process on the adoption of the code".³³

Malaysia proposed a declaration on the Spratly Islands at the ASEAN Ministerial Meeting (AMM) in Brunei in July 2002. However, this non-binding document even failed to mention the Spratlys by a name in English. It was also unclear whether the document would be referred to as a code of conduct or as a declaration. Most member countries refused to support the Malaysian proposal. Vietnam and the Philippines, for instance, insisted on the adoption of a binding document for the South China Sea.³⁴ Unable to reach consensus, the Foreign Ministers announced in a joint communiqué their decision to work closely with China towards a Declaration on the Conduct of Parties in the South China Sea. ASEAN Foreign Ministers and China's Vice Foreign Minister Wang Yi finally signed a Declaration on the Conduct of Parties in the South China Sea on the sidelines of the ASEAN Summit in Phnom Penh, Cambodia in November 2002. The agreement was intended to prevent further tensions over the disputed territories and to reduce the risks of military conflict in the South China Sea. The parties committed their adherence to the principles of the UN Charter, UNCLOS, the ASEAN Treaty of Amity and Cooperation 1976 (TAC) and the Five Principles of Peaceful Coexistence, and reaffirmed their respect for and commitment to 'the freedom of navigation in and over flight above the South China Sea'.³⁵ They agreed to resolve territorial disputes by peaceful means, 'without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law'.³⁶ The parties

³² Wu Shicun, Ren Huaifeng, More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea, *Chinese Journal of International Law*, 2003, 311.

³³ Chairman's Press Statement, Third Informal Summit of the ASEAN Heads of State Government, Manila, Philippines, 28 November, 1999

³⁴ Joint Communiqué of the 35th ASEAN Ministerial Meeting, Bandar Seri Begawan, Brunei, 29 – 30 July, 2002.

³⁵ Declaration on the Conduct of Parties in the South China Sea. Phnom Penh, Cambodia, 4 November 2002.

³⁶ Declaration on the Conduct of Parties in the South China Sea. Phnom Penh, Cambodia, 4 November 2002.

also pledged to practice self-restraint in activities that could spark disputes and to enhance their efforts to “build trust and confidence between and among them”.³⁷

In summary, the signing of the Declaration on the Conduct of Parties in the South China Sea 2002 was the first step toward setting a foundation for easing tensions over the disputed territories in the Spratly Islands. The diplomatic process was hastened after China had landed troops in the Mischief Reef. The DOC showed a desire by the parties to pursue their claims by peaceful means. It openly denounced the use of force in the South China Sea and sent a message that the parties would be willing to work together for a joint agreement. In that sense, it contributed to ease tensions among the claimants. The DOC is essentially a part of ASEAN’s search “for explicit confirmation that China’s presence in the South China Sea will not jeopardize peaceful coexistence”.³⁸ This showed that though highlighting the significance of a multilateral commitment which paved the way for co-operation in the disputed territories, the Declaration was not considered as an important step toward controlling conflicts and providing solutions. The Declaration did not help preventing territorial clashes or other possible conflicts such as the arrest of fishermen by foreign navies and the building of military forces on reefs. Tonnesson pointed out that “the Declaration does not establish a legally binding code of conduct: it is simply a political statement”.³⁹

The failure to develop a code of conduct should be blamed on all claimants. China did not want to be bound by a multilateral code in the South China Sea. Moreover, the code would limit the sovereignty over the Spratlys to dialogue rather than sovereign jurisdiction. Nevertheless, the absence of consensus and solidarity among the ASEAN member countries should be noted, particularly between Malaysia on the one hand, and the Philippines and Vietnam on the other. The ASEAN claimants were also unwilling to shelve their territorial claims and moved together to resolve the problem of sovereign jurisdiction. Finally, cooperation in the South China Sea was affected by mistrust existing even among the ASEAN claimants. Differences among ASEAN countries made it difficult to develop a Code of Conduct in the South China Sea.⁴⁰

5. CONCLUSION

The sea disputes in the South China Sea remain a status quo. Diplomatic measures to manage and resolve the disputes have been rather limited. The 1992

³⁷ Declaration on the Conduct of Parties in the South China Sea. Phnom Penh, Cambodia, 4 November 2002.

³⁸ Liselotte Odgaard, “The South China Sea: ASEAN’s Security Concerns about China” in *Security Dialogue*, Vol. 34, No. 1, March 2003, p. 22

³⁹ Stein Tonnesson, “Sino – Vietnamese Rapprochement and the South China Sea Irritant” in *Security Dialogue*, Vol. 34, No. 1, March 2003, pp. 55 – 56.

⁴⁰ At the recent ASEAN Summit in Huahin, Thailand, the ASEAN members, on the basis of consensus, continuing bilateral negotiations with China on the disputed territories showed the above mentioned process.

Declaration on the South China Sea only applies to the ASEAN countries while the Declaration on the Conduct of Parties in the South China Sea 2002 based on a multilateralism aims at resolving the dispute by peaceful means. Lacking a resolution mechanism to the disputes, the Declaration is a political agreement. Despite the use of force by China and others to take control of some uninhabited features in the South China Sea, the measures taken remains primarily political rather than military. China has so far managed to divide and maintain military threat against the Southeast Asian countries.⁴¹

In the short and medium term, a major armed conflict leading to the confrontation between China and the ASEAN seems unlikely although risks of military clashes exist. In the longer run, however, the sea disputes could become a major military threat to China, ASEAN countries and other parties concerned if these countries continue the armed race. As oil prices have risen substantially over recent years, the strategic environment in the South China Sea would become complicated and unpredictable. Whether the strategic environment would change for the better or worse depends on the regional and global geo-politics and the status of China-ASEAN relations. There are many reasons for us to be more optimistic when examining the conflicts and measure to resolve them.

It is possible that in a near future, the claimants to the South China Sea would not be able to resolve sovereignty, a complicated and sensitive problem considered sacred and very important. However, we can expect a moderate solution from the parties involved on joint exploration and development in these disputed territories.

⁴¹ Recent incidents in which the Philippines opposed to the General report on the boundary outside the continental shelves from Vietnam and Malaysia on September, 4th 2009, probably illustrated for the Philippines' pressure from China.

FUNCTIONAL COOPERATION AND PAN-BEIBU GULF: POTENTIAL FOR PEACE IN THE SOUTH CHINA SEA

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In the past decade or so, China-ASEAN relations have been steadily growing, thanks to both parties' efforts to find areas of converging interests and cooperation and their mutual recognition that conflicts and political alienation would be harmful to regional stability. However, diplomatic tussles over sovereignty and resource claims over the South China Sea have never been totally absent. This is evidenced by the imbroglios among disputant countries over submissions to the United Nations Continental Shelf Commission in the first half of the year.

Given the complexity of the South China Sea issue, it may be unrealistic to hope for a final solution to the dispute any time soon. It is, however, reasonable to expect continued stabilization in the security situation in the area in the near future. I argue in this paper that this sense of cautious optimism is based on three factors or trends that are still taking place in the South China Sea region. First of all, the relations among various claimants have improved significantly over the past decade. The political, economic, and security ties between China and other states involved in the dispute have reached such a positive level that no party would be willing to take actions in the South China Sea to dramatically disrupt the largely tranquil (although still contentious) situation in the area. Second, all parties involved in the contention are more or less developmental states, which means that leaders in these countries, in the foreseeable future, would still adopt a head-in-the-sand approach to focus on their domestic economic growth. A stable and peaceful environment will continue to be the priority for national leaders in the region. And, to facilitate domestic development, cooperation with other parties in the neighbourhood will continue to be essential. Third, we have witnessed quite positive developments in the South China Sea in the past decade or so. It seems that these factors that brought about these positive developments are still functioning.

On the ground of cautious optimism, I argue that there is a good opportunity for parties concerned to consider and push for a functional cooperation approach in the South China Sea. Enhancing functional cooperation in the South China Sea will contribute significantly to the stability in the region and conform to the common interests of all disputant countries in the area. I believe that a few factors are likely to contribute to the emergence of a functional cooperation approach to the dispute. First of all, all other major proposals to the solution of the dispute either failed or have been proven to be not feasible. Second, China-Southeast Asian relations have been significantly enhanced

and continue to move towards the positive direction. Third, non-traditional security cooperation has been identified as one of the priorities in China-ASEAN relations. Fourth, in recent years, China has demonstrated growing activism in regional maritime cooperation. Fifth, the growing China-ASEAN economic integration, such as the Pan-Beibu regional economic zone, and the imperatives in the South China Sea (including environmental protection, biodiversity, marine economy, anti-piracy, safety of the sea lanes of communication, etc) call for joint efforts in pushing for functional cooperation in the South China Sea.

In the rest of the paper, I will briefly discuss the strategic significance of the South China Sea for parties involved, the new Beibu regional economic zone proposal, and China's improving relations with ASEAN countries. We will then examine the recent developments in the South China Sea and put functional cooperation and the Beibu plan in this context for analysis.

THE SIGNIFICANCE OF THE SOUTH CHINA SEA

The South China Sea is the maritime heart of Southeast Asia. Connecting the Malacca Strait to the Southwest and Balintang Channel, Bashi Channel, and Taiwan Strait to the Northeast, it is a strategic navigation corridor between the North Pacific and the Indian Ocean, where one fourth of the global maritime exchanges transit each year. It is also rich in fishing resources and potentially rich in oil and gas.

The South China Sea is strategically significant for all parties involved in the contention: quest for energy resources, fishing and other maritime interests, and overall national security. The South China Sea, often dubbed the "second Persian Gulf," has been regarded as one of the most important strategic oil and gas sources for various contenders. According to one estimate, the energy deposit in the South China Sea is somewhere between 23 billion to 30 billion tons of oil.¹ Another estimate predicts that oil reserve in the Spratlys would be 34.9 billion tons and natural gas about 6 trillion cubic meters.²

In light of this, it is not a surprise that many countries have scrambled to exploit the energy resources in the South China Sea. As a matter of fact, exploitation of oil and gas resources in the South China Sea has been a constant source of irritation in the relationships among these claimant states. Marine economy is also an important factor

¹ Chen Shangjun, "Ruhe renshi haiyang zai guojia nengyuan anquan zhanlue zhong de diwei" (How to understand the role of the sea in China's energy security strategy), *China Oceans Newspaper*, 30 August 2005; Li Zengtang and Tian Yudong, "Er ling yi ling nian qian wo guo haiyang shiyou canliang jiang fan bei" (China's oil production in the sea to double before 2010), *Zhongguo haiyang bao* (China Oceans Newspaper), 23 September 2005.

² Xu Longdi, "Ershiyi shiji diyuan zhengzhi zhong de nansha qundao" (Spratly Islands in the 21st century geopolitics), *Journal of Shanghai Jiaotong University*, No. 5, Vol.13, 2005.

in the considerations of various parties. Fishing industry has been an important part of the economic life of almost all parties adjacent to the SCS. Various states have begun to pay more attention to the sea and marine economic growth.

Another important consideration for all parties is strategic. Each party believes that the SCS is uniquely important to its national security. Having a strong foothold in the SCS would provide a strategic defence hinterland, the security implication of which would be profound, particularly given the fact that the South China Sea has been traditionally a transit area for the navies of major powers. Similar to all other competing states and external powers, the SCS is also important because it contains very important flight routes and sea lanes of communication. Its importance as a transportation outlet is related to the Malacca Strait, which is a crucial channel for the energy security of all parties.

All these considerations give rise to the rigid and non-yielding positions of all parties concerned in the South China Sea disputes and perhaps explain why all the major policy proposals or initiatives have either failed or proven to be unfeasible.

THE SOUTH CHINA SEA CONTENTION

The South China Sea might be one of the most controversial areas on the planet, as six parties (China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei) are involved in disputes over jurisdiction of the territory and maritime space. Attitudes of the other countries involved in the Beibu Gulf Cooperation toward China are quite diverse.³ Cambodia is not involved in any dispute, has only indirect interests in the South China Sea, and cultivates very good bilateral relations with China.⁴ Singapore and Thailand are not involved in any dispute, and both enjoy cautious but friendly relations with China, while being probably the strongest advocates of continued US military presence in Southeast Asia. Indonesia has been neutral in the disputes until China emitted a claim over a gas-rich zone near the Natuna Island. Since 1990, Jakarta has been playing a leading role in trying to manage the potential conflicts in the South China Sea disputes, while remaining suspicious about China's moves toward Southeast Asia in general.⁵ Malaysia too has been very active in the Sino-Southeast Asian informal dialogue on the South China Sea that began in 1990, also favouring a continued US presence, while at the same time trying to engage and accommodate China, especially

³ Liselotte Odgaard, "The South China Sea: ASEAN's Security Concerns About China", *Security Dialogue*, Vol. 34, No. 1, March 2003, pp.11-24; Amitav Acharya, "Seeking Security in the Dragon's Shadow: China and Southeast Asia in the Emerging Asian Order", IDSS Working Paper No 44, March 2003; Ralf Emmers, "Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo", IDSS Working Paper No 87, September 2005.

⁴ Ian Storey, "China's Tightening Relationship with Cambodia", *China Brief*, Jamestown Foundation, Vol.6, Issue 9, 26 April 2006.

⁵ Ian Storey, "Progress and Remaining Obstacles in Sino-Indonesian Relations", *China Brief*, Jamestown Foundation, Vol.5, Issue 18, 16 Aug. 2005.

through bilateral negotiations.⁶ Brunei is involved only in maritime boundary disputes in the South China Sea and occupies no territory. It maintains a low profile position, keeping friendly but limited relations with both China and the US.

Given their past experiences with China in the South China Sea, the Philippines and Vietnam are certainly the ASEAN states most concerned about China's intentions in the region. The Philippines considers China's occupation of the Mischief Reef in 1995 and repeated Chinese incursions into Scarborough Reef since 1997 offensive moves against its national territory. As a result, Manila tries hard to balance the Chinese increased regional power by keeping close ties with the US, and favours a continued US military presence in Southeast Asia. As for Vietnam, it has twice confronted China militarily over islets, in 1974 in the Paracels and in 1988 in the Spratlys, both conflicts resulting in China's victory. Vietnam's relations with the US have been lukewarm at most, and with the fall of the Soviet Union, Hanoi felt more isolated than ever, nurturing fears that China would build a hegemonic rule at its expense. It is also important to note that significant disputes exist among the disputant countries in Southeast Asia, making cooperation among themselves and a united approach to China very difficult.

The Philippines and Vietnam have traditionally been the least keen on negotiating with China about the South China Sea issue. In 1992, Vietnam refused the Chinese proposal to shelve the sovereignty issue and to jointly explore disputed maritime areas, stating that it would never allow Chinese companies to enter areas considered to be under its national jurisdiction. The Philippines too turned down China's offer of joint use of its facilities on Mischief Reef, in 1998.⁷ But both countries' concerns about China have recently been minimized and gave way to what seems to be a more cooperative approach. In 2000, China and Vietnam signed a joint statement showing their willingness to seek a durable solution acceptable to both sides and agreeing to cooperate on issues of maritime environmental protection, meteorology, and disaster prevention. In September 2004, the Philippines agreed with China, and then with Vietnam in March 2005, to jointly explore ocean territory around the Spratly Islands in connection with a Joint Marine Seismic Undertaking (JMSU). The tripartite agreement calls for joint seismic research but also for exploration into oil and gas deposits in the area which would be undertaken by the state-owned oil companies, the Philippine National Oil Company (PNOC), the China National Offshore Oil Corp. (CNOOC), and the Vietnam Oil and Gas Corp. (PETROVIETNAM).

⁶ Ian Storey, "Malaysia's Hedging Strategy With China", China Brief, Jamestown Foundation, Vol.7, Issue 14, 11 July 2007.

⁷ Liselotte Odgaard, "The South China Sea: ASEAN's Security Concerns About China", Security Dialogue, Vol. 34, No. 1, March 2003, pp.11-24.

CHINA'S NEW APPROACH TOWARD THE SOUTH CHINA SEA DISPUTE

China is understandably the most important player in the South China Sea dispute. Throughout the 1990s, China has made a great effort to normalize its relations with the Southeast Asian states. Departing from its initial approach that favoured bilateral relations, China got more involved in multilateral and regional institutions⁸, especially in frameworks that allowed Beijing to enhance its dialogue with ASEAN. When President Jiang Zemin and all the ASEAN leaders organised the first ASEAN+1 Summit in December 1997, they issued a joint statement of establishing partnership of good neighbourliness and mutual trust oriented towards the twenty-first century, thus mapping the development of their future relations. As a consequence, economic and political relations between China and the ASEAN countries developed rapidly.⁹ But security relations were tarnished by territorial disputes in the South China Sea, especially with the Philippines over the Mischief Reef and Scarborough Shoal, and with Vietnam over their sea and land borders. At the turn of the century, however, the tensions began to reduce, thanks to a series of agreements: China and Vietnam signed a Treaty on the Land Border in December 1999, followed by an agreement demarcating maritime territory in the Gulf of Tonkin in 2000,¹⁰ and in November 2002, China and ASEAN signed the Declaration on the Conduct of Parties in the South China Sea. Meanwhile, at the ASEAN-China summit in November 2001, ASEAN leaders accepted China's proposal to create a China-ASEAN Free Trade Area (CAFTA) that would include China, Brunei, Malaysia, Indonesia, the Philippines, Singapore and Thailand by the year 2010, followed by Cambodia, Laos, Myanmar and Vietnam by the year 2015.¹¹

Generally speaking, China's new approach to the South China Sea reflects its flexibility in seeking some balance in pursuing sovereign, economic, and strategic interests. Given the political, economic, and strategic importance of the SCS for China, many people in China may have wished to use assertive means to push for China's interests in the area. However, in the past decade, there has been no major

⁸ Christopher R. Hughes, "Nationalism and multilateralism in Chinese foreign policy: implications for Southeast Asia," *The Pacific Review*, Vol. 18, No.1, 2005, pp. 119-135, Ronald C. Keith, "China as a Rising World Power and its Response to 'Globalization'," *The Review of International Affairs*, Vol. 3, No. 4, 2004, pp. 507-523.

⁹ Saw Swee-Hock, Sheng Lijun, Chin Kin-Wah, Eds., *ASEAN-China Relations, Realities and Prospects*, ISEAS, Singapore, 2005.

¹⁰ Zou Keyuan, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin", *Ocean Development and International Law*, No.36, 2005, pp.13-24.

¹¹ Sheng Lijun, "China-ASEAN Free Trade Area, Origins, Developments and Strategic Motivations", ISEAS Working Paper, International Politics and Security Issues Series No.1, ISEAS, Singapore, 2003, Ian Storey, "China-ASEAN Summit: Beijing Charm Offensive Continues", *China Brief*, Jamestown Foundation, Vol.6, Issue 23, 22 Nov. 2006.

military conflict between China and other disputants over the SCS.¹² Prediction that in the aftermath of the Asian financial crisis in 1997, ASEAN states would be unable to pressurize China into accepting multilateral negotiations turned out to be incorrect.¹³ China, on one hand, held a strong position on its claim of sovereignty at all diplomatic occasions, took peace-meal actions to consolidate its presence in the SCS, and responded with stern warnings when other disputants acted against Chinese interests. But on the other hand, Beijing felt that it had to address other more important goals in its foreign policy towards Southeast Asia, entailing quite a few significant changes in the Chinese actual behaviour.

For instance, it has changed its previous adamant insistence on bilateral talks to now gradually accepting multilateralism as an approach. It has signed the Declaration on the Conduct of Parties in the SCS (DOC), which is not a treaty in the legal sense but does serve as a moral restraint on the parties concerned. This demonstrated to some extent China's acceptance of norms to regulate issues concerning the SCS, no matter how primitive and informal the norms are. Together with the traditional "joint exploitation" proposal, the DOC indicated further compromise of the Chinese sovereignty claim. Also, by joining the TAC, China has legally committed itself not to use force against members of the ASEAN. Another change in Chinese policy is Beijing's increasing intensity of pushing for concrete programs of joint development, whereas in the past Beijing has been criticized of advocating "shelving disputes, joint development" without any practical proposals.

Why China would adopt these relatively more moderate policies? It is an important question, not only to understand the history in the past decade, but also to have some clue for future development. One factor that most observers can agree upon is insufficient capability of the PLA Navy,¹⁴ but this factor alone does not give us a satisfactory explanation: after all, China did take forceful actions in 1974, 1988, and 1995 when its navy was even far inferior. In reality, three major factors concurrently played a crucial role in shaping China's new approach: the need of a peaceful neighbourhood for domestic economic development, the importance of ASEAN, and the strategic pressures from other external powers.

On top of these concerns, Beijing seems keener than ever to appear as a responsible major power, in order to water down the "China threat theory" and ready to favour dialogue, confidence building measures, and cooperative relations instead

¹² The territorial dispute in the SCS is often cited as one evidence to support the dooms-day scenario of security in East Asia; see for example: Aaron L. Friedberg, "Ripe for Rivalry: Prospects for Peace in a Multipolar Asia," *International Security*, Vol.18, No.3, Winter 1993-1994, pp.5-33.

¹³ For such prediction, see Allan Collins, *The Security Dilemmas of Southeast Asia*, Macmillan Basingstoke, 2000, p.169.

¹⁴ Felix K.Chang, "Beijing's reach in the South China Sea," *Orbis*, Vol. 40, Issue 3, Summer 1996; Ralf Emmers, "The De-escalation of the Spratly Dispute in Sino-Southeast Asian Relations," *RSIS Working Paper*, No.129, 6 June 2007.

of aggressiveness and sabre-rattling, which could prove more damaging for its own interests. This new approach does not mean that China and the other claimant states can easily overcome their historical quarrels, but it means that China is willing to pay more attention to the political interests and long-term strategic interests in Southeast Asia, and to work out a win-win solution. Chinese analysts believe that solving the SCS dispute within the framework of a strategic partnership is beneficial to China's core interests, including Chinese efforts to prevent Taiwan independence.¹⁵

As the popular saying goes, it takes two to tangle. Without the positive response and reciprocity from other claimant states, the South China Sea would not have seen the current stable situation. Similar to the Chinese concerns, other regional states were also willing to adopt a more conciliatory stance because all of them needed a peaceful and stable external environment for their domestic economic programs. Many of them realized that confronting China in the South China Sea would be detrimental to a stable China-ASEAN relationship. Other external powers, such as the United States and Japan, also would not favour conflicts in the South China Sea for fear of disrupting the maritime transportation and regional peace.

CHINA'S GROWING ACTIVISM IN MARITIME COOPERATION IN EAST ASIA¹⁶

In the past decade or so, China has exhibited growing activism in maritime affairs in East Asia. This is first and foremost demonstrated by the notable progress that the PLA has made in engaging the militaries of many other countries. This growing military openness and international communications, especially between the PLA Navy and the naval forces of other countries, have had a positive impact on China's maritime cooperation.

China has made notable progress in participating in joint search and rescue exercises on the seas with a wide range of countries in recent years. China and India held their first naval joint search and rescue operation in 2003 in East China Sea. The military exchanges between the two powers have been gradually increasing ever since, leading to the second joint search and rescue exercise in the Indian Ocean in December 2005.¹⁷ In July 2005, China, South Korea, and Japan held a joint search and rescue exercise in China's offshore area. In September and November 2006, Chinese and American navies conducted two search and rescue exercise in the U.S. West coast and in the South China Sea respectively.¹⁸ This was the result of 8 years of maritime security

¹⁵ Tian Xinjian and Yang Qing, *Zhongguo haiyang bao* (China ocean newspaper), 14 June 2005.

¹⁶ This section is taken from author's own publication; see Mingjiang Li, "China's Gulf of Aden Expedition and Maritime Cooperation in East Asia," *China Brief*, Volume IX, Issue 1, January 12, 2009.

¹⁷ Han Xudong, "Zhong yin junshi guanxi 'san bu qu'" [Sino-Indian military relations: three phases], *Liao wang xinwen zhoukan* [outlook news weekly], issue 19, May 10, 2004.

¹⁸ Luo Yuan, "Zhong mei junshi guanxi feng xiang he fang" [where is the Sino-US military relationship headed], *heping yu fazhan* [peace and development], issue 2, 2008, pp. 9-14.

consultations between the two countries and a major breakthrough in the past 20 years.¹⁹ China participated in the first ARF maritime-security shore exercise hosted by Singapore in January 2007. In March 2007, two Chinese missile frigates, together with the naval forces from Bangladesh, France, Italy, Malaysia, Pakistan, Turkey, the United Kingdom and the United States participated in the four-day sea phase of “Peace-07” exercises in the Arabian Sea. In May 2007, a PLAN missile frigate took part in the Western Pacific Naval Symposium (WPNS) exercise that also involves Australia and the United States. Although China joined this forum over twenty years ago as one of its founding members, this was the first time it got involved in a live exercise.²⁰ Joint search and rescue operations were also conducted with Australia and New Zealand in October 2007.

These joint search and rescue operations offered experience to the PLAN, and gradually changed the Chinese military decision makers’ mindset that contributed to the political and military confidence shown in the decision of the Gulf of Aden mission. Moreover, the naval exchanges with external powers and regional states have been quite significant in facilitating China’s participation in various programs of maritime cooperation in East Asia.

China is no longer an outsider in East Asian maritime cooperation, particularly in some of the concrete projects, such as joint oceanic research, environmental protection, and many sea-based non-traditional security issues. In Northeast Asia, China helped North Korea train personnel and provided various equipments to North Korea. The two countries also engaged in a few research projects in the Yellow Sea.²¹ China and South Korea signed a MOU on joint oceanic research in 1994 and set up a joint research centre on marine science the next year. The two sides have been collaborating quite closely on a wide range of issues ever since, e.g. management of offshore areas, marine environmental protection, and information exchange. China and Japan, in the past years, also cooperated in studies of oceanic currents. Japan provided equipment and trained Chinese personnel.²² At the trilateral level among China, Japan, and South Korea, starting from 1999, the three countries launched a ministerial level meeting on environment and various concrete proposals on sandstorms and marine environmental protection have been carried out. In 2004, the authorities monitoring earthquake in the three countries agreed to share seismic information and technology. The immigration authorities of the three countries have also held workshops on countering terrorism, drug trafficking, and human trafficking in Northeast Asia.

¹⁹ Ren Xiangqun, “Zhong mei junshi jiaoliu zou xiang wushi” [Sino-US military exchanges move towards pragmatism], *Liaowang xinwen zhoukan* [outlook news weekly], November 27, 2006.

²⁰ Eric McVadon, “China and the United States on the High Seas,” *China Security*, Vol. 3 No. 4 Autumn 2007, pp. 3 – 28.

²¹ Xu Heyun, “Wo guo yu dongya guojia de haiyang hezuo buduan jiaqiang” [China strengthens maritime cooperation with East Asian countries], *zhongguo haiyang bao* [China ocean newspaper], December 12, 2006.

²² *Ibid.*

In Southeast Asia, China has agreed to various legal frameworks that would facilitate closer maritime cooperation with its neighboring states in the region, either bilaterally or multilaterally. These documents include the 2000 China-ASEAN action plan on countering drug trafficking, the 2002 China-ASEAN joint declaration on cooperation in non-traditional security issues, and the 2004 China-ASEAN MOU on non-traditional security cooperation. Bilaterally, China has attempted to strengthen maritime cooperation with Vietnam, Thailand, Malaysia, the Philippines, and Indonesia. With Vietnam, discussion and cooperation were conducted through the joint marine experts group. Major areas of cooperation included forecast of waves in the South China Sea, offshore environmental protection, exchange of information, and coastal area management capacity building. China and Thailand are negotiating a formal agreement to further institutionalize and deepen their cooperation in maritime affairs.²³ During a visit to Southeast Asia by the former director of China's State Oceanic Administration Wang Shuguang in 2004, China and reached agreements with Malaysia, the Philippines, and Indonesia on cooperation in a variety of maritime issues (e.g. marine environmental protection, oceanic resources management, and oceanic science and surveys). Various concrete projects have been or are being carried out. During Wang's visit, he even proposed that maritime ministers of countries surrounding the South China Sea meet regularly.²⁴ China claims that it intends to further engage ASEAN countries in disaster reduction and relief, seminars on oceanic studies, and eco-monitoring training programs in the South China Sea area.²⁵ All these proposals are essentially areas of functional cooperation.

At the broader international level, China has been participating in the UNEP's Global Meeting of Regional Seas, the Global Program of Action for the Protection of the Marine Environment from Land-based Activities, the East Asian Seas Action Plan, and the Northwest Pacific Action Plan. In the Northwest Pacific Action Plan, for instance, in December 2007, China joined the relief work of an oil spilling incident off South Korea coastal area under the emergency response mechanism of the plan and, in September 2008, China and South Korea held a joint emergency exercise in dealing with search and rescue and oil spilling in the sea.²⁶ China joined the North Pacific Coast Guard Forum (NPCGF) in 2004, four years after its inception. The forum attempts to provide a platform for international coast guard leaders to interact regularly and also

²³ Qian Xiuli, "Zhong tai tuozhan he jiaqiang haiyang lingyu hezuo" [China and Thailand expand and enhance cooperation in the sea], *zhongguo haiyang bao* [China ocean newspaper], October 7, 2008.

²⁴ Yang Yan, "Zhongguo haiyang daibiaotuan fangwen dongnanya san guo" [Chinese marine delegation visits three Southeast Asian countries], *zhongguo haiyang bao* [China ocean newspaper], December 24, 2004.

²⁵ Xu Heyun, "Wo guo yu dongya guojia de haiyang hezuo buduan jiaqiang" [China continues to strengthen maritime cooperation with East Asian countries], *Zhongguo haiyang bao* [China ocean newspaper], December 12, 2006.5.

²⁶ Zhou Yongfeng, "Jiaqiang guoji hezuo, baohu haiyang huanjing" [enhancing international cooperation, protecting marine environment], *zhongguo shui yun bao* [China water transport newspaper], September 3, 2008.

initiated at-sea combined exercises that began in 2005. China now actively participates in its six areas of cooperation: anti-drug trafficking, joint actions, counter-illegal immigration, maritime security, information exchange, and law enforcement on the sea. In 2006, China even hosted the seventh experts' meeting of the NPCGF.²⁷ China's participation in the NPCGF is particularly significant since it provides a valuable forum for China and the US to communicate and exchange views on various maritime issues.²⁸ Two Chinese ports-Shanghai and Shenzhen-are now officially part of the US Container Security Initiative (CSI).²⁹

All these new policy moves and behaviors reflect a slightly changed mindset among Chinese decision makers. Some Chinese analysts believe that cooperation with other militaries, including the U.S. military, on various non-traditional security issues is an inevitable trend as China further integrates itself into the international society. Military exchanges with other countries are also important as the Chinese military may have to be more frequently involved in protecting China's overseas interests and evacuating Chinese nationals in emergent foreign conflict areas. Exchanges with foreign militaries, especially the US military now would lay a good foundation for cooperation and avoidance of misunderstanding when such cases arise.³⁰ These are evidence that China is prepared to engage other disputant countries in the South China Sea to formally launch functional cooperation in the South China Sea.

THE PAN-BEIBU GULF PROPOSAL: POTENTIAL TO STABILISE THE SOUTH CHINA SEA

The origin of the Pan-Beibu Gulf proposal is the China-ASEAN Free Trade Agreement (CAFTA) framework in which Guangxi, together with Vietnam, proposed a Beibu Gulf regional economic cooperation zone. Apart from Vietnam, this scheme would include China's Guangxi, Guangdong, and Hainan provinces. Starting from early 2006, Guangxi began to push for a wider Pan-Beibu Gulf economic cooperation scheme to also include Hong Kong, Macao, Vietnam, Thailand, Cambodia, Malaysia, Singapore, Indonesia, the Philippines, and Brunei. The expansion of the original sub-regional economic zone is an effort on the part of Guangxi to construct its coastal area as a new economic growth centre in China.

Guangxi proposed that the Beibu Gulf scheme be part of what is called a physically M-shaped structure in China-ASEAN cooperation: the Greater Mekong Sub-region

²⁷ Xu Wenjun, "Jiaqiang haiyang zhifa guoji hezuo" [enhancing cooperation in maritime law enforcement], *renmin gong'an bao* [people's public security newspaper], March 31, 2006.

²⁸ Eric McVadon, "China and the United States on the High Seas," *China Security*, Vol. 3 No. 4 Autumn 2007, pp. 3 – 28.

²⁹ See Xinhua report, http://news.xinhuanet.com/newscenter/2005-06/24/content_3132408.htm, accessed January 6th, 2008.

³⁰ Ren Xiangqun, "Zhong mei junshi jiaoliu zou xiang wushi" [Sino-U.S. military exchanges move towards pragmatism], *Liaowang xinwen zhouban* [outlook news weekly], November 27, 2006.

(GMS); the Nanning to Singapore corridor (Mainland economic cooperation); and the Pan-Beibu Gulf zone (Maritime economic cooperation). Guangxi does not have advantages in the GMS, but the Pan-Beibu Gulf zone and the M-shaped strategy will allow it to play a leading role in China-ASEAN economic cooperation.

The initiative has been approved by the central government in Beijing. China's State Development and Reform Commission issued a formal planning document recently on the proposal. The regional economic zone has received strong support from top Chinese leaders. The Chinese government has also started campaigning the proposal at the international level. Premier Wen Jiabao, for instance, gave encouraging comments on the proposal both at the memorial summit of China-ASEAN summit in November 2006 and at the tenth China-ASEAN summit in January 2007. Both the local government in Guangxi and the central government in Beijing are expected to further promote the Beibu Gulf proposal in the framework of ASEAN + China.

There are a few reasons why leaders in Beijing think favourably of this initiative. It is perceived as useful in rapidly developing the economy in Guangxi, still a relatively poor province, and the economic development in China's vast under-developed mid-western regions. Also, it is believed to contribute positively to the China-ASEAN FTA because those Southeast Asian countries involved in the cooperation are relatively developed.

The main overall objective is to take advantage of the geographical situation of the Beibu Gulf in order to create a regional hub and transform the area into a dynamic economic pole. Nine key-sectors of development have been identified, ranging from transports, trade, investments, energy, tourism, agriculture and fisheries, services and environment. First among them, the construction of a "tri-dimensional" (sea, air, land) transport network is seen as essential to allow the trade exchanges and human flows. If fully implemented, the Pan Beibu Gulf Economic Cooperation project will lead to a deep economic integration between the nine coastal states and five Chinese territories involved, putting the South China Sea in the position of an "internal lake" in the middle of the M-shaped regional economic cooperation scheme.

Indeed, in the proposed Chinese plan, there are a few functional areas that directly deal with the South China Sea. The proposed short-term objectives (5 years) include the building of a "tri-dimensional hub" (sea, land, air) between China and ASEAN countries, the creation of a platform for information sharing and the implementation of a highly informatized network for ports management, the development of major coastal cities into dynamic economic growth poles, the promotion of marine-based tourism, the protection and sustainable development of the fishing resources and of their biological environment.

The first key sector that needs to be developed has been identified as the transports,

especially the ports. The project calls for an increased cooperation in cargo, containers and people transport, the opening of new tourist maritime routes, the protection of the marine environment, the establishment of a “Pan Beibu International Port Shipping Group”, the implementation of a negotiation and cooperation mechanism for maritime and port affairs, and the coordination of regional efforts in marine salvage.³¹

Substantive cooperation in any of these functional areas (which, intentionally or not, do not include the contentious issue of joint exploitation of oil and gas) would mean a major breakthrough in the South China Sea dispute. Chinese analysts and top leaders have commented that the emergence of the Pan-Beibu Gulf Zone will help initiate China-ASEAN dialogue and cooperation in maritime affairs. It will also serve as a platform for communication and coordination among various parties on the SCS and it will give the member states more motivation to act responsibly when facing crucial issues such as the protection of the environment and the sustainable development of the coastal and maritime zones. At this point, it looks like a way to a peaceful and pragmatic response, if not yet a complete resolution, to the conflicts in the SCS. The Pan-Beibu Gulf regional cooperation, now strongly pushed by China, is likely to give further impetus for Beijing to engage other claimant states on the SCS dispute. If the relevant ASEAN countries eventually agree to join hands in the new sub-regional cooperation scheme, the time will soon come when all parties in the SCS dispute earnestly tackle this maritime issue. They will find it helpful to revisit many of those policy recommendations that were proposed at the Indonesia-initiated workshops in the 1990s and various joint development schemes or schemes of sharing resources that had been suggested by the scholarly community.

Many experts have already shown how much the SCS is under serious stress and how the disputes over sovereignty have so far inhibited a coordinated plan to tackle the significant issue of environmental degradation.³² The United Nations Environment Program funded by the Global Environment Facility (UNEP/GEF) project entitled “Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand” and the South China Sea Workshops are tentative coordinated responses to this issue.³³ However, the Pan Beibu Gulf Cooperation presents a more comprehensive approach that would encompass the two sides of a same coin, namely sustainable economic development together with the preservation of biodiversity and marine

³¹ Gu Xiaosong, *Fan Beibuwan fazhan hezuo baogao* (Report on the Pan Beibu development and cooperation), June 2007.

³² See the publications of the project entitled “Maritime Conflict in Asia”, International Peace Research Institute of Oslo (PRIO), led by Stein Tonnesson, <http://www.prio.no/research/asiasecurity>

³³ See the UNEP/GEF website <http://www.unepscs.org> ; David Rosenberg, “Environmental pollution around the South China Sea: Developing a Regional Response to a Regional Problem”, Resource Management in Asia-Pacific Working Paper No.20, Australian National University, Feb. 1999 ; Tom Naess, “Environmental cooperation around the South China Sea: the experience of the South China Sea Workshops and the United Nations Environment Programme’s Strategic Action Programme”, *The Pacific Review*, Vol.14, No. 4, 1 December 2001 , pp. 553-573.

environment.

Various institutional arrangements have already been created in order to address maritime and ocean issues in the region. Most countries have a Ministry of Environment. Indonesia created a Ministry of Marine Affairs and Fisheries in 2001, Thailand and Vietnam have a Ministry of Natural Resources, China established a State Oceanic Administration, Singapore's management of coastal and marine waters are under the responsibility of the Maritime Port Authority. Most of these institutions work in parallel on the same issues, without any collaborative planning or connections with each other. The Pan Beibu Gulf Cooperation might be able to provide those institutions with a way to combine and harmonize their efforts, thus reducing costs and allowing for more knowledge and information sharing that will ultimately be beneficial for the entire community. The same can be achieved with a wider synergy between the regional marine affairs institutes which address such issues as pollution, marine piracy and boundaries (China Institute for Marine Affairs, Indonesian Center for the Law of the Sea, Maritime Institute of Malaysia, Philippine Center for Marine Affairs, Thailand Institute of Scientific and Technological Research, Vietnam Continental Shelf Committee, to name a few).

If the proposals concerning the development of a tri-dimensional transport hub are to be realized, this will mean that a greater coordination of efforts will be needed and supervisory mechanisms will have to be put in place. Standardized procedures, mutual consultations, sets of rules to govern the air and ocean spaces will also be needed, which at the end of the day will tremendously reduce the risks of encroachments in the sky and at sea. Moreover, in order to protect the bulk carriers and shipping containers whose increased number will match the development of the inter-regional commercial exchanges, joint patrols for anti-piracy and joint search and rescue teams will also be required. It will then be necessary to establish cross-jurisdictional arrangements. With time, these necessary arrangements might pave the way for the different claimant states to be less reactive about who owns what, and to look at the SCS more like an internal regional lake source of shared benefits gains rather than a bone of contention among neighbours.

The Pan Beibu Gulf Cooperation project is a great opportunity to enhance the synergistic relationships among regional governments and intergovernmental bodies, and across sectors. Strengthening regional partnership around core projects like the ones proposed by the Pan Beibu Gulf scheme will enable members to implement cost-effective actions that will ultimately lead to alleviate the pressure on the marine environment, to improve the living conditions of the local populations, and to increase the fluidity of regional exchanges. There are lots to be done around the SCS in the areas of ecological preservation, natural resource management, coastal and ocean policies, tourism, trade, shipping and ports. A shared vision of the achievements that can be gained through cooperation will enable the members to concentrate on concrete and

pragmatic measures that have to be taken for the good of the overall community rather than focusing on self-interests. By putting aside the deadlock question of sovereignty rights and working on functional and technical areas, the members of the Pan Beibu Gulf project may well promote a stable and peaceful South China Sea for years to come.

CONCLUSION

Any solution to a prominent international dispute needs the political wisdom and will on the part of state leaders. This is particularly the case with regard to the South China Sea simply because this issue is perhaps more complicated than most other international disputes. Political wisdom and judgment are of course closely related to state leaders' shrewd calculation of national interests as well as responses in their domestic politics.

The road toward peace and cooperation in the SCS may still be long, but the last decade has given reasons to be more optimistic, as the situation has been evolving from confrontation to a more cooperative trend.³⁴ Although the different claimant states are not yet prepared to give up their sovereignty claims, at least they have been able to move beyond the fixation of the sovereignty issue, and they have shown their ability to focus on dialogue and the preservation of regional stability.³⁵ Indeed, the recent developments show that, when provided with grounds for cooperation on non-traditional security issues without focusing on jurisdictional and sovereignty issues, claimant states were able to talk about the dispute in a non-confrontational basis.³⁶ The informal meetings organised since 1990 within the framework of the "Managing Potential Conflicts in the South China Sea" project have successfully been focusing on cooperation in sectors such as marine scientific research, marine environmental protection, safety of navigation and communication, resource assessment and means of development, and legal matters.³⁷

The Chinese proposal of the Beibu economic zone, which extends to neighbouring states surrounding the South China Sea, provides such an opportunity for decision makers

³⁴ "The South China Sea: Towards a Cooperative Management Regime", Conference Report, Maritime Security Programme, RSIS Singapore 16-17 May 2007.

³⁵ Ralf Emmers, "Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo", IDSS Working Paper No 87, September 2005.

³⁶ Ian Townsend-Gault, "The Contribution of the South China Sea Workshops: Importance of a Functional Approach", unpublished paper presented during the RSIS Maritime Security Programme's Conference about "The South China Sea: Towards a Cooperative Management Regime", Singapore 16-17 May 2007.

³⁷ Ian Townsend-Gault, "Legal and Political Perspectives on Sovereignty over the Spratly Islands", Hasjim Djalal, "South China Sea Island Disputes", The Raffles Bulletin of Zoology, Supplement No.8 (The Biodiversity of the South China Sea), 2000, pp.9-21.

in relevant parties to make the political judgement and weigh in their national interests. There are reasons to believe that some cooperative mechanisms among various parties serve the common interests of all. China, the most important player in the South China Sea dispute, has long been proposing “shelving disputes and joint development.” The Pan-Beibu Gulf cooperation proposal, which explicitly mentions areas of international cooperation in the South China Sea, presents an opportunity for various parties to further engage and discuss concrete measures to help maintain long-term peace and stability in the sea. The Pan-Beibu Gulf cooperation proposal, if eventually adopted by China and ASEAN, has the potential to further de-securitise the South China Sea and could lead to breakthroughs in multilateral cooperation in such functional areas as maritime transportation, environmental protection, and joint exploitation of resources. The proposed Pan Beibu Cooperation scheme, if implemented, would constitute a step forward a greater integration and cooperation on non-traditional issues in a more formal framework.

According to the social constructivist theory of international relations, “community enhances security”--the more the idea of community takes hold in Asia, the more stable and secure the region will become.³⁸ The Beibu Gulf economic zone is likely to further push forward a sense of economic community that may well pave the way for the development of a peaceful South China Sea. Also, economic interdependence, now gradually taking shape in this part of the world, is likely to restrain parties involved from adopting assertive moves in the South China Sea. Moreover, the new regional economic cooperation proposal may provide further incentive for the various parties to move beyond the status quo to enhance their engagements in various areas of functional cooperation.

³⁸ Dominique Schirmer, “Communities and Security in Pacific Asia,” in Stephen Hoadley and Jürgen Rüländ, Eds., *Asian Security Reassessed*, ISEAS, Singapore, 2006, p.328, Amitav Acharya, *Constructing a Security Community in Southeast Asia*, ASEAN and the Problem of Regional Order, Routledge, London, 2001.

SUPPRESSING PIRACY IN THE SOUTH CHINA SEA: TOWARDS A NEW COOPERATIVE ESTABLISHMENT

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INTRODUCTION

Piracy remains a persistent problem in the South China Sea. It is known that the sea area with its points in Hong Kong, Luzon Island, and Hainan Island is called “the Hainan Triangle” which was once a pirate resort. Although the international attention is focused on Somali piracy, piratical accidents in the South China Sea did rise in 2009. The report released by the ReCAAP Information Sharing Centre reveals that the piratical accidents in the South China Sea have actually increased in 2009: from three actual incidents in January-September 2008 to 10 during that period in 2009. This increase coincided with a general increase at the global level as the International Chamber of Commerce’s International Maritime Bureau (IMB) said in a release that a total of 306 incidents were reported to the IMB Piracy Reporting Center in the first nine months of 2009 while the total number of attacks for 2008 was only 293. This increase also proves that piracy remains a serious concern in East Asia.

International law has established an obligation on States to cooperate in suppression of piracy and grants States certain rights to seize pirate ships and criminals. According to the 1982 UN Convention on the Law of the Sea (LOS Convention), all the countries have the obligation to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”, and “every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board”.¹

However, the definition on piracy in the LOS Convention only applies to this international crime on the high seas or areas beyond the jurisdiction of any state, thus limiting its application to similar criminal acts in the territorial seas and maritime areas close to the coasts.² Having realized that many piratical incidents did occur in the waters of national jurisdiction, the International Maritime Organization (IMO) developed a functional definition for the crackdown on piracy: while detaining the meaning of

¹ Article 105 of the LOS Convention.

² For the discussion on the definitional deficiencies, see Zou Keyuan “New Developments in the International Law of Piracy”, *Chinese Journal of International Law*, Vol. 8, 2009, 341-344.

the LOS Convention definition on piracy, the IMO definition has been added “armed robbery against ships”, which has become a most popular applicable definition for the purpose of anti-piracy operations. This definition has now been accepted by the United Nations Security Council as well as incorporated into the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). As a result, there are now in fact two definitions in international law: one is contained in the LOS Convention while the other in the ReCAAP. Though both legally defined, their applicability is different: while the former limits its applicability to the high seas, the latter applies to all sea areas whether national or international. However, it is to be noted that in comparison with the LOS Convention, the ReCAAP is only a regional agreement applicable to the Asian region.

RECENT DEVELOPMENTS FOR MARITIME SECURITY IN THE SOUTH CHINA SEA

The South China Sea is defined as a semi-enclosed sea under the LOS Convention and the littoral states are obliged under the Convention to cooperate in matters of their common concern. As we all know, all the coastal States are parties to the LOS Convention (see Table 1) and they have the responsibility to suppress piracy in the South China Sea in compliance with relevant provisions of the Convention.

However, due to the deficiency of the definition on piracy provided in the LOS Convention as well as territorial and maritime disputes among the littoral States, cooperation for the fight against piracy is not effective enough and there is a lack of established mechanism for that purpose. It is necessary, therefore, to seek a new way of cooperation.

Recent developments in the South China Sea have showed that there is a sound basis to formulate an anti-piracy mechanism. In addition to joining the LOS Convention, all the coastal States to the South China Sea are also parties to the ReCAAP.

ReCAAP

The ReCAAP was signed by 16 Asian countries including Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam on 11 November 2004. The Agreement came into force on 4 September 2006 when it received 10 ratifications.³ The Agreement obliges Contracting States (a) to prevent and suppress piracy and armed robbery against ships; (b) to arrest pirates or persons who have committed armed robbery against ships; (c) to seize ships or aircraft used for committing piracy or armed robbery against ships; and (d) to rescue victim ships and victims of piracy or armed robbery

³ It is regretted that two major Straits States Indonesia and Malaysia have not yet ratified the Agreement.

against ships.⁴ The Contracting States pledge to implement the Agreement including preventing and suppressing piracy and armed robbery against ships “to the fullest extent possible” “in accordance with their respective national laws and regulations and subject to their available resources or capabilities” (Article 2.1).

For the above purposes, the Contracting States are required to cooperate between/among themselves. The first area required for cooperation is information sharing. Each Contracting Party designates a focal point responsible for its communication with the Information Sharing Center (ISC), and should “ensure the smooth and effective communication between its designated focal point, and other competent national authorities including rescue coordination centers, as well as relevant non-governmental organizations.” Each Contracting Party should “make every effort to require its ships, ship owners, or ship operators to promptly notify relevant national authorities including focal points, and the Center when appropriate, of incidents of piracy or armed robbery against ships” (Article 9). Contracting Parties are required to give prompt notification of the information about an imminent threat of, or an incident of, piracy or armed robbery against ships and in the event that a Contracting Party receives an alert from the Center as to an imminent threat of piracy or armed robbery against ships, that Contracting Party should promptly disseminate the alert to ships within the area of such an imminent threat (Article 9). The Agreement has created a right of request for all Contracting Parties regarding the information about piracy and armed robbery against ships. The requested Contracting Party has the obligation to implement such request by taking effective and practical measures.

The second area required for cooperation lies in the endeavours to take legal and judicial measures for the prevention and suppression of piracy and armed robbery including extradition and mutual legal assistance. According to the Agreement, a Contracting Party should endeavour to extradite pirates to the other Contracting Party which has jurisdiction over them and to render mutual legal assistance in criminal matters including the submission of evidence related to piracy and armed robbery at the request of another Contracting Party, but all these endeavours are subject to the national laws and regulations of the Contracting Party concerned.⁵

The third area required for cooperation is in the process of capacity building (including technical assistance such as educational and training programs) as the Agreement obliges each Contracting Party to endeavour to cooperate to the fullest possible extent with other Contracting Parties so as to enhance the capacity to prevent and suppress piracy and armed robbery against ships (Article 14.1). Contracting Parties can also make cooperative arrangements such as joint exercises between/among themselves (Article 15).

⁴ Article 3 of the ReCAAP.

⁵ See Articles 12-13 of the ReCAAP.

Another important legal arrangement made by the Agreement is the establishment of the ISC, which is located in Singapore. The Center is composed of the Governing Council (which is the decision-making body composed of one representative from each Contracting Party) and the Secretariat (which is headed by the Executive Director who is responsible for the administrative, operational and financial matters of the Center in accordance with the policies as determined by the Governing Council and the provisions of the Agreement). It is designed “to promote close cooperation among the Contracting Parties in preventing and suppressing piracy and armed robbery against ships” (Article 4.1). The ISC was officially launched in November 2007 and the information about its operations can be found at http://www.recaap.org/index_home.html. The daily operations of the ISC are funded by the Host State as well as voluntary contributions from other Contracting Parties or even other sources as agreed by the Governing Council (Article 6.1). In addition to Singapore, three Contracting Parties –China, Japan and South Korea also provide operational funds for the ISC.

There are several characteristics regarding the ReCAAP. First, though the original negotiators of the Agreement are 16 Asian States, the accession to the Agreement is not exclusive; any State can join after its entry into force as provided for in the Agreement (Article 18.5). Second, the ReCAAP is the first specific international treaty concerning the prevention and suppression of piracy. Because of this, it becomes a model of law for other regional legal arrangements. It is reported that a similar agreement will be concluded for the Western Indian Ocean. Thirdly, the ISC established under the ReCAAP is a governmental international organization, different from other organizations which operate similar functions such as the IMB Piracy Reporting Centre (situated in Kuala Lumpur). Finally, it contributes to the legal definition on the piracy and armed robbery against ships as mentioned above.

The 2002 DOC

Apart from legal instruments which can provide basis for the establishment of a regional anti-piracy mechanism for the South China Sea, some soft-law documents can also play an important role in this respect. In November 2002, ten ASEAN members and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC), which pledges to

(1) “reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations”;

(2) “are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and

mutual respect”;

(3) “reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”;

(4) “undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”;

(5) “undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner”, and “undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including: a. holding dialogues and exchange of views as appropriate between their defense and military officials; b. ensuring just and humane treatment of all persons who are either in danger or in distress; c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and d. exchanging, on a voluntary basis, relevant information”, pending the peaceful settlement of territorial and jurisdictional disputes;

(6) “explore or undertake cooperative activities including a. marine environmental protection; b. marine scientific research; c. safety of navigation and communication at sea; d. search and rescue operation; and e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms”, pending a comprehensive and durable settlement of the disputes;

(7) “stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them”;

(8) “undertake to respect the provisions of this Declaration and take actions consistent therewith”;

(9) “encourage other countries to respect the principles contained in this Declaration”; and

(10) “reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective”.⁶

The document is significant in the sense that the South China Sea issue originally being bilateral has now turned to be a regional issue and should be solved under the framework of the China-ASEAN cooperation. As the Philippine President Arroyo declared, the agreement represented a “diplomatic breakthrough” for peace in the region and the first step in the implementation of the ASEAN Code of Conduct with China.

After the signing of the 2002 Declaration, the ASEAN and China established two mechanisms in 2005 for the purpose of implementing the Declaration: one is the “ASEAN-China Senior Officials Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC)”, and the other “ASEAN-China Joint Working Group on the Implementation of the DOC”. While the first, which is ad hoc, will review the progress of the implementation of the 2002 DOC and discuss principles and methods thereof, the second, which gathers twice a year, will function under the direction of the ASEAN-China Senior Officials Meeting.

The ASEAN-China Senior Officials Meeting which was held in December 2004 adopted the terms of reference of the joint working group (JWG). According to the Terms of Reference, the main task of the JWG is “to study and recommend measures to translate the provisions of the DOC into concrete cooperative activities that will enhance mutual understanding and trust”. The JWG can make recommendations regarding the guidelines and the action plan for the implementation of the 2002 DOC as well as regarding specific cooperative areas such as marine environmental protection, marine scientific research as listed in the 2002 DOC. The JWG Meeting held in Sanya, China in February 2006 exchanged views on guidelines for the implementation of the 2002 DOC, discussed project proposals within the related areas of cooperation and issued the 2006 Working Plan. Unfortunately, there is no further substantial progress afterwards.

Nevertheless, it is to be noted that the DOC clearly states that piracy and armed robbery at sea is one of the areas that the signatories should cooperate to work out a plan of action. It is an imperative task for the signatories to consider how to enhance the effectiveness of the DOC in its implementation. The cooperation in the suppression of piracy no doubt can become a yardstick to test the effectiveness of the DOC implementation.

⁶ Text is available at <http://www.aseansec.org/13163.htm> (accessed 9 June 2008).

China-ASEAN Non-Traditional Security Arrangements

Since the disputes in the South China Sea are mainly between China and some ASEAN countries, China's attitude and policy towards the South China Sea as well as towards the anti-piracy cooperation are very crucial. In the China-ASEAN relations, China carries out the policy to "maintain its own stability and development, uphold peace and security in the neighborhood areas, promote dialogue and cooperation, and foster harmony and common prosperity in the region". China has attended the ASEAN Regional Forum (the ARF) since 1995. China openly supports the positive role played by the ARF in maintaining regional peace and stability, and in exploring and developing dialogue and cooperation in non-traditional security field, including counter-terrorism/piracy. At the ARF SOM held in May 2002, China distributed its Position Paper on Enhanced Cooperation in the Field of Non-Traditional Security Issues. Besides, non-traditional security issues are also discussed at the ASEAN+1 forums and ASEAN plus China meetings.

In November 2002, the Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues (the Joint Declaration) was adopted, which initiated full cooperation between ASEAN and China in the field of non-traditional security issues and listed the priority and form of cooperation. The two sides pledge to formulate measures and modalities to enhance their capacity handling non-traditional security issues so as to safeguard regional peace and security. They agree to cooperate in information exchange, personnel exchange and training, capacity-building, joint research, and other areas. The priorities at the current stage of cooperation include "combating trafficking in illegal drugs, people-smuggling including trafficking in women and children, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crime and cyber crime."

Following the China-ASEAN Declaration, China and ASEAN (under the authorization of the Governments of its member States) signed the Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of the People's Republic of China on Cooperation in the Field of Non-traditional Security Issues (MOU on Non-Traditional Security Issues) in Bangkok on 10 January 2004,⁷ attempting to make the objectives and principles contained in the Declaration implementable. The two sides pledge to develop practical strategies to "enhance the capacity of each individual country and the region as a whole in dealing with such non-traditional security issues", but "in accordance with their national laws and regulations" (Art.1),⁸ and identified the following four areas for their cooperation: (1) information exchange; (2) personal

⁷ Text is available at <http://www.aseansec.org/15647.htm> (accessed 1 May 2008).

⁸ This wording is difficult to be understood in the fact that non-traditional security issues as listed in the MOU are transnational crimes and international law is indispensable for their prevention and punishment. But only national laws are mentioned here.

exchange and training and China should organize relevant workshops and training courses; (3) law enforcement cooperation including such fields as “evidence gathering, tracing of crime proceeds, apprehension and repatriation of criminal fugitives and return of crime proceeds”; and (4) joint research by experts and scholars.⁹ The MOU came into effect on the date of its signing and would remain in force for a period of 5 years. It may be extended subject to the agreement of the two parties. In November 2007, China and ASEAN member States hold a consultative ministerial meeting in Bandar Seri Begawan and agreed to review and revise the MOU in 2009. Since piracy is one of the issues of priority within the non-traditional security field, it can be naturally included in the China-ASEAN cooperative agenda.

Besides, China has signed bilateral agreements on maritime cooperation with some ASEAN countries, for example, with Indonesia (25 April 2005), and with Malaysia (25 August 2006).¹⁰ In terms of extradition and judicial assistance in relation to piracy suppression, China has begun to negotiate with its foreign counterparts bilateral treaties on judicial assistance and/or extradition since 1985 and signed such treaties with other East Asian countries (see Table 2).

MALACCA EXPERIENCES

The Straits of Malacca and Singapore is a most important route of maritime transportation and links the Indian Ocean to the South China Sea. That means vessels passing through this straits must also pass through the South China Sea. A recent comparative analysis shows that more than 50,000 ships transit the Straits of Malacca each year accounting for 40% of the world’s trade while about 21,000 commercial ships transit the Gulf of Aden per year (see Table 3).

Piracy used to be a serious issue threatening safety of navigation in the Straits. The riparian States to the Malacca Straits have contributed significantly to the establishment of an institutional mechanism in the fight against piracy. The tripartite cooperation among Indonesia, Malaysia and Singapore for the maritime security in the Malacca Straits began in the early 2000s. The three countries have been conducting a coordinated anti-piracy patrol off their waters in the Malacca and Singapore Straits. In the end of July 2005, a scheme of maritime air surveillance was discussed, aiming to strengthen the crackdown of piracy in this critical international waterway. In August 2005, the above three countries agreed to implement the scheme of air patrol over the Malacca Straits from September 2005 and also agreed to establish a Tripartite Technical Experts Group on Maritime Security. There are currently three anti-piracy mechanisms in place: Malacca Strait Sea Patrol (MSSP), ‘Eye-in-the-sky’ (EiS), and

⁹ See Article 2 of the MOU on Non-Traditional Security Issues.

¹⁰ See Joshua Ho, “Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism”, *Ocean Development and International Law*, Vol.40, 2009, p.238.

the Intelligence Exchange Group (IEG) (see Table 3).

Individually, among the three nations, Singapore is the most active in maintaining maritime security. Although all three Malacca Straits States are parties to the LOS Convention, only Singapore ratified the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention)¹¹ as well as the ReCAAP. In 2007 the Singapore Government together with the IMO convened the Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection (Singapore Meeting) where the Cooperative Mechanism for the Straits of Malacca and Singapore was created. The Mechanism comprises the Cooperation Forum, the Project Cooperation Committee and the Aids to Navigation Fund. Straits user States, including inter alia, Australia, China, Japan, United Kingdom and the United States, expressed their strong support for this initiative.

Thanks to the efforts particularly made by the littoral States of the Straits, the number of piratical accidents has been significantly reduced (see Table 3).

SUPPRESSION OF SOMALI PIRACY: IMPLICATIONS FOR THE SOUTH CHINA SEA

In recent years, piracy in Western Indian Ocean, especially adjacent to the Somali coast has been soaring (see Table 3). It has become an international concern. In June 2008 the UNSC passed a resolution on combating acts of piracy and armed robbery off Somalia's coast (Resolution 1816). While the Security Council expressed its grave concern about piracy and armed robbery against vessels in the waters off the coast of Somalia, it determined that such piratical incidents exacerbated the situation in Somalia "which continues to constitute a threat to international peace and security in the region". Therefore, the Security Council decided to act under Chapter VII of the Charter of the United Nations. It urges "States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to be vigilant to acts of piracy and armed robbery" and "to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law".¹² More significantly, the Security Council decided that "for a period of six months from the date of this resolution, States cooperating with the TFG¹³ in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may: (a) enter the territorial waters

¹¹ Text is reprinted in 27 ILM 672 (1988).

¹² See UN Doc S/RES/1816 (2008).

¹³ It refers to the Transitional Federal Government of Somalia.

of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery”.

It is the first time that the UN Security Council had placed the issue of sea piracy on its agenda and treated it as a matter threatening international peace and security. According to the UN Charter, UN member States are obliged to implement UNSC resolutions as it is stipulated that UN members agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Furthermore, UN Member States have the duty to contribute to the maintenance of international peace and security by supporting materialistically the actions undertaken by the Security Council, with armed forces, assistance, and facilities, including rights of passage.¹⁴ These provisions in the UN Charter constitute a legal foundation for the UN member States to act in accordance with Resolution 1816.

After the UN Security Council passed several important resolutions concerning the suppression of piracy in Somalia, UN member States individually or collectively sent warships to the Somali waters and the Gulf of Aden in compliance with the UNSC resolutions. The Combined Maritime Forces led by the United States established Combined Task Force 151 (CTF-151) in January 2009 to conduct counter-piracy operations in and around the Gulf of Aden, Arabian Sea, Indian Ocean and the Red Sea. The European Union has launched its naval operations against Somali piracy under the European Security and Defence Policy framework called EU NAVFOR (Operation Atalanta). Several Asian countries have also sent warships to the Somali waters for the purpose of piracy prevention and suppression.

China, for the first time ever, sent warships to the sea areas around Somalia contributing to the international efforts to crackdown on Somali piracy. The Chinese naval fleet consisting of two destroyers and a large supply vessel completed its first escort mission on 6 January 2009 for four Chinese merchant ships. As expressed by the Foreign Ministry spokesman on 20 December 2008, the task of the Chinese navy is to protect Chinese ships and crew on board as well as ships carrying humanitarian relief materials provided by international organizations including the World Food Programme, in strict compliance with the UN Security Council resolutions and international law. According to a circular issued by the Ministry of Transport, Chinese merchant vessels including those from Hong Kong, Macao and Taiwan can apply for naval escort when entering the Gulf of Aden and Somali sea area through the Chinese Association of Shipowners.

¹⁴ See Article 43 of the UN Charter.

The irony is: Asian countries carry out naval operations against piracy as far as in Africa while piracy remains a serious problem in their adjacent seas. People are wondering whether they can use their naval forces to clear up adjacent piracy which is much more threatening to maritime interests of Asian countries. Though in recent years, countries concerned have conducted military drills in the South China Sea for the purpose of maritime search and rescue as well as piracy suppression, it is now the time for the countries adjacent to the South China Sea to consider how to turn such kind of drills into real actions combating piracy.

CONCLUSION

Based on the above explanations, some concluding observations can be made. First, there is no doubt that the legal basis for the formulation of the anti-piracy mechanism has been already provided. The countries concerned can use several existing channels to develop such a mechanism. The meetings for the implementation of the 2002 DOC could be one of these channels. It is expected that the governments concerned can demonstrate their political wisdom by moving a step further to “setting aside disputes for joint maintenance of maritime security” in the South China Sea. In order to remove worries about the impact on sovereignty claims, the governments concerned are expected not to seek unilateral benefits from anti-piracy cooperation. Such cooperation should produce a win-win result. The good experiences accumulated from the Malacca cooperation should be learned.

Secondly, information sharing is particularly important for security cooperation in the disputed sea areas. This can be achieved by establishing a shared database on maritime security in the South China Sea and an information exchange system. The experiences gathered from the ReCAAP Information Sharing Centre established in November 2006 can be borrowed.

Thirdly, with regard to the complex and changing traditional and non-traditional security issues, it is expected that the countries concerned can place security and anti-piracy cooperation in the South China Sea at the top of their agenda so as to build up consensus for the establishment of a multilateral maritime security cooperation framework in the foreseeable future.¹⁵ Such cooperation will be more feasible if a functionalist approach is taken.

¹⁵ See Wu Shicun and Zou Keyuan, “Maritime Security in the South China Sea: Cooperation and Implications”, in Wu Shicun and Zou Keyuan (eds.), *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (Surrey, England: Ashgate, 2009), 11-12.

Ten years ago, I presented a paper to the Piracy Seminar organised by the Singapore International Law Society, in which I called for regional anti-piracy cooperation in the South China Sea.¹⁶ At that time there were no DOC, no ReCAAP, no institutional mechanisms for the Malacca Straits, and no UN resolutions. Now the conditions for cooperation have been much improved and more significantly, the UN Security Council has treated piracy as a threat to international peace and security, thus equivalent to terrorism. It is, therefore, reasonable to perceive that the countries concerned will work out a plan of action to deal with this long-infested crime and make the South China Sea a sea of peace and cooperation.

Table 1: Ratification of International Anti-Piracy Conventions in East Asia

States	The 1982 LOS Convention (d/m/y)	The 1988 SUA Convention (d/m/y)
Brunei Darussalam	05/11/1996	04/12/2003
Cambodia		18/08/2006
China	07/06/1996	01/03/1992
Indonesia	03/02/1986	
Japan	20/06/1996	23/07/1998
Korea (North)		
Korea (South)	29/01/1996	14/05/2003
Laos	05/06/1998	
Malaysia	14/10/1996	
Mongolia	13/08/1996	
Myanmar	21/05/1996	19/09/2003
Philippines	08/05/1984	06/01/2004
Singapore	17/11/1994	03/02/2004
Thailand		
Vietnam	25/07/1994	10/10/2002

Source: compiled by the author

¹⁶ The revised version of the paper is published as Zou Keyuan, “Issues of Public International Law Relating to the Crackdown of Piracy in the South China Sea and Prospects for Regional Cooperation”, *Singapore Journal of International and Comparative Law*, Vol.3 (2), 1999: 524-544.

Table 2: Bilateral Judicial Assistance/Extradition Treaties between China and Other East Asian Countries (as of 31 August 2008)

State	Type of Treaty	Signing	Entry into force (d/m/y)
Cambodia	Extradition	09/02/99	13/12/00
Indonesia	Civil & criminal	24/07/00	28/07/06
Japan	Criminal	01/12/07	29/08/08*
Laos	Civil & criminal	25/01/99	15/12/01
	Extradition	04/02/02	13/08/03
Mongolia	Civil & criminal	31/08/89	29/10/90
	Extradition	19/08/97	10/01/99
North Korea	Civil & criminal	19/11/03	21/01/06
Philippines	Criminal	16/10/00	
	Extradition	30/10/01	12/03/06
Singapore	Civil & commercial	28/04/97	27/06/99
South Korea	Criminal	12/11/98	24/03/00
	Extradition	18/10/00	12/04/02
	Civil & commercial	07/07/03	27/04/05
Thailand	Civil & commercial	16/03/94	06/07/97
	Extradition	26/08/93	07/03/99
	Criminal	21/06/03	20/02/05
Vietnam	Civil & criminal	19/10/98	25/12/99

Source: prepared by the author based on <http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/tfsczkzlk/zgywgsbtyylb/t422584.htm>.

* The date of China's ratification

Table 3: Horn of Africa and the Straits of Malacca: Comparative analysis

Location	Horn of Africa/Gulf of Aden	Straits of Malacca
	<p>Situated in North-East Africa/ West Asia, the Gulf of Aden lies between Yemen and Somalia and connects the Indian Ocean to the Red Sea, the Suez Canal and the Mediterranean Sea. Major littoral states include Somalia, Djibouti, Eritrea, Egypt, Saudi Arabia and Yemen</p> <p>Importance to Maritime Commerce: Approximately 21,000 commercial ships transit the Gulf of Aden each year. Over 10 % of the global waterborne transportation of oil passes through the gulf & about 7 % of the world's maritime commerce transits the Suez Canal. .</p>	<p>Situated in Southeast Asia between Indonesia, Malaysia, and Singapore, the Strait of Malacca links the Indian Ocean to the South China Sea and the Pacific Ocean. Major littoral states include Malaysia, Indonesia and Singapore.</p> <p>Importance to Maritime Commerce: More than 50,000 ships transit the Straits of Malacca each year accounting for 40% of the world's trade.</p>
Number of Pirate Attacks (2003-2008)	<p>Number of attacks (both attempted & hijacked) in the Gulf of Aden, Red Sea and Somalia• January-June 2009: 130 out of 240 worldwide (ww) attacks. • 2008: 111 out of 293 ww attacks. • 2007: 44 out of 263 ww attacks. • 2006: 20 out of 239 ww attacks. • 2005: 45 out of 276 ww attacks. • 2004: 10 out of 329 ww attacks. • 2003: 21 out of 445 ww attacks.</p>	<p>Number of attacks (both attempted & hijacked) Strait of Malacca• January-June 2009: 2 out of 240 worldwide (ww) attacks. • 2008: 2 out of 293 ww attacks. • 2007: 7 out of 263 ww attacks. • 2006: 11 out of 239 ww attacks. • 2005: 12 out of 276 ww attacks. • 2004: 38 out of 329 ww attacks. • 2003: 28 out of 445 ww attacks.</p>
Ongoing Anti-Piracy Operations	<p>Primarily multinational in approach: • US-led, multinational Combined Task Forces, namely CTF 150 & CTF 151; • European Union's 'Operation NAVFOR ATALANTA'; and • NATO's 'Operation Ocean Shield'.</p>	<p>Primarily regional in approach: • Malacca Strait Sea Patrol (MSSP); • 'Eye-in-the-sky' (EiS); & • Intelligence Exchange Group (IEG).</p>

Source: Roderick Chia, Pau Khan Khup Hangzo and Kevin Punzalan, "Maritime Predations in the Malacca Straits: Treading New Waters", NTS Insight, August/1 2009, p.10.

APPENDIX: LIST OF PARTICIPANTS

I. International Participants

TITLE	NAME	POSITION	FROM	ROLE
Prof.	Carlyle A. Thayer	School of Humanities and Social Sciences, The University of New South Wales at the Australian Defense Force Academy	Australia	Presenter
Prof.	Ian Townsend-Gault	Director, Faculty of Law-Centre for Asian Legal Studies University of British Columbia	Canada	Presenter
Prof.	Liu Nanlai	Deputy Director Center for Human Rights Studies, Professor of International Law, Center for International Law Studies, Chinese Academy of Social Sciences	China	Presenter
Prof.	Li Guo-qiang	Center for China's Borderland & Geography Studies, China Academy of Social Sciences	China	Discussant
Prof.	Li Jinming	Institute of International Relations, Xiamen University	China	Presenter
Prof.	Zhang Xuegang	Southeast Asian Studies, China Institutes of Contemporary International Relations, Beijing	China	Discussant
Ms.	Li Jianwei	Deputy Director, National Institute for South China Sea Studies, Hainan	China	Presenter
Prof.	Ji Guoxing	Director, Program for Maritime Security Studies, School of International and Public Affairs, Shanghai Jiaotong University	China	Presenter
Prof.	Yann-huei Song	Institute of European and American Studies	Chinese Taipei	Presenter

General (rtd)	Daniel Schaeffer	International business consultant (Asia)	France	Presenter
Dr.	Ewald Brandt	Chief Senior Prosecutor, Head of Public Prosecutor's Office (Federal Ministry of Germany)	Germany	Presenter
Ms.	Sarah Raine	Research Fellow, The International Institute for Strategic Studies - Asia office	IISS	Discussant
Major General	Dipankar Banerjee	Director and Head, Institute of Peace and Conflict Studies (New Delhi); Member of International Research Committee, Regional Centre for Strategic Studies (Colombo, Srilanka)	India	Discussant
Dr.	Probal K. Ghosh	Senior Fellow - CAPS Co-Chairman CSCAP Study Group on Naval Enhancement in Asia Pacific	India	Discussant
Major General (rtd)	Vinod Saighal	Executive Director Eco Monitors Society	India	Presenter
Prof.	Hajim Djalal	Director Centre for South East Asian Studies	Indonesia	Presenter
Mr.	Budi Suharto	Senior Legal Staff Division of Law, Bureau for Cooperation and Promotion of Science and Technology, Indonesian Institute of Sciences (LIPI)	Indonesia	Participant
Mr.	Agus Sardjana	Head of Centre for Policy Analysis and Development on International Organizations, MOFA - Indonesia	Indonesia	Participant
Mr.	Rieaza Rahadian	Official of the Centre for Policy Analysis and Development on International Organizations, MOFA - Indonesia	Indonesia	Participant

Mrs.	Christine Refina	Official of the Centre for Policy Analysis and Development on International Organizations, MOFA - Indonesia.	Indonesia	Participant
Mr.	Matthias Fueracker	Legal Officer International Tribunal for the Law of the Sea	ITLOS	Presenter
Prof.	Leszek Buszynski	Graduate School of International Relations, International University of Japan	Japan	Presenter
Rear Admiral (Rtd.)	Kazumine Akimoto	(Retired Rear Admiral, JMSDF), Senior Researcher, Ocean Policy Research Foundation	Japan	Discussant
Dr.	Jong-Hee Ghang	President, Korea Maritime Institute	Korea	Opening Session
Mr.	Hak-So Kim	Korea Maritime Institute	Korea	Participant
Mr.	Hak-Bong Chang	Korea Maritime Institute	Korea	Discussant
Dr.	Choi, Jin Mo	Deputy Director of International Cooperation Division, Korea Coast Guard	Korea	Participant
Dr.	Jeong, Gil Young	Officer of International Cooperation Division, Korea Coast Guard	Korea	Participant
Mr.	Khamvone Phanou-vong	Deputy Director General, Institute of Foreign Affairs	Laos	Participant
Dr.	Ba Hamzah	Senior Research Fellow University of Malay, Kuala Lumpur, Malaysia.	Malaysia	Presenter
Mr.	Nazery Khalid	Senior Fellow, Maritime Institute of Malaysia	Malaysia	Presenter
Amb.	Kadir Mohamad	Distinguished Fellow, Institute of Strategic and International Studies of Malaysia	Malaysia	Discussant

Prof.	Stein Tonnesson	Director, International Peace Research Institute (PRIO), Norway.	Norway	Presenter
Mr.	Alberto A. Encomienda	Executive Director of DagatKalingaAlaga, Inc.	Philippines	Discussant
Prof.	Rommel C. Banlaoi	Executive Director, Philippine Institute for Peace, Violence and Terrorism Research (PIPVTR) and Head of Center for Intelligence and National Security Studies	Philippines	Presenter
Atty.	Allan Dexter Macaraid	Director III, Legal Office, Office of the President of the Philippines	Philippines	Participant
Atty.	Rowena Sanchez	Director IV, Legal Office, Office of the President of the Philippines	Philippines	Participant
Atty.	Myra B. Quiambao	Senior State Solicitor, Office of the Solicitor General, Republic of the Philippines	Philippines	Participant
Atty.	Jane Yu	Senior State Solicitor, Office of the Solicitor General, Republic of the Philippines	Philippines	Participant
Atty.	Fretti Ganchoon	State Counsel IV Department of Justice, Republic of the Philippines	Philippines	Participant
Dr.	Lokshin G. Mikhailovich	Institute of Far Eastern Studies, Russian Academy of Sciences	Russia	Presenter
Dr.	Voronin A. Sergeevich	Institute of Far Eastern Studies, Russian Academy of Sciences	Russia	Discussant
Dr.	Li Mingjiang	Assistant Professor, China Programme, S. Rajaratnam School of International Studies	Singapore	Presenter
Dr.	Dr. Ian Storey	Editor, Journal of Contemporary Southeast Asia, Fellow of Institute of Southeast Asian Studies (ISEAS)	Singapore	Presenter

Amb.	Rodolfo C. Severino	Head, ASEAN Studies Centre, Institute of Southeast Asian Studies	Singapore	Discussant
Dr.	Lee Lai To	President of Political Science Association of Singapore, National University of Singapore	Singapore	Presenter
Prof.	Ramses Amer	Senior Research Fellow, Center for Pacific Asia Studies (CPAS), Department of Oriental Languages, Stockholm University	Sweden	Presenter
Lieutenant Commander	Narupon Joytongmool	Lieutenant Commander of the Office of the Judge Advocate General, the Royal Thai Navy	Thailand	Participant
Mrs.	Chantana Seelsorn Lao	Second Secretary, Ministry of Foreign Affairs of Thailand	Thailand	Participant
Ms.	Nuanprae Bunnag	Third Secretary, Ministry of Foreign Affairs of Thailand	Thailand	Participant
Prof.	Geoffrey Till	Professor, Joint Services Command and Staff College	UK	Presenter
Prof.	Keyuan Zou	Harris Chair in International Law, Lancashire Law School, University of Central Lancashire	UK	Presenter
Prof.	Mark J. Valencia	Maritime Policy Analyst, East-West Centre, Hawaii	USA	Presenter
Ms.	Stephanie Renzi	Project Director, The National Bureau of Asian Research	USA	Participant

II. Local Participants

Scholars

Major General	Lê Văn Cương	Former Director of Institute for Strategic and Public Security Sciences Studies, Ministry of Public Security
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Prof.	Nguyễn Bá Diễn	Faculty of Law, Hanoi National University
Mr.	Lê Kim Dũng	Institute for Military Strategies, Ministry of National Defense
Mr.	Dương Danh Dy	Former Consul in Guangzhou, China
Prof.	Nguyễn Hoàng Giáp	Director of Institute for International Relations - Ho Chi Minh National Academy of Politics and Public Administration
Mr.	Hồng Hà	Former Director of Committee for External Relations, CPV
Prof.	Trần Khánh	Institute for South East Asian Studies
Mr.	Hoàng Như Lý	Former General Director of Asia 1 Department, MOFA
Prof.	Phạm Quang Minh	Director of Faculty of International Studies, University of Social Sciences and Humanities
Prof.	Nguyễn Quang Ngọc	Director of the Institute for Vietnamese Studies and Development Sciences, Hanoi National University
Dr.	Nguyễn Nhã	Member of the Vietnam Association of History
Prof.	Đỗ Tiến Sâm	Director of the Institute for China Studies
Mr.	Trịnh Ngọc Thái	Former Deputy Director of Committee for External Relations , CPV
Prof.	Nguyễn Xuân Thắng	Faculty of International Law, Hanoi University of Law
Prof.	Lưu Ngọc Trịnh	Institute for International Political and Economic Studies
Dr.	Trần Công Trục	Former General Director of the Government's Border Committee
Dr.	Nguyễn Sỹ Tuấn	Director of the South East Asian Studies
Mr.	Hoàng Việt	Law School, Ho Chi Minh National University

Observers from Vietnam Government's Ministries and Agencies

Mr.	Nguyễn Văn Cư	Ministry of Natural Resources and Environment
Dr.	Chu Đức Dũng	Deputy Director of the Institute for International Political and Economic Studies
Colonel	Trần Đăng Dũng	High Command of Border Guard
Senior Lieutenant Colonel	Nguyễn Văn Hải	Vietnam Navy
Prof.	Phạm Văn Linh	Commission for Propaganda and Ideological Education of the Party Central Committee
Ms.	Nguyễn Thị Minh Ngọc	CPV Central Office
Prof.	Phạm Bích San	General Secretary of the Vietnam Union for Scientific and Technical Association
Mr.	Đặng Thanh Sơn	Ministry of Justice
Mr.	Đình Văn Sơn	PetroVietnam

Observers from Vietnam MOFA

Mr.	Nguyễn Mạnh Đông	Deputy General Director of Law and International Treaty Department
Mr.	Lê Chí Dũng	Deputy General Director of America Department
Mr.	Nguyễn Trường Giang	Director General Department, National Border Committee
Mr.	Vũ Hồ	Deputy General Director of ASEAN Department
Mr.	Nguyễn Xuân Lư	Deputy General Director of Europe Department
Mr.	Phạm Sao Mai	Deputy General Director of North East Asia Department

Ms.	Nguyễn Phương Nga	General Director of Press and Information Department
Mr.	Nguyễn Tất Thành	Deputy General Director of Department of Multilateral Economic Cooperation
Others		

Vietnamese Lawyers Association

Dr.	Phạm Quốc Anh	President of the Vietnamese Lawyers Association
Mr.	Trần Đại Hưng	Vice President of the Vietnamese Lawyers Association
Ms.	Lê Thị Kim Thanh	General Secretary of the Vietnamese Lawyers Association
Others		

Diplomatic Academy of Vietnam

Prof. Amb.	Dương Văn Quảng	President of Diplomatic Academy of Vietnam
Mr	Đặng Đình Quý	Vice President of Diplomatic Academy of Vietnam
Dr.	Trần Trường Thủy	Director of Program for South China Sea Studies
Others		

III. Diplomatic Missions in Hanoi

NAME	TITLE	COUNTRY
Ms. Vanessa Wood	Deputy Head of Mission	AUSTRALIA
Ms. Leah Yeak	Second Secretary	AUSTRALIA

H.E. Mr. Hubert Cooreman	Ambassador	BELGIUM
Ms. Sia Ai Ching	Second Secretary	BRUNEI
Mr. Sok Sophoan	Counselor	CAMPUCHIA
Mr. Liu Zhi	Head of Political Section	CHINA
Colonel Moham	Defense Attaché	INDIA
H.E. Mr. Pitono Purnomo	Ambassador	INDONESIA
Colonel Angkasa Dipua	Defense Attaché	INDONESIA
Mr. I Nyoman Gurnitha	Counselor	INDONESIA
Mr Bob Patterson,	Deputy Head of Mission	IRELAND
Mr. Koichi Aiboshi	Minister	JAPAN
Mr. Yoshio Uchiyama	Counselor	JAPAN
Mr. Masuo Ono	Counselor (political section)	JAPAN
Mr. Hidemaro Oto	Defense Attaché	JAPAN
Mr. Kiyoshi Shimonishi	Third Secretary (political section)	JAPAN
Ms. Seo Eun Ji	First Secretary	KOREA
Mr. Khamphan Anlavan	Minister Counselor	LAOS
H. E. Mrs. Dato' Lim Kim Eng	Ambassador	MALAYSIA
Ms. Maria Alnee M. Arugay	Charge d' Affaires	PHILIPPINES
Mr. Janusz Bilski	Charge d' Affaires	POLAND
Mr. Igor A. Khovaev	Counselor	RUSSIA
Mr. Shevchenko Pavel	Second Secretary	RUSSIA
Mrs. Bakeeva Ekaterina	Second Secretary	RUSSIA
Mr. Lee Boon Beng	First Secretary	SINGAPORE
Mr. Pham Le Hung	Staff of Embassy	SINGAPORE

Mr. Mattias Forsberg	First Secretary, Political and Trade Section	SWEDEN
Ms. Dang Phuong Lan,	Commercial Officer, Political and Trade Section	SWEDEN
Ms. Josefin Pehrson	Trainee, Political and Trade Section	SWEDEN
Mr. David Edmondson	Head of Political and Economic Section	UK

IV. International and Local Press

