



International Conference on East Sea Disputes

Organized by

Ton Duc Thang University

July 25th – 26th, 2014

**Ton Duc Thang University
Ho Chi Minh City, Vietnam**

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Preface

The “International Conference on East Sea Disputes” is a two-day international conference on an issue of great regional and international importance at the main campus of Ton Duc Thang University, Ho Chi Minh City, Vietnam, July 25-26, 2014

The East Sea is the world’s second busiest sea-lane through which more than half of the world’s super tankers and \$5.3 trillion in annual trade pass. In recent years, conflict over maritime boundaries and attempts to unilaterally impose territorial claims have caused tension, threatened regional peace, maritime security and freedom of navigation, and affected the livelihood of thousands of fishermen in their traditional fishing area. Failure to reduce tension and manage conflict may lead to skirmishes and wars. It is important to find ways to peacefully manage conflict and resolve disputes based on international law and diplomacy. The focus of the conference is not on the conflict itself, but on how to manage conflict and resolve disputes without the use of force or threat of use of force, and protect the right of fishermen to continue fishing in their traditional fishing area.

The proceedings include selected and unedited papers of scholars and experts dealing with different aspects of the conference’s focus. This collection of papers provides an easy reference for participants to follow and participate in the discussions at the conference. It is hope that, in its rough draft, it could also be useful to those whose are interested in the East Sea disputes.

We would like to take this opportunity to thank colleagues from different continents and countries who contribute papers to the proceedings, to Ton Duc Thang University for hosting this conference, and to its staff who works so hard and so efficient to make this important conference possible and the proceedings available on time.

July 2014
Nguyen Manh Hung
Program Chair

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ASEAN and Settlement of Disputes in the East Sea in New Context – A Personal View

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Since 2009, China has increasingly taken more decisive actions towards the East Sea through channels, from diplomacy, military to economy, etc. in order to control around 80% of the East Sea (South China Sea) area and it has recently deployed the Haiyang Shiyu 981 rig into Vietnam's territorial waters unilaterally, posing threat to peace and security in the region. Until now, subjects (disputing parties, and countries outside of the region) have forwarded many dynamic solutions to settle the East Sea issue but the situation seems to be "at a standstill" This is really a hot and annoying issue and it may not continue to wait and procrastinate anymore for ASEAN in general and Vietnam in particular.

In the article, the author analyzes the new regional and international contexts, which have affected disputes and conflicts in the East Sea since 2009; and summarizes disputes over hot spots in the East Sea. As a result, the author proposes solutions in order to settle disputes and conflicts in the East Sea from his personal view and considers them as top long-term and fair solutions in the new situation.

1. Regional and world contexts (2009 – 2014)

Disputes and conflicts in the East Sea are considered one of the most complicated, tense and multi-dimensional issues in the contemporary international relations. This issue must be comprehensively considered from different angles, and international aspects, or in other words, disputes and conflicts must be considered logically from impacts and influences of the regional and international contexts. Because, disputes and conflicts over the East Sea not only relate to disputing parties but also affect geo-political interests and geo-strategic interests of countries

dispute-related countries¹ and powerful countries outside of the region². Among disputing parties, China is the main subject causing the current situation.

The 2008 – 2009 world economic crisis, derived from the U.S., made a tremendous impact on the face of the world, the wave of the crisis pushed the world economy recession unprecedentedly in history, which depleted the U.S. might and destroyed European economy and destabilized developing economies, including ASEAN region. Such consequences were followed by consecutive economic and socio-political uncertainties such as the sovereign debt crisis in Europe and many other countries, rising unemployment, unreduced social conflicts, and emerging terrorism. All these things deepened the complexity, conflicts, opportunities and challenges in countries.

It is worth saying that in the context that countries have been struggling with the crisis, China – which is the least affected by the crisis – has risen more powerfully in all aspects, especially economics and military. China has used its visible and invisible hands in aspect of economics to promote economic activities, trade, aid, and investment in many countries and regions in the world, especially its neighboring countries (Cambodia, Laos, Vietnam, Thailand, and Singapore, etc), apart from two-way potential benefits in terms of economics and politics, helping China go far in the East Sea. The East Sea has really become China’s strategic chessboard since 2009, marking its promotion of intense disputes.

The Ukrainian crisis (“the Ukrainian issue”), which has happened since early March 2014, has wounded a central part of European heart and has considerably developed complicatedly. The issue intensifies tensions among the U.S, Europe and Russia, especially the US-Russia relationship has turned the most tense and complex since the second world war. It can be said that the political crisis in Europe has created a big opportunity for China to take provocative actions in the East Sea. According to two analysts - Ernest Bower and Gregory Poling, Beijing may be attempting “to substantially change the status quo” because they feel that Washington is being distracted by the developments in Ukraine. On the other hand, the

¹ Subjects (disputing parties in the East Sea include China, Taiwan, the Philippines, Brunei, Malaysia, and Vietnam) (also known as 5 countries and 6 parties), Indonesia does not make territorial claim in the East Sea.

² Powerful countries such as the U.S., India, Russia and Australia, etc. have strategic interests in disputed areas, including maritime freedom and freedom of navigation and aviation, and military activities (warships, intelligence activities, etc.)

above crisis has made the China-Russia relations enter a stable period, become closer and developed the most in the history of bilateral relationship because both China and Russia share foreign strategic thinking.

The U.S. and its “axis rotation” strategy in Asia – Pacific: After the September 11, 2001 event, reality shows that the U.S. has declined in many aspects whereas China has revived and developed strongly. The “US”, “China” factors and the bilateral relationship have become main subjects in the world political life and international order. The rising of China in aspects of economics, military modernization; China’s idea of dividing the East Sea into halves with the U.S. (January 2008), putting the East Sea into its scope of “core interests”: China’s escalating actions in the East Sea and the South China Sea, *China's establishment of Air Defense Identification Zone (ADIZ)* forced the U.S. to take steps in its policy towards Asia – Pacific. The U.S. carried out the “axis rotation” policy³ towards Asia again, in which the East Sea is a test, aiming to make effort to “re-balance” its foreign priorities and military forces and promote its role of being Asian-Pacific powerful countries to cope with the rising of China, especially in military field.

The U.S.’ consecutive actions such as organizing visits of U.S. Secretary of State and U.S. Minister of Defence, participation in regional organizations and forums in recent time, especially U.S. President’s visit to Asian countries (Japan, the Philippines South Korea, and Malaysia) in late June 2014, marked re-engagement of the U.S. in the region. Besides, the U.S. has built alliance and partnership system, creating its potential control over China.

In that context, China has considered the U.S. as a challenge to its interests in the region and seen that the U.S. takes actions to cope with China. All these things makes China become more resolute and powerful in the South China Sea and the East Sea.

Political insecurity, social instability and terrorism in the Southeast Asian region have occurred over the past decades, including in Thailand, Cambodia, Myanmar, Indonesia, etc. The humanitarian crisis has happened for a long time. All these things are really a chronic disease and a factor showing the complexity and the crisis of political and social system in some regional countries. These countries must focus on solving their internal issues, which contribute to reducing their position in comparison with countries outside of the region, splitting and sowing division among countries in the region and ASEAN. Having a thorough grasp of the

³ The U.S. started participating Treaty of Amity and Cooperation in Southeast Asia (TAC) (July 2000) and designed maritime freedom in the East Sea as part of its “national interest” (July 2010)

socio-political lives of Southeast Asian countries, China has sought to entice or separate these countries to carry out its political and economic intentions beneficial to itself. Obviously, the above uncertainties have created conditions for China to step up aggression in the East Sea.

Rising China and its grand strategy from reform and opening up until now. Though there are many different viewpoints on the rising of China, the world may be unable to deny the current might of China. The economic growth combined with internal crises has led to China's intense ambitions in the twenty-first century. China's strategy in the twenty-first century is to make it become a powerful country in the region, reach out to the world and surpass the U.S. China has been carrying out China-styled global strategy in over the world. Phrases like "Chinese century", "Chinese dream", and "Chinese dragon", etc. reflect its ambitions. China's deployment of grand military strategy, especially maritime navy potential and maritime power building⁴, has shown the importance of the needs for adjusting itself to the world's sea-related competitive situation, for the rising, for maritime security and interests and for protecting the world peace⁵. China's aggressive actions from 2009 until now and its deployment of the Haiyang Shiyou (Hai Duong) 981 oil rig into Vietnam's exclusive economic zones and continental shelf (since early May 2014) show China's intrigue.

As such, developments of the regional and international situation over the past one decade, especially since early 2014, have made tremendous impacts on the geopolitical face of the region and the world, especially China's actions in the East Asian sea region, especially in the East Sea.

2. The East Sea: The most potential hot spot of the twenty-first century

Disputes and conflicts in the East Sea (herein after referred to as called the East Sea issue) is a complex issue, especially in the Spratly (Truong Sa) islands and the Parcel (Hoang Sa) islands, because the issue is related to many aspects such as sovereignty, security, military, economy, politics, diplomacy; and the internationally political lives such as countries, parties, bilateral relations, multilateral relations and international relations; and the living space of

⁴ China has for the first time put "maritime power building" into the document of its 18th Party Congress, showing Chinese leaders have attached much importance to maritime issues.

⁵ 张明明 刘允中 (2013), *中国建设海洋强国的若干思考*, <http://www.ddsfcn.com/13-12/13-12-8.htm>

coastal countries, geopolitical space of big countries; maritime freedom and safety, maritime environment; peace, stability, and cooperation and development in the East Sea.

The East Sea has become hot news and hot spot relating to three main aspects: firstly, territorial sovereignty in islands; secondly, delimitation among overlapped territorial waters and continental shelves; thirdly, maritime freedom and security. Therefore, the issue is considered the world's most complicated sovereignty disputes over islands and conflicts of interests, which may be able to result in potential and intense disputes.

Indeed, disputes over the East Sea, which are complicated and hot issues and strategic chessboard of big countries in the twenty-first century, are shown in the following status quotes:

a. *Countries are directly related to disputes among different territorial sovereignty claims on islands and archipelagoes in the East Seas*, besides factors such as complicated laws, histories, and culture. That countries alongside the East Sea have in turn claimed their territorial waters to the 1982 United Nations Convention on the Law of the Sea has made the problem of settling disputes over the East Sea become further complicated and unsolved.

b. *The disputes over the East Sea seems to be new and security and military issues*. China built and carried out maritime strategy, modernized naval forces, designated the East Sea as “a core interest”, harassed the U.S.navy ship (March 2009) and has continued naval confrontations with the U.S. since 2010, which demonstrated the complexity in security, military and maritime freedom in the East Sea. The confrontation between the U.S. and China relating a clash of China's core interest and U.S.' national interest is one of reasons why the East Sea has become a disputed hot spot in the region. Moreover, the internationalization of oil and gas exploitation, the control and exploitation of energy resources in the East Sea has made the East Sea become an international issue.

c. *The East Sea is a strategically competitive chessboard among big countries*. Though in reality the East Sea is not located in strategic centers of such big countries as Japan, India, Russia and Australia, ect., their involvement in the East Sea has made the East Sea issue become more and more complicated. Besides the U.S, and China, the above countries have taken steps to develop strategic interests in the East Sea. India called East Asian countries and the East Sea a part of its “Look East” policy, connecting with region to make it into its “string of pearls”. Japan has carried out its southward policy, deployed military to the south, established strategic partnership with the Philippines and provided warships and increased its military presence in the West Philippine Sea. Meanwhile, Russia has paid more and more

attention to the East Sea situation and meddled in the situation with the Russian style as its new eastward policy. In addition, the involvement of big countries in the East Sea and the internationalization of the East Sea issue have created a new face with many interests, adding more levers for countries directly related to disputes over the East Sea to improve their geo-strategic roles through protecting national sovereignty over islands and sea, and engaging in settling disputes and conflicts in the East Sea.

Finally, China has deployed the HD-981 oil rig unilaterally and moved the second oil rig to Vietnam's exclusive economic zone and continental shelf (from May 02, 2014 until now), used more than 150 ships (including fishing ships, civilian ships, military ships, law enforcement ships, and aircrafts, etc.) to protect the 981 oil rig, and at the same time, rammed into and fired water cannons at Vietnamese vessels, beaten and robbed Vietnamese fishermen of their properties, etc. in order to set up its sovereignty over the East Sea and implement the so-called nine-dash line illegally, turn the East Sea into its core interests and express its determination to assert claims in the East Sea. China's the above actions violated the 1982 United Nations Convention on the Law of the Sea, and Vietnam's sovereignty, jurisdiction over its two Spratly and Paracel archipelagoes and territorial waters, went against the spirit of the Declaration on the Conduct of Parties in the East Sea (DOC) signed by ASEAN and China was unwilling to pursue the common aim of Vietnamese and Chinese high-ranking leaders to maintain peace, stability and in order not to complicate or expand disputes over the East Sea. As such, China made the East Sea situation more intense and the possibility of an intense and aggressive clash between China and Vietnam is probable, which will lead to long-term consequences for the region and the world.

3. ASEAN and settlement of disputes over the East Sea

As discussed above, dispute issues are extremely complicated and multi-dimensional, requiring parties to be in full possession of their senses and have creative and public strategies. In the new regional and world contexts, the strategic values of the East Sea have made China more resolute to seize the sea area so that it triggered off disputes over the East Sea, making the status quo of the issue become more intense and complicated. China did not really respect the right sense while moral code of a big country and Chinese nationalism rose more powerfully than ever.

It doesn't mean that small countries (in dispute with China), other countries in the ASEAN block and countries outside the block accept to cede territories to China, they have to improve justice in the international relations to cope with a stubborn and rigid China instead. The development histories of the world and the region and countries show that it is necessary to promote nationalism, not to arrive at a compromise and make concessions. Similarly, coping with China in the East Sea, countries need to take tough measures and select clauses of international law to benefit themselves and court the international community's support and interpretation.

In the process of monitoring and research, we found that the complexity of the issue became higher and higher, with solutions to disputes being given in many forums, conferences and seminars, etc. at national and international levels and being deployed in many different countries. However, solutions are only solutions and they may be sometimes done, done in a limited level or may not be done. Therefore, as for the global complex issue, it is necessary to deploy and promote proposals, research and discussion in order to bring about feasible choices in short-term, medium-term and long-term scope of countries but here in the article, we consider scope of ASEAN – a leading organization in the Southeast Asian region.

(1) ASEAN needs to strengthen dialogue, confidence building; and make it clear about viewpoints, policies, consensus, and goodwill; and promote cooperation in the region.

Building confidence is a foundation for ASEAN's sustainable development. ASEAN in the 1960s, 1970s, and 1980s did not reach appropriate developmental position because of limited confidence among countries, especially the groups of five countries (Thailand, the Philippines, Indonesia, Malaysia and Singapore) in relations with a group of three countries (Laos, Vietnam and Cambodia), the lesson about the necessity to develop the intra-ASEAN block, increase ASEAN's position in the international stage, promote developmental cooperation among regional countries brought ASEAN members closer together. However, the East Sea issue turns complicated, difficult to resolve among ASEAN countries, between some ASEAN members and China. Therefore, ASEAN foreign ministers released the 1992 ASEAN Declaration – Manila Declaration, providing 5 principles toward the East Sea issue⁶ in order to ensure regional peace and security. However, the declaration was not as effective as expected when China used its

⁶ *ASEAN Declaration On The South China Sea*, Manila, Philippines, 22/7/1992, see: www.aseansec.org/1196.htm.

tactics at the Mischief Reef (Vanh Khan) in 1995. The 29th ASEAN Ministerial Meeting held in Jakarta, Indonesia in July 1996 raised concerns amid tensions in the East Sea and endorsed the idea of concluding a regional code of conduct in the East Sea in order to create foundation for long-term stability of the region and strengthen mutual understanding among claimants.

By 2002, the Declaration on the Conduct of Parties in the East Sea (DOC) was approved by ASEAN members and China on November 04, 2012 at the 8th ASEAN Summit in Phnom Penh, Cambodia, marking a breakthrough step in ASEAN-China relations. The declaration stated that parties concerned were pledged to intensifying efforts in the spirit of cooperation and mutual understanding in order to implement some solutions to build confidence and trust among parties while awaiting peaceful solutions for territorial disputes, and jurisdiction.

However, DOC itself can not solve disputes or control conflicts in the sea because it only provides recommendable but non-binding principles. It has a definite historical position in the process of settling disputes but does not create breakthrough to solve disputes in the East Sea. China approved of DOC, aiming to step up ASEAN-China relations in fields of economics and military. Though China reached 8-point DOC after 9 years of negotiation (2011) and aimed at Code of Conduct (COC) in the East Sea, the events occurring after the agreement such as Scarborough Shoal Conflict, Chinese vessels' cutting of cables of a Vietnamese vessel, China's establishment of Sansha (Tam Sa) city and the latest actions which China has taken against Vietnam and the Philippines as a strategic base in the East Sea to control the sea have made the agreement become a temporary solution and fall into oblivion quickly.

The results of discussions over the East Sea were clearly recognized through ASEAN Summit chaired by Cambodia. For the first time after 45 years, ASEAN did not reach a joint statement due to disagreement relating to disputes over the East Sea. As a result, China implicitly succeeded in driving a wedge from ASEAN members.

Until now, the negotiations with China to come to COC have continued reaching deadlock; COC has become a narrow path between ASEAN and China. The world's experts make positive evaluations about COC, saying that COC is a little solid and lacks effective power and that COC only focuses more on symbol than on contents. China seems to be careful and choose playing for time. China's growing tendency to take more and more provocative actions in the East Sea to complicate the situation, the prospects of settlement of disputes have become more difficult, especially when the competition between the U.S. and China appeared, the ability and efforts to manage disputes have turned more insolvable.

The 24th ASEAN Summit (May 2014) issued a statement on the East Sea, showing that ASEAN increasingly tightened its stance and there was “a rare consensus” about disputed sovereignty over the sea. However, one issue that no party has not mentioned yet, especially China, is ASEAN’s norm.

However, having a comprehensive and overall view on the ASEAN-China relations in the settlement of disputes in the East Sea, ASEAN’s stance on the East Sea issue has been deeply dominated, countries which are not claimants don’t want to worsen strategic partnership with China. Therefore, the above countries do not express a clear-cut stance, even act in accordance with China’s stance instead. Professor Carl Thayer initially found out ASEAN countries’ viewpoints in order to see what countries acknowledge allegiance to China and which countries confront with China in disputes over the East Sea, and concluded that disputes over territories and territorial waters in the East Sea might be the greatest challenge to ASEAN’s solidarity when the block wanted to become a close-knit community. At an international conference on the East Sea held in November 2011, Dr. Ian Storey said that the management and settlement of conflicts in the East not only met with uncooperative attitude of China but also the complexity of the intra-ASEAN block. With regard to COC, ASEAN seemed to forward iconic commitments.

Obviously, ASEAN block does not express its stance on legal claims that parties concerned have made. ASEAN countries also aim at common interests but lack internal consistency, which contributes to weakening ASEAN’s abilities and creating conditions for China to dominate over the East Sea. Due to the inconsistency of stance and confidence in settlement and management of conflicts in the East Sea, the ability to create positive sentiment to settle dispute is hard to implement.

As such, having no consensus has limited ability to act in the block. ASEAN countries need to be clear in their viewpoints, policies, and agreements and to have goodwill in the East Sea. Therefore, the consensus has become an urgent needs and prerequisite to maintain ASEAN’s central role.

(2) ASEAN countries need to promote diplomatic activities and dialogues with big countries outside the block, create a favorable international environment for settlement of disputes and conflicts.

ASEAN plays a crucial role in settling the East Sea issue. Regional forums create many good opportunities for discussion and seeking solutions to disputes and conflicts in the East

Sea. ASEAN block now has its voice in the international stage, and has connected networks of international relations, and set up dialogue mechanism with many big countries such as the U.S., Japan, and South Korea, etc., initiated and chaired ASEAN Regional Forum (ARF), initiated the Asia-Europe Meeting (ASEM), ASEAN + 3, ASEAN 10 + 3, etc. All these activities enable ASEAN to improve the roles and contributions of countries to create a power structure in South East Asia in a changeable balanced world to settle the East Sea.

One fact is that the U.S. and other big countries (India, Russia, and Japan, etc.) do not want China to impose hegemony on any big country or group of big countries in an important international sea like the East Sea. The East Sea issue is a regional one and depends on regional countries in regard to settlement of disputes. However, the international community, which enjoys benefits from the settlement of disputes, will be willing to cooperate with regional countries and find solutions.

Despite not being claimants in the East Sea, the U.S. and other countries enjoy maritime freedom in the East Sea, at least 70% of commercial interests in the sea. Some countries are afraid of threats from China while others have had histories of long-standing and complicated disputes over territories and territorial waters with China (including India, Japan, and Russia, etc.). The U.S. deployed its re-engagement strategy in the East Sea and paid attention to its strategic allies in South East Asia, sought alliances to protect its allies and take control over China, which clearly shows the U.S.' stance to assist regional countries (India, Japan, and Russia) in settling disputes with China and deploying policies in the region.

In such favorable cases, ASEAN need to deploy dialogue and cooperation with big countries, avoid conflicts, and create a peaceful and stable environment to settle disputes. The consensus between ASEAN members and their partners through bilateral and multilateral diplomatic channels will create pressure to isolate China. However, not every country turns their back on China, they have need of China to develop instead. In reality, China is in urgent need of ASEAN countries to develop and vice versa, especially in fields and economics and commerce and surrounding peaceful environment.

Therefore, ASEAN block need to use smart and clever diplomatic solutions, with flexible strategies and rigid principles to cope with China. "ASEAN countries and international community should continue raise their voice in opposing China's territorial claims and in ensuring the strict compliance with international law and peace and stability in the region and the world," said Vietnamese Prime Minister Nguyen Tan Dung.

(3) ASEAN block need to use the pressure of the international community to require China to accept to bring disputes in the East Sea to global courts for trial (the *International Court of Justice -ICJ* and *International Tribunal for the Law of the Sea - ITLOS*)

Settling disputes in the East Sea between ASEAN and China can refer to the following solutions: Firstly, diplomatic channels like bilateral diplomacy. However, settling disputes by this solution does not totally bring about success because China thinks that disputes in the East Sea is not related to ASEAN, the issue is only connected between China and some countries in the ASEAN block. Therefore, all bilateral diplomatic activities to solve the issue with China are almost unsuccessful. Secondly, multilateral diplomacy means that the third party can be used as a mediator to solve the issue. Thirdly, international law can be used to settle disputes.

The third solution is considered the most feasible in the current situation. China's aggression in the East Sea totally runs counter to international law and is not recognized by the world and international law. China's territorial claims and interests in the East Sea are baseless. Parties will build files to take China to international court to solve disputes and enlist the public opinion of the international community to isolate China. This is the toughest, most complicated and long-lasting solution to China because it is a powerful member of the U.N. and may refuse to participate and implement the lawsuit.

The event that the Philippines brought China to U.N. tribunal is difficult to predict results but many experts said that the event opens a new forward step – legalizing the East Sea, creating conditions for the use of international law to settle disputes relating to series of key issues. This can be predictable. The lawsuit contributes to facilitating deadlock and further seeking solutions for disputes and conflicts relating to the East Sea.

Conclusion

Under the influence of regional and international contexts, disputes in the East Sea are more and more complicated and unpredictable. The complexity of the geopolitical and economic complexity of the region and the permanence of the East Sea issue are creating new challenges for countries. The East Sea issue is a global one and its complexity will lead to confusion and difficulties in seeking solutions to disputes. The settlement of disputes is unsuccessful unless China adjusts its maritime claims in accordance with the 1982 United Nations Convention on the *Law of the Sea*. However, all should be included in the common goal: peace, stability and no conflicts and there must be cooperation among countries.

Contrasting the Chinese and Japanese Views of the South China Sea Disputes

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Abstract: In this paper I examine how the Chinese and Japanese view the South China Sea disputes based on their perceived national interests and evolving national identities. The Chinese view the South China Sea disputes as restoring their historical rights and as a necessary step toward affirming its great power status. By contrast, the Japanese view the South China Sea disputes as tied to their own territorial tensions with China in the East China Sea and see their involvement in the South China Sea as consistent with their interest in checking on a rising China and with their own national identity as a more deserving East Asian leader.

This paper analyzes the Chinese and Japanese views of the South China Sea disputes. What is there to be analyzed? Some may immediately point out. Doesn't anyone view international issues based on where they sit? That is partly true. There is no question that countries are mostly driven by their interests and their views are necessarily clouded by these interests. Thus, one should expect Japan to be sympathetic to the Southeast Asian countries that have territorial disputes with China because it also has disputes in the East China Sea even if it does not acknowledge officially the existence of the Diaoyu/Senkaku dispute. One should also expect China to view the South China Sea disputes from its own perspective as a direct party to them. This line of analysis is correct but crude.

A more serious challenge to this paper is that we already know the basic positions of the Chinese and Japanese governments. Analysts are interested in the views of various countries because they want to figure out what kind of policy these players may adopt influenced by those views. However, the Chinese and Japanese governments have been clarifying their positions in recent months, with the most recent case in the speech by Japanese Prime Minister Abe Shinzo at the Shangri-La Dialogue in Singapore on May 30, 2014. Abe pledged a greater security role for his country in Asia-Pacific and beyond, including the South China Sea. It is fair to say that for those who are mainly interested in the policy output, they do not have to bother reading

about the views that fed into these policies. At the same time, it is still meaningful to understand the views in order to gauge the strength and durability of the policies.

This paper seeks to theorize the Chinese and Japanese views as well as providing a finer-grain analysis. We want to go beyond daily minutia and it is not a great idea to be crude in thinking in a complex strategic environment. Empirically, both the Chinese and Japanese are calibrating their views and positions, not always smartly though it may be. Moreover, people need to know that the Chinese and Japanese have their own distinct ways of thinking and identities, which third parties may or may not be familiar with. Last but not the least, the paper also touches upon the Chinese and Japanese policy choices to show how exactly their views matter.

I base my analysis on my constant monitoring of Chinese and Japanese sources and my field work in China and Japan for the past two decades, including two years in Japan from August 2010 to August 2012.¹ If you follow the developments in a particular country over a particular issue long enough, you begin to see patterns and trends. But I have cited a few news stories as representative of the larger trends.

The South China Sea disputes are becoming a more explicit issue between China and Japan. China has been a direct party and Japan is not. Japan's defeat at the Second World War meant that the country lost all possible direct claims in the South China Sea. At the same time, Japan has had a high stake in the South China Sea situation because it has risen as a global trading power that depends on the safety of the sea lanes to its trading partners in Southeast Asia and beyond. But the South China Sea was not a diplomatic issue between Beijing and Tokyo until a few years ago because of where the two countries were in the international system and of the nature of their bilateral ties.

While claiming much of the South China Sea since before the People's Republic of China was founded in 1949, the Chinese government became more engaged in the South China Sea mainly in the 1970s, reflecting its emerging nationalist agenda. China had been involved mainly ideologically in Southeast Asia to advance a revolutionary internationalist agenda after 1949. The United States did not oppose the Chinese moves over Xisha (the Paracel Islands)

¹ For some of my works on Sino-Japanese relations, see *Sino-Japanese Relations: Interaction, Logic, and Transformation* (Stanford: Stanford University Press, 2006); "Sino-Japanese Relations Adrift in a Changing World," *Asia-Pacific Review* 18, 1 (May 2011), pp. 73-83; "Japan-China Relations: Structure or Management?" in Alisa Gaunder, ed., *Routledge Handbook of Japanese Politics* (London: Routledge, 2011), pp. 339-49; "Japan's Party Politics and China Policy: The Chinese Fishing Boat Collision Incident," *The Journal of Social Science* 63, 3-4 (December 2011), pp. 95-110.

because it was pulling out of the Vietnam War and was forging a new relationship with Beijing against Moscow. Besides, China did not possess military capability to exercise effective control over the South China Sea and was not yet to assert into Nansha (the Spratly Islands).

Japan had a honeymoon period with China in the 1970s after normalizing diplomatic relations in 1972. Japan was cautious diplomatically and sought mainly to advance economic and social ties with China on a bilateral basis. Even though everyone in the world knew that Sino-Japanese diplomatic normalization took place in a larger strategic context in which the United States and China moved closer to check on the Soviet Union, the Japanese government did not want to endorse that rationale explicitly, which explains why it was so difficult for Beijing and Tokyo to sign their peace treaty. The Japanese did not want to include the anti-hegemony clause, which meant anti-Soviet Union from the Chinese perspective. The Japanese were largely mute over the Chinese clash with South Vietnam over Paracel in 1974. In fact, Tokyo did not say very much either over the Sino-Vietnamese border war in 1979.

It is conceivable that future researchers may find evidence in the Chinese and Japanese archives that the South China Sea was somehow an issue beneath the surface, which relates to the Sino-Japanese relationship over this issue years later. But the matter of fact is that there was not much expressed view about China and the South China Sea between the two countries. Chinese and Japanese studies of Sino-Japanese relations rarely mentioned the South China Sea angle or any other major issues beyond immediate bilateral concerns.

Sino-Japanese relations began to change in the early 1990s. The Cold War had ended and Sino-U.S. relations had become highly strained due to the 1989 Tiananmen Incident and shifted strategic priorities. Sino-Japanese relations were actually better than Sino-U.S. relations but the Japanese government wanted to end what they viewed as a disadvantageous “special relationship” with Beijing and to restructure this relationship in the context of the larger world. The Japanese now had a different perception of their country as a rising economic superpower and would like to leave the war behind and charge forward as a respected great power on the world stage. After all, Japan was lending a hand to China that was being isolated by the West. The Japanese were also confident that they could bring their own development experience to the table. They were debating with the World Bank over the sources of successful East Asian development experience and were interested in helping countries like Vietnam to reform their economy. In the scheme of things, security was yet to emerge as a major concern for the Japanese.

The Chinese government issued a new territorial law in 1992, which made clear its claim to Diaoyu (Senkaku in Japanese) and most of the South China Sea. While not an immediate source of diplomatic quarrel, the Chinese law added fuel to a slow burn over the disputed islands that had gone back even further with some Japanese nationalists landing on the islands and triggering Chinese protests.

The Taiwan Strait crisis in 1995-1996 had a large impact on the Japanese thinking about national security. The Japanese had already had to rethink their security role during the first Gulf War when they were criticized for exercising a checkbook diplomacy while the United States and some other allies were shedding blood. Taiwan was of course closer to home for Japan. The Japanese government appeared to be balancing between the U.S. pressure for Japanese security contributions and its desire to maintain strong relations with China that had become an important economic partner. But Taiwan was actually viewed as more important for Japan than for the United States given its strategic location along the sea lanes and the Japanese sense that the Taiwanese were pro-Japan. Thus, the true Japanese assessment was below surface and the Japanese deference over the Taiwan issue was contingent upon the nature of its relationship with Beijing and the nature of cross-strait relations.² The Chinese were highly suspicious of Japanese intentions, which served to harden rather than soften their positions on Taiwan. The South China Sea was further down the list of concerns in Sino-Japanese relations in this period, but would track the Sino-Japanese interaction over Taiwan, with a significant time lag.

By the early 2000s, it was visible to all that the Sino-Japanese relationship was now troubled, with two major sources of disputes, namely the history issue and the territorial issue. The history issue dominated in the early 2000s, over Prime Minister Koizumi's annual visits to the controversial Yasukuni Shinto Shrine. The territorial issue was there as well although not as dominant. Abe Shinzo became prime minister in 2006 and managed to improve the bilateral relationship, followed by a string of short-lived prime ministers until September 2010. During this period, the two sides reached a temporary understanding over the overlapping EEZ claims in the East China Sea but no formal international agreement could be reached.

With a seemingly acquiesced diplomatic truce over history between China and Japan, the territorial issue surfaced to the top. Then the Chinese fishing boat incident took place, which

² Ming Wan, "Japanese Strategic Thinking toward Taiwan," in Gilbert Rozman, Kazuhiko Togo, and Joseph P. Ferguson, eds., *Japanese Strategic Thought toward Asia* (New York: Palgrave Macmillan, 2007), pp. 159-81.

caused a serious fight between the two nations. The territorial tensions escalated further when the Noda government nationalized the disputed islands, triggering extremely strong Chinese reactions including frequent official patrol around the islands.

The high tension on the sea swung Japanese public opinion strongly in favor of Vietnam and the Philippines. This was also reinforced by a perceived lack of criticism over history by the Southeast Asian countries. More broadly, Japan is competitive over leadership in East Asia and feels more qualified than China as a democracy that respects international rules. There was already a sense of competition over economic primacy in East Asia in the 2000s, particularly over regional free trade arrangements. Security tensions now give Tokyo an added motivation and urgency to shore up its ties with Southeast Asia to check on or encircle China. The South China Sea thus constitutes a front in the now multilateralized Sino-Japanese rivalry. Both China and Japan now also appeal to the larger international community for understanding and support.

Southeast Asia is not a passive player in the Sino-Japanese rivalry and has its own interests and identities and there are differences among the ASEAN member states. But this paper focuses on the Chinese and Japanese views toward the South China Sea. What stands out is both concern and confidence exhibited in Beijing and Tokyo.

On the one hand, both governments seem to think that they have an upper-hand in Southeast Asia. There is much wishful thinking on both sides and they do not want to give the other side the satisfaction that they are losing in the battle. At the same time, both sides do have good reasons to think that they have some control over the situation. Both are great powers that have cards to play with. The Japanese rightly calculate that they have much in common with those who also have territorial disputes with China and that the United States is on their side when push comes to shove. The Chinese rightly calculate that they are a rising power with economic resources that benefit as well as punish. They do not think that they are the bad guy since they have resolved almost all the land territorial disputes including with Vietnam and the smaller countries are encroaching upon their turf. They see the ASEAN as fundamentally divided over this issue and stand a good chance of divide and conquer. And they think that they have been a great power historically and can weather periodic challenges from non-great powers.

The basic Chinese and Japanese calculations are reflected in their media portraits of the events unfolding in the region. The Japanese media coverage of the South China Sea at present is predictable. There is not that much diversity in the Japanese media representation of

the South China Sea disputes, reflecting a broad consensus among the Japanese public and policy elites. There is not as obvious a difference between news report and editorial pieces in Japan as in the United States. One can readily see the preferences expressed not so subtly in Japanese media coverage. In fact, you can argue that the Japanese journalists often participate in news creation and shaping of public opinion through the choice of their questions, some of which are leading. They want to see a worsening Sino-ASEAN relationship and cheer for a united ASEAN front.

As a non-democracy, the Chinese media is tightly controlled over sensitive diplomatic issues. The Chinese prefer not to see a united front from ASEAN and do not want to participate in creating a sense of such scenario emerging. They are partially right because they have other relationships with the ASEAN countries. One should also note that in contrast to its highly negative and intense media coverage on Japan, the official Chinese media often glosses over negative stories from Vietnam and the Philippines, with the recent anti-China demonstrations in Vietnam as a case in point.

The contrast between the Japanese and Chinese views can be illustrated in two recent events. Japanese prime minister Abe held a special Japan-ASEAN summit in Tokyo in December 2013. The Japanese government hoped to get ASEAN on board to encircle China, but was not that successful, revealing a “difference in tempera” between the two sides over China.³ The Japanese knew that some ASEAN nations have a strong relationship with Beijing and have been working on them to switch side. The Chinese commentaries viewed the Abe effort at the summit as unsuccessful despite commitment of large sums of official development assistance.⁴ In the 2014 *Japan bluebook* the Institute of Japanese Studies of the Chinese Academy of Social Sciences issued in March 2014, the Chinese Japan analysts noted that Abe was the first Japanese prime minister to have visited all ten ASEAN countries and viewed his strategy as seeking alliance with ASEAN against China and to divert Chinese attention from Diaoyu. But the report concluded that Abe had achieved little.⁵

³ *Yomiuri shimbun*, December 15, 2013, accessed on December 14, 2013, <<http://www.yomiuri.co.jp/politics/news/20131215-OYT1T00184.htm?from=ylist>>.

⁴ *Huanqiu shibao*, December 16, 2013, accessed on December 15, 2013, <<http://www.chinanews.com/gj/2013/12-16/5620916.shtml>>.

⁵ Reported in China News Agency, March 31, 2014, accessed on March 31, 2014, <<http://www.chinanews.com/gn/2014/03-31/6013499.shtml>>.

The other case is the ongoing standoff between China and Vietnam in the Paracel region. Japanese media puts much emphasis on this event and has unanimously criticized the Chinese action as seeking to change the status quo with force and creating a *fait accompli* to secure energy resources.⁶ Since the incident began right before the ASEAN summit, the Japanese media was most interested in whether the ASEAN summit would form a united front on China and was hopeful that the hosting president from Myanmar might be more willing to do so than the Cambodian government in 2013. In the end, the Japanese felt that they got partly what they wanted, namely indirect criticism of China. Naming China would be better.⁷ The Japanese senior officials and politicians also expressed their view to cooperate with ASEAN to ensure the navigational freedom of the open sea.⁸

When the anti-China demonstrations turned violent, the Japanese media became partly negative and seemed to realize belatedly that Vietnam actually shares a similar political system with China. As a major investor in foreign countries, the Japanese media and public generally frown upon violent demonstrations against foreign companies that threaten expats and destroy properties. The Japanese media reported on some damages on the Japanese factories in Vietnam.

But the official Chinese media hardly mentioned it except making known the Chinese official position through the Chinese Foreign Ministry spokeswoman. And Beijing reiterated its position that it has disputes with only a few countries rather than with ASEAN as a whole.

Media report aside, one should pay great attention to the policy shifts in both China and Japan's foreign policy, which reflect the larger shifts in their domestic politics. As anticipated, Prime Minister Abe announced his intention to allow collective self defense based

⁶ For sample news stories, see *Sankei shimbun*, May 9, 2014, accessed on May 9, 2014, <<http://sankei.jp.msn.com/world/news/140509/chn14050903190003-n1.htm>>; *Nikkei shimbun*, May 10, 2014, accessed on May 10, 2014, <http://www.nikkei.com/article/DGXNASGM1001Y_Q4A510C1FF8000/?n_cid=TPRN0005>.

⁷ For sample news stories, see *Nikkei shimbun*, May 10, 2014, accessed on May 9, 2014, <<http://sankei.jp.msn.com/world/news/140510/asi14051008310003-n1.htm>>; *Mainichi shimbun*, May 10, 2014, accessed on May 9, 2014, <<http://mainichi.jp/select/news/20140510k0000m030113000c.html>>; *Nikkei shimbun*, May 10, 2014, accessed on May 10, 2014, <http://www.nikkei.com/article/DGXNASGM1001R_Q4A510C1000000/>; NHK Newsweb, May 11, 2014, accessed on May 10, 2014, <<http://www3.nhk.or.jp/news/html/20140511/t10014356731000.html>>; *Nikkei shimbun*, May 11, 2014, accessed on May 11, 2014, <http://www.nikkei.com/article/DGXNASGM1100S_R10C14A5FF8000/?dg=1>; *Sankei shimbun*, May 12, 2014, accessed on May 11, 2014, <<http://sankei.jp.msn.com/world/news/140512/asi14051200300001-n1.htm>>.

⁸ See for example *Sankei shimbun*, May 11, 2014, accessed on May 11, 2014, <<http://sankei.jp.msn.com/politics/news/140511/stt14051123450004-n1.htm>>.

on a radical reinterpretation of the constitution. If established, Japan would be able to provide military assistance to not only the United States but also other allies. Abe had tried to revise the constitution in vain. While no one can criticize a sovereign state for adapting to changed environment, Abe's move has damaged the constitution in my view. Abe made his intention to play a greater security role for Japan clearer at the Shangri-La dialogue on May 30, 2014.

On the Chinese side, President Xi is busy with domestic affairs and then hosting the Conference on Interaction and Conflict Building Measures in Asia summit in Shanghai, calling for a new Asian security structure excluding the United States. Premier Li Keqiang was in Africa. The Chinese Chief of Staff Fang was in the United States. In the meantime, the Chinese public opinion on Vietnam has worsened, putting some pressure on the Chinese government to be tougher over the South China Sea disputes.

The Chinese are increasingly vocal against the Japanese involvement in the South China Sea disputes, which has so far little deterrence on the Japanese who are intending to send a strong signal to Beijing with its rhetoric and actions. Now the Japanese government is considering changing the Self Defense Law to extend collective self defense to cover countries with which it has "close relationships." There is both increased security and entangled risk. Multilateralization of Sino-Japanese tensions also complicates any attempt to improve the bilateral relationship despite some signs of willingness to mend the fence to some extent.

Fostering Cooperative Trends in the South China Sea: Russian Perspective

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Not one generation of researchers focusing on the South China Sea issue has come to disappointment while their proposals on cooperation were facing harsh reality. At present, prospects for cooperation are undermined not only by the unresolved problems, but also by serious internal imbalances ripening in the issue.

At the current stage of the evolution of the South China Sea issue, the key prerequisite to keep it in a relative stable, manageable state means to strengthen the overall cooperative milieu in Asia-Pacific. This can be done by Russia, an emerging regional power interested in strengthening peace and security in Asia-Pacific and the South China Sea and maintaining enough policy instruments to effectively cope with this task.

The paper is divided into three parts. Part One addresses the key imbalances in the South China Sea issue. Part Two gives insights into priorities, directions and instruments of Russia's Asia-Pacific policy. Part Three Russia's potential and possibilities in influence upon the South China Sea issue. The conclusion summarizes the foregoing analysis.

South China Sea Issue: Main Imbalances

Since the US has been “back in Asia”, the South China Sea issue has been much in the news for a long time. The contradictions are regularly escalating in spite of the fact that all the parties with stakes in the area are repeatedly stressing their preference for peace and stability. Multilateral efforts have complicated the problems rather than contributed to their successful resolution. Proposals endorsed by renowned scholars have been in overabundance, but no tangible progress is achieved. As a result, prospects for the South China Sea issue to remain the key security challenge in Asia-Pacific for many years to come are more and more obvious.

Arguably, this stalemate is predetermined by the interplay of the horizontal and the vertical imbalance in the issue. With no prospects for rectifying them, the time factor plays for the conservation of the contradictions rather than their effective resolution.

In analytical terms, the South China Sea issue has, figuratively speaking, three levels. They are closely intertwined and mutually dependent. The lowest level is the contradictions over the sovereignty over the disputed Paracel and Spratly islands. The mid-level is presented by negotiations between China and ASEAN on the Code on Conduct of Parties in the South China Sea instead of Declaration 2002. The top level is exemplified by Sino-American geopolitical rivalry in the South China Sea.

At present, the key contradictions have shifted to the Sino-American level. The question is whether in the years to come China or the US will set the rules of the game in maritime Asia-Pacific. Beijing and Washington have differing interpretations on what freedom of navigation stands for: in China's opinion, this implies an impeded passage of trade ships while for the US, this means freedom of military navigation. In conceptual terms, this resulted in a clash between the Chinese Active Defense (or, to put it differently, Anti-Access/Area Denial) and the American Air-Sea Battle. The former is aimed at undermining the US' supremacy and hampering its freedom of action in maritime Asia-Pacific, or at least make these actions highly risky and prohibitively costly. The latter, in its turn, elaborates on measures to preserve American strategic pre-eminence in these waters and conduct any military activity as Washington sees it necessary¹.

This shift amply suggests that the essence of the South China Sea contradictions have acquired the pan-regional dimension. This logically presupposes using the potential of pan-regional multilateral institutions which embrace key the actors of Asia-Pacific security. But the effectiveness of these institutions has been limited.

The ASEAN Regional Forum is a case in point. Its expanded number of participants, many of which has nothing to do with the South China Sea issue, as well as principles of cooperation based on consensus and a pace comfortable to all parties, hampers goal-oriented steps taken to foster cooperation. More than that, an obvious conceptual stalemate of the ARF

¹ For a detailed elaboration on the South China Sea issue in Sino-American relations, see: Kanaev E. China's and the US' Approaches to the South China Sea Issue: Changing Patterns and Strategic Implications. // Security and Cooperation in the South China. M: Institute of Oriental Studies, Russian Academy of Sciences, 2014. P. 198-211.

activity, with a line between confidence-building measures and preventive diplomacy being blurred², has further undermined prospects for successful resolution of security issues.

The East Asia Summit and ASEAN Defence Ministers Meeting Plus Eight are also good examples. The majority of their participants are either American allies or are strengthening military ties with the US. This adds to China's apprehensions about possible "hostile encirclement" or "external pressure" on sensitive issues. Therefore, meaningful discussions on measures to make the contradictions on the South China Sea less intensive than they currently are remain out of the agenda.

In sum, while ASEAN has created quite a big number of pan-regional multilateral dialogue platforms aimed to raise and discuss urgent security issues, with respect to the South China Sea progress has been limited so far. This demonstrates the *horizontal imbalance*: the pan-regional level of multilateral diplomacy is hardly appropriate to effectively discuss and resolve a pan-regional security challenge.

At the Sino-ASEAN level, the problem has another dimension. There is the *vertical imbalance*: while the negotiations of the Code of Conduct of Parties in the South China Sea are being conducted, and incongruence The same assessment holds true with regard to mid-level. Prospects for resolving the issue within negotiations between China and ASEAN on the Code of Conduct of Parties in the South China Sea are also bleak. The reason stems from the following reality: in the foreseeable future, finalizing COC might be against the key interests of the negotiating parties.

China doesn't want to lose the advantages outlined in the Declaration on Conduct of Parties in the South China Sea. The key are specified by article 4 which stipulates that all the contradictions are to be resolved by sovereign states directly concerned, and article 10 which emphasizes the principle of consensus while making amendments to DOC. More than that, a DOC revision or renunciation would be disadvantageous to China for reputational reasons as China will stop being the rule-setter and become the rule-follower in the South China Sea geopolitical game.

² This conclusion can be drawn from analyzing the following documents adopted by ASEAN: ASEAN Regional Forum (ARF) Concept and Principles of Preventive Diplomacy. Adopted at the 8th ARF. 25.07. 2001. // <http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports/159.html>; ASEAN Regional Forum Preventive Diplomacy Work Plan. Approved by ARF SOM. 10.06.2011. // <http://aseanregionalforum.asean.org/files/library/ARF%20Chairman's%20Statements%20and%20Reports/The%20Eighteenth%20ASEAN%20Regional%20Forum.%202010-2011/2%20-%20ARF%20Work%20Plan%20on%20Preventive%20Diplomacy.pdf>

In its part, *ASEAN* cannot but realize that in the foreseeable future to live without COC might be easier than to strive to finalize it. The year 2015 marks the deadline for the establishment of ASEAN Community. A rush for COC will reveal both intra-ASEAN contradictions and its limited ability to manage the situation in the South China Sea as it sees appropriate. Also, a decisive move towards COC might well suspend current economic projects in which many Southeast Asian states participate owing to China's painful reaction on projects carried out by South China Sea claimants together with extra-regional states. Last but not least, attempts to internationalize the issue, for instance – through UN Arbitral Tribunal, might once again reveal ASEAN inability to effectively tackle security challenges within its own territorial domain. This will be all the more painful since the Association is harboring ambitious plans to raise its international status at the regional and global level.

These two imbalances – the horizontal and the vertical – are aggravated by another *imbalance* which is generated by the lowest level. A rapid process of re-nationalization of domestic and foreign policies the claimants to the South China Sea islands are encountering make it very difficult to elaborate on compromises and mutually agree upon them. A politician or party that dares to suggest this will ruin his/her or its political future. As a result, another imbalance seems to be playing a role: between the globalizing nature of the South China Sea issue and an increasing influence of nationalism in elaborating upon steps to resolve the existing contradictions.

These imbalances – each being of long-term, fundamental nature – influence upon the issue hampering prospects for its effective resolution. This is exemplified by a failure of numerous attempts to use the experience of the parties have obtained in managing other disputes – for instance, the Tonkin issue in Sino-Vietnamese relations. Consequently, a necessary and timely exercise is to “think outside the box”. This means to clearly understand: the maximum that can be achieved is not the final or an interim resolution but rather the manageable state of the contradictions over the South China Sea in relations between the parties with stakes in the area. Although this might sound unusual, Russia, an emerging power in Asia-Pacific, might contribute to this scenario – by not getting involved in the issue, but by fostering the cooperative paradigm of Asia-Pacific development.

Russia in Asia-Pacific: in Search of Cooperative Agenda

Russia's pivot to Asia-Pacific has become an irreversible trend. It has been

predetermined by not only the current state of its relations with the West, but rather necessity to expand the resources for both internal and external tasks the country has to deal with.

First, turn to Asia-Pacific contributes to expanding an access to the external resources for implementing the internal economic and social modernization. This priority is outlined in the key documents adopted by the Russian Government and should be regarded as both a strategic guiding line of Russia's foreign policy and the key indicator to what extent it has been successful. In the current deterioration of relations between Russia and the US and the EU, in partnerships with Asia-Pacific countries Russia can obtain investment, technologies and expertise it needs.

By developing relations with its Asia-Pacific neighbors, Russia plans to diversify its foreign policy instruments. In the short-term perspective, energy diplomacy will probably remain the cornerstone of Russia's policy. Nevertheless, an important task lies in using possibilities of energy diplomacy for developing and strengthening cooperation in other sectors, including innovative and technologically-advanced ones. This will give a strong impetus to Russia's internal economic development.

Second, an urgent priority for Russia is to develop the potential of "smart power". The first step in this direction – to develop and preserve an emotionally positive image of both the country itself and its foreign policy. Asia-Pacific, where Russia doesn't have political problems with the majority of states, is a good platform for achieving this goal.

Third, raising its profile in Asia-Pacific will contribute to strengthening Russia's positions at the global level. In the present world, increasingly influenced upon by Asia-Pacific economic, political and security dynamics, to maintain high global status without strong positions in Asia-Pacific is impossible.

By developing relations with Asia-Pacific countries, Russia can contribute to "the other globalization" – different from the one under the American supremacy. This "other globalization" will focus upon the formation of the truly polycentric world based on the principles of equality, non-use of force and win-win cooperation.

To achieve this goal, Russia is developing a comprehensive Asian strategy. It includes both development of Russian Siberia and Far East and maintaining good relations with Asia-Pacific countries. In the latter realm, the following points are noteworthy.

The cornerstone of Russia's policy in Asia-Pacific is "indivisible security" outlined by

Russian Minister of Foreign Affairs S.V.Lavrov at the Brunei session of the East Asia Summit³. This means that the security of one state cannot be preserved at the expense of others, which gains growing understanding among Russian Asia-Pacific neighbors.

Against the backdrop of current geopolitical changes, Russia doesn't draw dividing lines in relations with its partners, be they American allies or not. As stated by S.V.Lavrov, "It's wrong to think that if someone is an ally of the United States he cannot be a partner of Russia and vice versa"⁴. This demonstrates that Russia is open to develop relations with all interested parties regardless their political preferences.

In practical terms, Russia has offered the region the cooperative agenda. It displays itself at both multilateral and bilateral levels.

First, the priorities of Russia's APEC agenda correspond with the developmental needs of its Asia-Pacific partners. Such directions of cooperation as food security, reliable transport and logistics and fostering innovations loom large in the priorities of many Asia-Pacific economies, first and foremost, ASEAN members. By the association, strengthening food security has traditionally been top priority, as exemplified by ASEAN Integrated Food Security (AIFS) Framework and Strategic Plan of Action on Food Security in the ASEAN Region (SPA-FS) 2009-2013⁵ and other documents. In this connection, the adoption of Kazan Declaration on APEC Food Security couldn't pass by unnoticed by the association. Transport and logistics are being elaborated on within Master Plan on ASEAN Connectivity. As for innovative development, the current globalizing world leaves ASEAN countries no other choice than to develop innovative economic sectors as the key prerequisite to remain competitive.

Before and in the aftermath of APEC Summit in Vladivostok, Russian experts developed and endorsed Eurasian-Transpacific connectivity initiative. Emphasis is placed upon the comprehensive connectivity between Russia and its Asia-Pacific neighbors along with an

³ Speech by the Russian Foreign Minister Sergey Lavrov at the plenary session of the 8th East Asia Summit. Bandar Seri Begawan, 10 October 2013. // http://www.mid.ru/brp_4.nsf/0/0C7F5771728E0FB644257C06003674F2

⁴ US allies can be partners of Russia and vice versa – Lavrov. ITAR-TASS News Agency. 30 April 2014. // <http://en.itar-tass.com/russia/730123>

⁵ For details, see: ASEAN Integrated Food Security (AIFS) Framework and Strategic Plan of Action on Food Security in the ASEAN Region (SPA-FS) 2009-2013. // http://www.gafspfund.org/sites/gafspfund.org/files/Documents/Cambodia_11_of_16_REGIONAL_STRATEGY_ASEAN_Integrated_Food_Security_Framework.pdf

accelerated development of Russia's Siberia and Far East⁶. Many components of this initiative have much in common with policy directions outlined by Master Plan on ASEAN Connectivity. The same is true with regard to Russian elaborations and the discourse connectivity in the agendas of Indonesian and Chinese APEC chairmanship.

Second, Russia has expanded its policy leverage to deal with Asia-Pacific security challenges. North Korean nuclear and missile developments are a good example. At present, prospects for the resumption of the Six-Party Talks are bleak, but to maintain dialogue with Pyongyang remains an urgent necessity. North Korea develops its nuclear weapons outside the monitoring and control of the international community, and at this juncture, hardly anyone can predict what the next North Korean bomb might look like. In these circumstances, Russia, a responsible nuclear power, may serve as a "bridge" between DPRK and the international community. Taking into consideration the current upward trends in relations between Moscow and Pyongyang, this scenario is not unrealistic.

Russia could use the potential of its chairing Northeast Asian Peace and Security Mechanism – a working group established by the participants of the Six-Party Talks. This platform may function as a permanent security forum in Northeast Asia. Issues under consideration might include not only DPRK policy, but also American BMD in Asia-Pacific or an escalation of sub-regional naval arms race. If translated into reality, these discussions might well contribute to strengthening trust among key Northeast Asian actors.

Third, in relations between Russia and its key Asia-Pacific partners the trend of separating politics from economy is evident. Russian-Japanese relationship is a case in point. In spite of Tokyo's joining anti-Russian sanctions, economic relations between two countries are on the rise. 19 March 2014, the next day after Tokyo announced anti-Russian sanctions, 6th Russia-Japan investment forum was held, and thirteen large-scale agreements and memoranda for cooperation between two countries were signed⁷. The plant Hitachi is harboring ambitious

⁶ For details, see: Sumsy V., Kanaev E., Koldunova E. *Russia's Interests in the Context of Asia-Pacific Region Security and Development* / Ed. by Ivanov I. – M.: Izdatelstvo Prospect, 2012. // <http://russiancouncil.ru/common/upload/riacapren.pdf>; Sumsy V.V., Kanaev E.A., Koldunova E.V., Zavadsky M.S., Zinovyeva E.S., Iontsev V.A., Kireeva A.A., Likhachev V.L., Lukonin S.A., Menzhulin G.V., Novikov A.V., Prokhorova Yu.A., Sevastyanov S.V., Stapan N.V. *Russia's Guiding Landmarks in the Asia-Pacific after the APEC Summit in Vladivostok* /Ed. by Ivanov I.S. – M.: Spetskniga, 2013. // http://russiancouncil.ru/common/upload/AsiaPacific2_En.pdf

⁷ Thirteen Agreements and Memoranda Signed at 6th Russia-Japan Investment Forum. PR Newswire. 20.03.2013. // <http://www.prnewswire.com/news-releases/thirteen-agreements-and-memoranda-signed-at-6th-russia-japan-investment-forum-251149021.html>

plans to produce excavators in the Tver region.

The same is true with regard to Russian – South Korean relations. The fact that Seoul didn't recognize the results of the referendum in the Crimea doesn't hamper the plans of South Korean business to develop the North Korean zone Rason, where Russia has modernized part of the infrastructure of port Rajin, and the railway Rajin – Khasan. More than that, there is a clear understanding in South Korean political and expert circles that Washington's and Seoul's interests should be separated. The Ukraine is in all respects far from South Korea while Russia is near. And good relations with Russia will be the key factor behind the success in implementing the Eurasian initiative as the key foreign policy priority of the Park Geun-hue administration.

Fourth, Russia supports ASEAN centrality in regional multilateral dialogue mechanisms. Russia shares ASEAN objectives aimed to prevent the unfolding of strategic scenarios that could undermine regional peace and, by implication, continued economic growth. Both Russia and ASEAN intend to achieve this through creation of a regional security system with ASEAN at the center. Russia pledges its support to the association at sessions of ASEAN Regional Forum (ARF), ASEAN Defense Ministers Meeting Plus Eight (ADMM+8) and East Asia Summit (EAS). Arguably, Russia's possible joining the latest ASEAN-led project – Regional Comprehensive Economic Partnership – may further strengthen ASEAN centrality in the overall system of multilateral cooperation in Asia-Pacific, with positive repercussions for the whole region.

In sum, Russia is carving out a niche of “regional non-allied power” genuinely interested in fostering peace and security in Asia-Pacific and establishing a polycentric regional and global order. The position undoubtedly welcomed by our regional partners.

The South China Sea Connection

As an emerging regional power, Russia cannot ignore the set of issues related to the South China Sea – the main Asia-Pacific security challenge in the years to come. In this regard, Russia's policy goals and means can be outlined as follows.

At the official level, Russia's position was outlined in Joint Statement on Intensification of Comprehensive Strategic Partnership between the Russian Federation and the Socialist Republic of Vietnam (July 2012). The parties stressed that the territorial disputes should be resolved by peaceful means without use of force or threat to do it and according to the standards of

international law outlined in the UN Charter and UN Law of Sea Convention 1982. In the South China Sea, support was made to Declaration on Conduct of Parties in the South China Sea 2002 and the move from the Declaration to Code on Conduct of Parties in the South China Sea⁸. This reflects Russia's intention that the South China Sea issue be kept within manageable bounds.

Russia's priorities stem from the following calculations. First, Russia understands that in case the South China Sea escalates, Russia will be dragged into the overall instability. This will run counter to Moscow's key priority – to form a benign external milieu as an important factor for implementing internal socio-economic modernization. More than that, instability will undermine prospects for building trust and confidence in relations between Russia and its regional partners.

Second, Russian companies are developing energy resources of the South China Sea. Among these companies are Gazprom, LUKoil Overseas, TNK BP as part of Vietsovpetro and some others. This factor looms large in Russia's priorities given that energy diplomacy remains one of the cornerstones of its Asia-Pacific policy. At the same time, however, the episode with Gazprom's projects in the South China Sea in summer 2012 amply demonstrated that Russia's commercial interests might well become the hostage of political contradictions⁹.

Third, China and Vietnam – the most uncompromising opponents in the South China Sea – are Russia's main partners and key buyers of Russia's arms in Asia-Pacific. This makes the situation very delicate as in case an armed conflict in the South China Sea should take place, Russia's image as a party genuinely interested in regional peace might suffer.

The factors outlined above predetermined a strong necessity for Russia to develop a pragmatic and goal-oriented approach to the South China Sea issue. Arguably, the key components of this approach should be as follows.

First, Russia should dissociate itself from all the existing contradictions. Moscow shouldn't strive for the role of the mediator between the conflicting parties. The evolution of the South China Sea issue has amply demonstrated that it is useless – suffice it to remember

⁸ Совместное заявление об укреплении отношений всеобъемлющего стратегического партнерства между Российской Федерацией и Социалистической Республикой Вьетнам. 27 июля 2012 года. // http://news.kremlin.ru/ref_notes/1279

⁹ Gazprom Falls Victim to China-Vietnam Territorial Dispute. Russia Today. 29.06.2012. // <http://rt.com/business/gazprom-oil-gas-057/>

Japanese failed attempts to act as an intermediary in Sino-Philippine dispute over the Mischief reef in 1995. More than that, current American efforts to get involved in the issue will result in nothing except its further complication.

These lessons should be carefully learned by Russia – and in fact, they are. Russia remains above the contradictions between China, the United States and ASEAN. Russia doesn't support both American interpretation of freedom of navigation and Chinese nine-dotted line in the South China Sea. Russia is carving out the niche of “the great non-allied regional power” interested in fostering peace and security in the South China Sea.

Apart from this, Russia should strengthen the cooperative paradigm of the regional evolution – with positive repercussions for the South China Sea issue. In this connection, three points bear relevance.

First, contradictions over the South China Sea issue are generated by the energy factor – oil and gas resources of the South China Sea. If it is so – why not buy more Russian oil and gas? This will make the afore-mentioned contradictions less intensive than they currently are. In this connection, the recent gas 30-year gas contract between Russia and China stipulating that 38 billion cubic meters of Russian gas will be annually delivered to China marks a good beginning.

Second, debates about freedom of navigation might become somewhat less intensive in case Russia succeeds in developing transport links via its territory. The Trans-Siberian railway and Northern Sea Route are cases in point. Although the throughput capacity of the Malacca Straits and the Trans-Siberian Railway and the Northern Sea Route are hardly comparable, this can and should be changed, simultaneously contributing to lessening contradictions over the South China Sea issue.

Third, Russia could offer its partners within ARF or East Asia Summit to adopt a document, similar to USSR-US Agreement on the Prevention of Incidents On and Over the High Seas signed in 1972. In this document, detailed information on what is – and, more importantly, what is not – to be done in cases of bumping, threatening movements and other actions which may represent a danger to navigation or to aircraft in flight should be carefully specified. This might add substance to the concept of “indivisible security” advocated by Russia.

The steps outlined above should be supported by information campaign presenting Russia's efforts as aimed to preserve peace and security in Asia-Pacific in general and the South China Sea in particular – by means of mitigating the existing contradictions.

Conclusion

The South China Sea issue is evolving on a complicating trajectory. At present, prospects for cooperation are undermined by a number of imbalances which exacerbate the existing problems. In this connection, the maximum that can be achieved is to keep the issue in a relatively manageable, non-threatening state.

The implementation of this task presupposes fostering the cooperative milieu around the South China Sea instead of testing next breakthrough ideas to resolve the contradictions. While creating these “external conditions”, the potential and possibilities of Russia should be carefully explored.

Russia’s positive contribution in the South China Sea issue doesn’t seem to be imaginary or unrealistic. The evidence that Russia currently has plenty of opportunities to strengthen the overall cooperative paradigm of Asia-Pacific evolution and therefore to lessen the contradictions over the South China Sea set of problems seems to be more than convincing.

China's Game-Plan in the South China Sea

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Abstract: The South China Sea is witnessing dangerous developments and the chances of tension generating incidents flaring up in a conflict have significantly increased. With the passage of time the situation in the South China Sea has become complex clouding all positive gains. While all disputants are showing interest in having a Code of Conduct to ensure that no untoward incident takes place in the region, Chinese reluctance is palpable. China neither likes to discuss the issue in any multi-lateral forum nor wishes to change its stance on the nine-dashed lines. In addition, China is gradually acquiring features and has placed an oil rig in the EEZ of other country. In fact China has evolved a game plan to control the South China Sea by redefining the boundaries and converting this as its base to expand in the Indian and Pacific Oceans. The recent escalation in Chinese aggressiveness indicates that China intends to adopt a muscular policy to achieve its objective. Such aggressiveness is witnessed in all the regions in its periphery. Chinese actions are intended to change the status quo. Unless the International Community takes effective steps to check Chinese aggressiveness, peace in the region would remain a distant dream. The need to pressurise/ persuade China to accept a COC and behave as a responsible Asian nation can hardly be over-emphasised.

Part 1. Introduction: Signals from China

1. The present paper makes an attempt to analyse Chinese objectives and strategy in the South China Sea. The paper is divided into four parts. The first part analyses the mixed signals sent by China on the South China Sea Disputes and the factors that are responsible for determining the current Chinese posture. The second makes an in-depth analysis of the objectives of the Chinese in the South China Sea and its long-term intentions keeping in view the Chinese policies towards other areas in its periphery and its global strategy. The important point is to understand whether China is only trying to assert its sovereignty in the areas so far indicated by it or it has plans to extend its influence beyond the South China Sea. The third analyses the various aspects of the Chinese over-all strategy in the South China Sea. The fourth

part covers conclusion drawn and suggestions for the resolution of disputes in which role of International Community is also discussed.

2. Of late, China has been sending mixed signals towards the South China Sea disputes. On the one hand, it is indicating that it is interested in the talks for the finalisation of Code of Conduct (COC) as also to ensure that the guidelines for the DOC are followed and on the other hand, China is declaring that its territorial claims are non-negotiable and escalating its aggressive activities.

3. With a view to understand the Chinese Strategy and objectives; it is essential to have a look at the recent developments leading to China's joining the talks and the Chinese aggressive activities in the South China Sea. Since 2013, some progress on the formulation of Code of Conduct (COC) for the South China Sea has been noted. First, after the ASEAN members prepared an agreed draft of Code of Conduct (COC) in August, 2013, China agreed to discuss the issue, though its reluctance was palpable in the Chinese statements.¹

4. Second, ASEAN-China representatives also agreed on 15th September, 2013 to speed up the process of finishing the COC for South China Sea. The agreement was result of the 9th ASEAN-China Joint Working Group meeting on the Implementation of the DOC of Parties on South China Sea and 6th ASEAN-China Senior Officials' meeting on the implementation of the DOC held in Suzhou, China. Both sides also agreed to set up an eminent persons and experts group with 50% members from China as proposed by latter.

5. Third, on Oct. 10, 2013, the eighth East Asia Summit, comprising the 10 ASEAN (Association of Southeast Asian Nations) members plus eight other countries including the United States, China and Japan welcomed "positive progress" on official consultations toward a Code of Conduct in the South China Sea. The declaration was included in the chairman's statement issued at the summit to assuage increasing enmity between China and some ASEAN countries over long-standing territorial disputes.²

6. Fourth, Chinese Foreign Ministry spokesman Qin Gang on 7th March, 2014 announced China's willingness to work with the Association of Southeast Asian Nations (ASEAN) to formulate a Code of Conduct (COC) for the South China Sea.³ Qin's comment

¹ <http://www.bangkokpost.com/news/local/364660.asean-agrees-on-south-china-sea-conduct>.

² <http://csis.org/publication/2013-apec-leaders-meeting-and-east-asia-summit>.

³ <http://english.peoplesdaily.com.cn/90883/8558808.html>.

came ahead of the 10th joint working group meeting between China and ASEAN on the implementation of the Declaration on the Conduct (DOC) of Parties in the South China Sea. The meeting was held on March 18, 2014 in Singapore. This was followed by 7th ASEAN-China Senior Officials' Meeting on this issue in Pattaya Thailand on 21st April, 2014.⁴ While no significant decision was taken in this meeting, yet the continuation of talks itself suggested that there was some movement in this direction. ASEAN and China have also stated that they would accelerate the COC process with four more meetings in 2014 — two at the working group (June-Jakarta and October-Bangkok) and two at senior official levels (Pattaya and Bangkok). To facilitate the COC process, Thailand circulated a list of commonalities found in the ASEAN-China relations enshrined in numerous documents signed since 1992 as well as their diplomatic practices. In return, China also circulated a concept paper on common positions that both sides shared. From China's perspective, these reinforced the need for step-by-step approach in the ASEAN-China scheme of things.⁵

7. On the negative side, there were a number of developments that cloud the positive developments and raise the level of tension so much that emergence of a conflict appears a distinct possibility. These include Chinese leaders' statements and aggressive activities. The Chinese Foreign Minister told the National People's Congress in March, 2014 that there was no room for compromise on history and territory.⁶ Since coming to power, Xi Jinping has repeatedly emphasized that China's good-neighbourly policy does not mean compromising on disputes over sovereignty, territory, and jurisdiction. Shortly after assuming the post of top party leader, Xi Jinping told his Politburo colleagues that China would never sacrifice its legitimate rights or basic interests.⁷ Similarly, Li Keqiang Chinese PM on 20th April, 2014 in the Boao Forum for Asia delivered a warning to South Asian countries that China will respond firmly to provocations. China has also reacted strongly against the move of Philippines to approach the International tribunal on the disputes. China particularly reacted to Philippine President Benigno Aquino's comments in connection with the territorial row in which he compared China to Nazi Germany. Aquino called the world leaders not to appease China over

⁴ <http://thediplomat.com/2014/chinas-oil-rig-gambit-south-china-sea-game-changer/>.

⁵ Kavi Chongkittavorn, "ASEAN, China look for common grounds", The Nation, dated 14th April 2014.

⁶ http://www.nytimes.com/2014/03/09/world/asia/china/html?_r=0.

⁷ <http://english.sina.com/china/2013/0129/555233.html>.

its claims in the South China Sea in the same way nations tried to appease Hitler before the World War II.⁸

8. Alongside, Chinese increased actions aimed at asserting its claims in the South China Sea were noticed. The new fishing regulations issued by China's Hainan provincial authorities from 1st January 2014, cover not only China's EEZ but also disputed areas as also international waters.⁹ These regulations reveal that China intends to adopt a more muscular approach towards its claims in the region. Daniel Russell Assistant Secretary of State for East Asia (US) had aptly pointed out that there was a growing concern over China's pattern of behaviour that reflected incremental efforts of China to assert control over the area (nine-dash line) despite objections of its neighbours.¹⁰ Brussels based Centrist Democrat International (an umbrella organisation of political parties and groups working with democratic governments around the world) in a resolution on 19th March, 2014 condemned the forcible take-over and occupation of Scarborough Shoal in South China Sea.¹¹ The Chinese stopping of ships of Philippines on the 9th March 2014 that were going to deliver supplies to marines at the Second Thomas Shoal was an attempt to change the status quo of the Shoal. The Philippines averted the crisis by dropping food and water by air.¹²

9. Again on March 29, when the Philippines sent another ship along with foreign press to document the Chinese response, the Philippine ship carrying supplies for its troops was harassed by a Chinese Coast Guard vessel that demanded it leave the area and repeatedly turned across the smaller boat's path, forcing it to veer away to avoid a collision. Eventually the Philippine ship entered shallower waters and escaped, delivering long-overdue supplies and troops to replace the garrison at Second Thomas Shoal. In 2012, China had occupied Scarborough Shoal. Chinese claims on Indonesian and Malaysian features have propelled them to voice their concerns vociferously. The statement of Chinese Defence Ministry that 'China will establish other Air Defence Identification Zones at the right moment after necessary

⁸ <http://www.bbc/news/world-asia-china-26062033>.

⁹ Thayer consultancy; Background Brief; South China Sea: Hainan Province's New Fishing Regulations- 'State Piracy?', Carlyle A.Thayer, January 10, 2014.

¹⁰ Ibid.

¹¹ <http://globalnation.inquirer-net/100780/intl-group-backs-ph-in-sea-dispute-with-china>.

¹² <http://www.eastasiaforum.org/2014/03/18/china-china-challenges-philippines-in-the-south-china-sea/>.

preparation are completed'¹³ has created an impression that China would create such a zone in the South China Sea as well. The reported plan to develop an artificial island in the Spratly Islands (on the Fiery Cross Reef) complete with airstrip and sea port is to better project its military strength in the South China Sea.¹⁴ This can be justified to establish Air Defence Identification Zone in this region.

10. Vietnam and Philippines blame China for imposing ban on fishing by other countries while encouraging its own fishermen to enter into the areas of other countries for this purpose. In May 2014, another incident occurred that further exacerbated relations between Philippines and China. Philippines arrested 11 Chinese fishermen with rare turtles in their area. Chinese asked the Philippines authorities to release them but the latter indicated that they were even taking action against their own fishermen and therefore the Chinese fishermen also are to be dealt with in accordance with the law. It is reported that Philippines has framed charges against 9 fishermen of China. Significantly, Chinese State media outlets quoting experts saying that the Philippines provocations in South China Sea were backed by US.¹⁵

11. China has not only occupied the reefs and shoals but has also started exploration activities in the EEZs of other countries. On May 2, 2014 the Chinese Maritime Safety Administration deployed rig HD-981 in a location of 15 degrees and 29'58'' North latitude and 111 degrees and 12'06'' East longitude and declared that it would remain operational from May 2 to August 15. According to Vietnam, the area falls in its EEZ. Vietnam strongly protested against this decision of China stating that any foreign drilling operation conducted in Vietnamese waters without express permission is illegal. The Vietnamese Foreign Affairs Ministry's spokesperson Le Hai Binh said this in a statement posted on a government website. On May 4, PetroVietnam also sent a letter to Chinese National Offshore Oil Company (CNOOC) Chairman and General Manager demanding that the Chinese company immediately stop its illegal acts and pull the drilling rig out of Vietnam's waters. However, situation worsened with Chinese ships ramming Vietnamese Marine Police ships, according to the Ngo

¹³ <http://cogitasia.com/when-will-china-set-up-an-adiz-in-south-china-sea/>Elizabeth Barnett's article.

¹⁴ <http://www.scmp.com/news/china/article/1527059/china-plans-artificial-island-disputed-spratlys-china-soth-china-sea>,

¹⁵ <http://www.watchcinatimes.com/news-subelan-cnt.aspx?id=20140510000041&cid=1101>.

Ngoc Thu Vice Chairman of Vietnamese Marine Police.¹⁶ Video shown at the press conference by Vietnam revealed that the Chinese ships were backed helicopters, 7 military ships and 33 Chinese marine patrol boats and surveillance ships and many other vessels.¹⁷

12. This was followed by harsh statements from the China. The Chinese official supported paper in an editorial warned that Vietnam should be taught a lesson, if Hanoi ratchets up tension in the South China Sea.¹⁸ The Chinese Foreign Ministry spokeswoman Hua Chunying declared that the drilling was taking place in the Chinese waters. The Chinese Foreign ministry blamed Vietnam for ramming Chinese vessels 171 times and that Vietnam started the problem.¹⁹ It also blamed US for stoking tensions in the disputed South China Sea by encouraging countries to engage in dangerous behaviour, following an uptick in tensions between China on one hand and Philippines and Vietnam on the other.²⁰ Vietnam's hardening of its stance towards China was also noted. Vietnamese military spokesperson warned China that if China continued ramming Vietnamese vessels, Vietnam could act in self-defence.²¹ The escalating tension assumed a dangerous dimension. The anti-Chinese protests in Vietnam witnessed violence that claimed four lives and injured scores of workers. There were a number of theories on the objective of the violence – from the genuine anti-Chinese protests to the handiwork of the Chinese agents to smear the image of the leadership in Hanoi.²²

13. The May incident attracted attention of International Community. This incident gained importance due to two reasons. First, it is a large drilling machine and its operation requires considerable preparation and expenditure. It is also being pointed out that there is less likelihood for substantial amount of hydrocarbons in those areas. Second, this rig was accompanied by a force that was fairly large reflecting Chinese strategic objectives. The US called the China's deployment of the rig "provocative and unhelpful" to security in the region, urging restraint on all sides. Japanese Foreign Minister Fumio Kishida also stated that 'China's

¹⁶ <http://thanhniennews.com/politics/china-ships-ram-vietnamese-vessels-in-latest-oil-rig-row-officials-26069.html>.

¹⁷ Ibid.

¹⁸ <http://www.Channelnewsasia.com/news/asiapacific/china-media-threatens/1096156.html>.

¹⁹ The Times of India, 10th May, 2014, New Delhi.

²⁰ The Hindustan Times, 10th May, 2014, New Delhi.

²¹ The Times of India, 10th May, 2014, New Delhi.

²² South China Morning Post, 22nd May, 2014, Hong Kong.

drilling operations in the South China Sea were provocative to the regional security and Beijing should clarify to Vietnam and the international community the basis of its increasing maritime activities.²³ India too has expressed its concern over the developments in South China Sea stating peace, stability, growth and prosperity in the region is of vital interest to the International Community. Indian Foreign Ministry's spokesperson Syed Akbaruddin stated, "India maintains that freedom of navigation in the South China Sea should not be impeded and call for cooperation and strengthening of maritime security."²⁴ On 10th May, 2014 at the ASEAN summit in Myanmar, Philippines and Vietnam pushed for stronger action to confront the Chinese aggressive behaviour in the South China Sea. The Vietnamese PM Nguyen Tan Dung was reported to have stated, "China has brazenly moved its deep water drilling rig escorted by over 80 armed and military vessels and many airplanes to the Vietnamese waters."²⁵ China, in reaction has warned US and Japan for commenting on the drilling operations and asked India not to worry about it.²⁶

14. Thus notwithstanding, China participating in talks to implement DOC and formulate COC, tension in the South China Sea is growing. Robert D. Kaplan in his book "Asia's Cauldron: the South China Sea and the End of a Stable Pacific", aptly describes the disputed South China Sea as a growing source of potential conflict that could overtake Europe and the Middle East as a focus of global tensions.²⁷ China's policy towards the South China disputes raises several questions. Whether China is interested in talks to resolve the issue or not? Why China is aggressively behaving and is it only towards the two countries or they are aimed at other disputants also? On talks it appears Chinese real intention is to buy time and wait for opportunity to dictate its own terms. China is also utilising this time to acquire features in the South China Sea and strengthen its position. The incident related analysis like response to the Vietnam's Law of the Sea in mid-2012, reaction to ExxonMobil's activities in the nearby blocks or Nelson's report that Chinese actions were pre-planned, do not provide satisfactory explanations.²⁸ The Chinese aggressive activities and diplomatic moves, which are seemingly

²³ http://zeenews.india.com/news/world/china-hits-out-atus-japan-over-sea-stand-off_930893.html.

²⁴ The Hindustan Times, 10th May, 2014, New Delhi.

²⁵ The Times of India, 12th May, 2014, New Delhi.

²⁶ The Hindustan Times, 13th May and 14th May, 2014, New Delhi.

²⁷ <http://www.canadaam.ctnews.ca/south-china-sea-a-potential-powder-keg-author-warns.1.1766268>.

²⁸ <http://thediplomat.com/2014/chinas-oil-rig-gambit-south-china-sea-game-changer/>.

contradictory, require in depth analysis of the Chinese policy towards all areas in its periphery which are claimed by China.

Part 2. Similarities in Chinese policies in all the disputed areas in the periphery

15. Similarity in Chinese approach is noticeable in three areas i.e. Sino-Indian land border, East China Sea and South China Sea. In all the three areas, while diplomatic talks take place, China is pursuing aggressive activities to assert its claims. The Chinese strategy in the three areas is explained in the following paragraphs.

16. The reason for China to continue talks with disputants was explained by Xi Jinping. He stated that China needed a stable and peaceful environment for some more time to continue to take steps for Chinese development. Xi Jinping at a major work conference on periphery diplomacy held October 24-25, 2013 in Beijing stated that the period extending to 2020 is a “period of strategic opportunity” for China’s growth and development. During this time, China needed to maintain a stable external environment that is conducive to domestic economic reform and growth. To achieve this goal, Xi exhorted that China must strive to make China’s neighbours “more friendly in politics, economically more closely tied to us, and have deeper security cooperation and closer people-to-people ties.” The neighbouring countries should be treated as friends and partners and China should make them feel safe and help them to develop, he added.²⁹ In this context, the statement of Mr M.K.Narayanan, who was India’s National Security Advisor and Special representatives for border talks with China from 2005 to 2010, deserve attention. In 2012, he stated that China is playing “a waiting game” to solve the protracted border dispute with India.³⁰ This in fact is true for all the nations having dispute with China. He, like some other scholars, has come to the conclusion that Chinese efforts are aimed at maintaining diplomatic links with the countries having disputes with China to buy time while keep making efforts to strengthen its claims so that finally it may get lion’s share in all the disputed regions. Another factor that China may be keeping in view is that its military strength has to match US, which is bound to react to Chinese attempts to establish hegemony. For this it

²⁹ “Xi Jinping: China to further friendly relations with neighboring countries,” Xinhua, October 26, 2013. http://news.xinhuanet.com/english/china/2013-10/26/c_125601680.htm. Quoted in Bonnie S. Glaser’s written statement before the U.S.-China Economic and Security Review Commission, 13th March, 2014.

³⁰ Mail Today, 29th February, 2012, New Delhi.

requires some more time. At the same time China continues to take aggressive action against the disputants with the aim of asserting its claims.

17. With India it has a land border dispute. Its troops are now aggressively entering into the Indian territory in violation of agreements made in 1993, 1996 and 2005. There had been four major intrusions into the Indian area in 2013. In April 2013 the Chinese troops entered the Indian territory in Daulat Beg Oldi (DBO) sector in eastern Ladakh and erected a tented post, setting the stage for a face-off with Indian troops.³¹ On 16th-17th July, 2013, 50 Chinese troops riding on horses and ponies, intruded into the Indian territory of Chumar in Ladakh on July 16 staking their claim over the area and stayed there till 17th July, 2013.³² In August, 2013 the Chinese troops intruded into Arunachal Pradesh and stayed there for four days.³³ Again the Chinese troops came to Chumar area in Ladakh on 19-20 December, 2013. The ITBP patrol on the Indian side noticed the Chinese troops on the 19th December around 1500 hours and confronted the latter, resulting in the half-an-hour face-off that ended with two sides performing the drill, warning the other about transgression.³⁴ Reports also state that in 2014 when talks were going on between the Special Representatives for talks between China and India, Chinese troops intruded into Indian territory. Needless to say that the incursions into the Indian territory were preceded by claims over all the bordering areas. China had been showing several Indian areas as Chinese in the maps stamped on the passports. Besides it regularly opposes the visits of Indian leaders to Arunachal Pradesh. And it continues to issue stapled to the Indians from J&K.

18. With Japan it has a dispute over Senkaku Islands. Despite the Treaty of Peace and Friendship between Japan and the People's Republic of China that was signed on August 12 and came into effect October 23, 1978, under the two leaders- Deng Xiaoping and Fukuda Takeo, the dispute continues. In 2008, its 30th Anniversary was observed and the then Japanese PM Aso Taro visited China and warm words were exchanged. However, China has indulged in several tension generating incidents which was against the spirit of the treaty. In recent times, the Chinese acts are intended to change the status quo. The Chinese jets and patrol boats have

³¹ The Hindustan times, 20th April, 2013, New Delhi.

³² The Hindu, 22nd July, 2013, New Delhi.

³³ The Indian Express, 23rd August 2013, New Delhi.

³⁴ The Hindustan Times, 25th December, 2013, New Delhi.

³⁵ http://csis.org/file/attachments/ts140313_glaser.pdf. Bonnie S. Glaser's written statement before the U.S.-China Economic and Security Review Commission, 13th March, 2014.

aggressively visited the area resulting in Japan responding similarly to protect its territory. In the dispute over the Senkaku/Diaoyu Islands with Japan, China took the first step to change the status quo in its favour in December 2008 when it dispatched law enforcement vessels into the 12 nm territorial waters around the islands for the first time. After the Japanese government purchased three of the five islands in September 2012, China reacted by conducting patrols in the contiguous and territorial waters on a nearly regular basis. Establishing routine presence is aimed at challenging Japan's administrative control over the islands and establishing Chinese jurisdiction.³⁵ On November 23, 2013, China demarcated maritime Air Defence Identification Zone (ADIZ). While other countries also have AIDZs, the Chinese zone is special in two ways. First, China's ADIZ encompasses the air space above Japan's Senkaku Islands and it overlaps with Japan's ADIZ. This is a direct challenge to Japanese sovereignty. Second, China is demanding that all aircraft comply with its newly issued regulations. In contrast, the United States only requires planes heading directly to the U.S. to comply with its regulations on identification and communication. After the announcement of ADIZ by China, it dispatched several fighter jets within days of US, Japan and South Korea military and civil planes flying through the zone in defiance of the new air space rule established by China. A highly tense situation developed.³⁶ Shi Jinke spokesperson of the Chinese People's Liberation Army Air Force stated that the Chinese Air Force had been put on high alert and that 'necessary action would be taken to protect the security of the country's airspace'.³⁷ China had sent its fighter jet (Su-27) that flew close to aircraft of the Japan Maritime Self-Defense Force and the Air Self-Defense Force on 24th May 2014 and Japan demanded that such incidents should not reoccur.³⁸ The US, Japan and South Korea have been sending their air craft both civilian and military without seeking permission from China.

19. While no untoward incident has taken place, tension is mounting in the region. In a speech in Tokyo on April 6, 2014, U.S. Defense Secretary Chuck Hagel made a reference to China's aggressive behaviour in the disputed Senkaku Islands, warning that countries cannot 'redefine boundaries and violate territorial integrity and sovereignty of nations by force, coercion or intimidation,' whether that be 'small islands in the Pacific or large nations in

³⁶ The Times of India, New Delhi, 30th November, 2013.

³⁷ The Hindustan Times, 30th November, 2013, New Delhi.

³⁸ http://www.mofa.go.jp/press/release/press1e_000012.html.

Europe.' Hagel's Chinese counterpart, Defense Minister Chang Wanquan responded aggressively by stating that China has 'indisputable sovereignty over the Diaoyu' -- as the Chinese call the islands -- while pointing out that the 'Chinese military can assemble as soon as summoned, fight any battle and win.'³⁹ This sums up Chinese approach towards the East China Sea dispute.

20. In South China Sea, China while maintaining diplomatic relations with disputants, is following a policy to assert its claims through imposing fishing bans, sending its maritime forces and carrying out naval exercises and gradually occupying areas. With Vietnam it signed two agreements- one in 1993 and another in 2011. It has also party to party relations with Vietnam. With Philippines too its diplomatic relations are continuing. China and ASEAN talks are continuing. But despite these, it has been involved with these countries in incidents like arresting fishermen of these countries, cutting cables of their ships and occupying the feature belonging to them.

21. Thus common approach towards these countries is noticeable. With Japan, Vietnam, Philippines and India while maintaining diplomatic relations and continuing talks, China is brazenly intruding into their areas and asserting her claims. The treaties with India, Japan and Vietnam are being violated. The Chinese activities are aimed at changing the status quo. In fact China does not see any contradiction in maintaining friendly relations or claiming to maintain friendly relations and asserting its sovereignty in the disputed areas. The friendly relations are maintained to keep projecting its 'peaceful rise', while strengthening its claims over the disputed areas. It is waiting for the opportunity when it would be able to settle the issue in its own favour. In short, China is following the policy- "play now and look for opportunities to occupy areas to consolidate its position and later settle the issue."

22. China is now making serious attempts aimed at exerting its control over the areas in its periphery, defending and advancing its sovereignty claims and establishing its hegemony in the region using economic relations as one of the tools and removing the influence of US. These three objectives determine Chinese policies towards its neighbours. In all the above mentioned areas, it is following the "salami slicing" strategy by taking small steps to acquire areas. China is asserting its control on land, on sea and in air. China is also sending a clear message that it intends to use coercion or more muscular means to achieve its objectives and its

³⁹ http://www.foreignpolicy.com/articles/2014/04/08/china_might_actually_seize_japan_s_southern-islands.

agreements with its neighbours could be sacrificed. While the three regions are geographically separate, yet the developments there reflect the common Chinese approach towards its neighbours. In fact, Chinese aggressive nationalism and irredentism has become a potent feature of China's foreign policy and aggrandisement. The perception that China has to rectify humiliation of the past centuries is taking the central place in the formulation of foreign and security policies of China.⁴⁰ The Chinese people and government feel that the areas in its periphery belong to China and they must be acquired. As China becomes more powerful, which China calls its "peaceful rise", its government and people see an increasing need for China to be more assertive in claiming these areas. While China may still need a friendly external environment, its need for this is gradually diminishing. The aggressive policies also appear to test the reactions of disputants and outside powers. The above also reflects that the policy adopted towards its neighbours is in fact a part of the larger global strategy of China.

Part 3. Chinese over-all strategy in the South China Sea

23. As mentioned above, the Chinese game plan towards the South China Sea is also geared to achieve three objectives- asserting control in the South China Sea, defending its sovereignty and establishing its hegemony in the region through economic integration. Chinese approach towards the South China disputes is based on three premises. First, China considers, as noted in the official sponsored Global Times on 31st March, 2013, that behind the South China Sea disputes, it is actually the rivalry between Beijing and Washington.⁴¹ The statement issued by the Chinese Foreign Ministry during the May incident confirmed this thinking. Second, it not an issue for discussion at a multilateral forum but to be discussed bilaterally with the parties directly involved.⁴² And the third is that the ASEAN has divisions which can be exploited for dealing with the claimants. Luo Zhaohui, Director General of the Department of Asian Affairs of China stated in November, 2012 that "it is some ASEAN countries and not China that are not ready to embrace a Code of Conduct (COC) in South China Sea".⁴³

⁴⁰ <http://www.eastasiaforums.org/2012/12/15/sino-vietnam-tensions-in-the-south-china-sea/>.

⁴¹ <http://www.globalresearch.ca/south-china-sea-disputes-us-proxy-conflict-with-china/5329184>.

⁴² http://zeenews.india.com/news/world/direct-talks-to-resolve-south-china-sea-dispute_866725.html.

⁴³ <http://www.bt.com.bn/news/national/2012/11/10/some-asean-countries-not-ready-coc-south-china-sea>.

24. The Chinese intensions in the South China Sea were clearly revealed in the 8-part documentary televised by China's state-owned television channel CCTV-4 from 24-31 December, 2013. There were four significant aspects covered in the documentary. First, the Chinese flaunted the flag raising ceremony at James Shoal on 29th April 2013 to assert its claims. Second, they showcased that the Chinese civilian maritime agencies were capable of enforcing maritime claims. The celebrations in great details were showcased about their glorious victory against the Vietnamese civilian ships that took place on 29-30 June, 2007. Third, it revealed in Episode 4 that China Bureau of Fisheries Administration was tasked with a top secret project to build installations on Mischief Reef in August 1994 for the purpose of safeguarding China's maritime sovereignty. It was showcased that the site was chosen because of its strategic location as a base to supply and protect Chinese fishermen from 'foreigners' and was presented as an "iron rod" to serve as 'a solid foundation to solve the South China Sea dispute'. This clashed with the Chinese version given by the Chinese diplomats at that time, which described that the installation was only for the fishermen's shelter in case of inclement weather. And fourth the documentary also reflected the Chinese claims of the region based on history.⁴⁴ This documentary clearly reveals Chinese intentions in the region that it is not going to compromise on the nine dashed line and it would not mind using military means to resolve the South China Sea disputes. The establishment of the prefectural level city of Sansha to administer the Paracel and Spratly Islands in June 2012 and creation of a military command base there confirm this view.

25. China claims most of the region in the South China Sea with its nine dotted lines. China considers it absolutely necessary to have undisputed control over the area in the South China Sea for strategic, economic and commercial reasons. Since 2010, the Chinese are reported to be considering South China Sea Issue as the "core interest", though not officially. China knows that economically this area is extremely important. China has the most optimistic estimate of hydrocarbon in the region. China also realises that South China Sea is rich in fisheries. Strategically it considers the region even more important for its security and connectivity it provides to other areas. Commercially it provides access to rich markets. Since 1984 when Chinese unveiled the plan to connect Yunan province with Indian Ocean, it is planning to ensure its reach to the Indian Ocean through different routes. The Chinese plan to link its areas with Indian Ocean was clearly indicated in its plan in the Chinese paper "The

⁴⁴ <http://www.rappler.com/thought-leaders/53897-china-documentary-philippines-asean>.

Peking Review” (as it was known at that time) on 2nd September, 1984. A recent assessment of Pentagon confirms this. It states that the PLA-Navy “continues to expand its operational and deployment areas further into the Pacific and Indian Oceans” though noting its limitations for logistical and intelligence support.⁴⁵ The same report also stressed that in the coming 10 years China will establish several access points especially to reach Indian Ocean Region. This explains the real significance of South China Sea. The South China Sea is given the same importance as it gives to Tibet and Taiwan. The Chinese ships, boats and aircraft are now aggressively patrolling the area and asserting its claims. It has occupied certain features and it is feared that China is looking for opportunities to acquire more features. Keeping the above in view, China is following a well-crafted strategy and systematically moving to establish its control over the area it claims in SCS. Important aspects of the Chinese game plan are mentioned in the subsequent paragraphs.

Diplomatic manoeuvrings

26. Diplomatic steps include projection of willingness for negotiations, while subtly trying to play on the leverages it has over the ASEAN members with a view to weaken their unified efforts. China’s reluctance to discuss the issue at multilateral forums is well known. In view of growing pressure and prospects of discussions of the ASEAN draft at a multilateral forum, while China has not openly rejected discussions, the Chinese leadership has come out with statements that reflect Chinese game plan to ensure that concerned parties discuss the issue separately with China. Wang Yi the Chinese Foreign Minister on the 2nd August, 2013 speaking in Bangkok on the occasion of the 10th Anniversary of ASEAN-China partnership proposed three way formula to resolve the South China Sea disputes. The first plank of the proposal demands direct bilateral talks among the parties concerned. The second plank of the proposal is to continue to implement the DOC while gradually push forward to formulate COC i.e. making progress on COC dependent on the implementation of DOC and the Guidelines. And the third plank is to cooperate in the common development projects.⁴⁶ The timing and the occasion was specially chosen to send a clear message to the members of the ASEAN. Later on 5th August in Hanoi, Wang Yi stated that all parties should have realistic expectations and take gradual approach to the proposed COC. He further said that there should not be any rush for

⁴⁵ The Times of India, 7th June, 2014, New Delhi.

⁴⁶ http://zeenews.india.com/news/world/direct-talks-to-resolve-south-china-sea-dispute_866725.html.

COC and stressed that a lot of work was yet to be done in this context. He also pointed out that no individual country should impose its will on others hinting that China would not like to accept a draft prepared by others.⁴⁷ He was hinting at Philippines' move to take the South China Sea issue to the international tribunal. Chinese PM Li Keqiang at the East Asia Summit (9-10 Oct. 2013) repeated the Chinese position that negotiations on the South China Sea should only be held directly between the concerned parties.⁴⁸ Wang Yi in May, 2013 visited four countries- Singapore, Thailand, Indonesia and Brunei. At that time some analysts pointed out that the Chinese aim was to sow divisions amongst the members of ASEAN.⁴⁹ In August, 2013 Wang Yi visited Malaysia, Vietnam and Brunei avoiding Philippines. An independent analyst of Cambodia Lao Monghay said, "The strategy of China is to divide Asean." Earlier China had used its influence on Cambodia and economic assistance to ensure that South China Sea issue was not mentioned in the Joint Communiqué as desired by Philippines and Vietnam. China is using its economic and political influence in countries like Cambodia, Thailand and Myanmar to obtain their support for Chinese strategy on the South China Sea disputes. China's main reason to continue talks with ASEAN is to ensure that they do not further enhance their political and military relation with US.

Economic diplomacy to increase its influence

27. Alongside, fostering greater economic dependence on China and promoting regional economic integration are integral to Beijing's strategy of persuading its neighbours of the benefits of China's rise and dissuading them from challenging Chinese interests. To achieve China centric economic integration of South East Asia, the Chinese leaders including Xi Jinping and Li Keqiang visited Southeast Asian countries in the fall of October 2013. They focussed on the four issues- (i) promoting the establishment of a new maritime silk road for the 21st century linking the Pacific and Indian oceans; (ii) the creation of free trade zones along China's periphery; (iii) deepening regional financial cooperation by creating an Asian infrastructure bank; (iv) pushing for the conclusion by the end of 2015 of the Regional Comprehensive Economic Partnership (RCEP), a free trade agreement that would include the ten ASEAN member states and its FTA partners (Australia, China, India, Korea, and New Zealand). In

⁴⁷ <http://www.reuters.com/article/2013/08/05/us-china-sea-idUSBRE9740C20130805>.

⁴⁸ <http://csis.org/publication/2013-apec-leaders-meeting-and-east-asia-summit>.

⁴⁹ <http://www.irrawaddy.org/archives/34200>.

addition, China is also focussing to improve connectivity with south East Asian countries. It has funded major infrastructure projects in Southeast Asia such as the Nanning-Singapore economic corridor that envisions an integrated road and railway transportation system that would link China, Vietnam, Laos, Cambodia, Thailand, Malaysia, and Singapore and is supporting the Great Mekong Sub-region, to link China's Yunnan Province, with the six nations of the Mekong River basin.⁵⁰ An underlying purpose of these moves is to check the growing relationship of ASEAN with US.

Political steps

28. Politically China is taking steps for projecting that its sovereignty over South China Sea is non-negotiable. It had passed the Law on Territorial Sea and Contiguous Zone of People's Republic of China in 1992 and declared that region in the U shaped area in the South China Sea belonged to China. This in fact turned the South China Sea into a Chinese lake. On 7th May, 2009 China submitted a map to the United Nations that contained nine-dash lines.⁵¹ Since then in all statements China says that it has sovereignty over this area, which must be protected. The Chinese cartographic aggression continues. It has in the past objected to the purely commercial activities like oil exploration in the EEZ area of Vietnam. It also bans fishing activities by the fishermen during May and August every year, while it encourages fishing by its own fishermen in areas which belong to other countries. The official media continues to project the South China Sea disputes as one of the core issues. China took next step to tighten its control over the disputed areas in June 2012, when the Chinese Cabinet approved the establishment of the prefectural level city of Sansha to administer the Xisha (Paracel), Zhongsha and Nansha (Spratly) island groups.⁵² Other actions by China in recent years include putting hydrocarbon blocks up for bid in an area within Vietnam's 200 nm Exclusive Economic Zone and a considerable distance from the islands that China claims as also interfering with other countries' seismic surveys within their EEZs.

⁵⁰ http://csis.org/file/attachments/ts140313_glaser.pdf. Bonnie S. Glaser's written statement before the U.S.-China Economic and Security Review Commission, 13th March, 2014.

⁵¹ <http://www.fas.org/sgp/crs/R42784.pdf>.

⁵² The Hindustan Times, 29th June, 2012, New Delhi.

Propaganda efforts

29. Since 2012, China has significantly up-graded its propaganda to buttress its claims. In 2012 China established a Steering Sub-Committee for guiding, coordinating and supervising, educating, propagating awareness of national map and controlling entire national map market with coordination of 13 Ministries which included National Agency for Geographic Information and Map Production, Committee for Propaganda and Instruction of the Communist Party of China, Ministry of Foreign Affairs, Ministry of Education, Ministry of Industry, Ministry of Public Security etc. The main objective of this committee is to instruct and guide the task of reprinting and republishing national maps and organising propaganda.⁵³ This indicated Chinese plan to intensify cartographic aggression and propaganda along with other aggressive activities. It may be added that the Chinese claims are based on selective history and interpretation of UNCLOS. “In case of Scarborough Shoal, China claims the area on the basis of the map of the 13th century when China was itself under the alien Mongol – rule”.⁵⁴ However, a 10th century Arab traveller and a geographer al-Masudi had made reference to the Cham Sea and trade between Champa and Luzon.⁵⁵ More over while China rejects the unequal treaties imposed by colonial powers, it points out that the Treaty of Paris of 1896 had not given Scarborough Shoal to the Philippines.⁵⁶ In the end of 2012, China began to issue biometric passports with a map of China showing the nine-dash lines that attracted severe reactions from the neighbouring countries.⁵⁷ On 1st January, 2013, China issued a new map, which for the first time marked in detail more than 130 islands, reefs, shoals in the South China Sea that Beijing claims within 9-dash lines.⁵⁸ China in fact is trying to strengthen its claim with regard to disputed areas with a view to deal with other claimants from the position of strength.

30. Towards the end of March, 2014 German Chancellor Angela Merkel hosted visiting Chinese President Xi Jinping at a dinner where they exchanged gifts. Merkel presented to Xi a

⁵³ <http://www.globaltimes.cn/NEWS/tabid/99/ID/2256/South-China-Sea-mapping-underway.aspx>.

⁵⁴ Phillip Bowring, “Writing out of the Non-Han: China’s aggressive policies vis-à-vis the South China Sea are based on selective history”, The Times of India, May18, 2012, New Delhi.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ <http://www.iiss.org/en/publications/strategic%20com/china-passport-move-south-china-sea-mapping-underway.aspx>.

⁵⁸ http://www.jamestown.org/uploads/media/cb_06_21.pdf.

1735 map of China made by prolific French cartographer Jean-Baptiste Bourguignon d'Anville and printed by a German publishing house. The map showed, according to its original Latin caption, the so-called "China Proper" -- that is, the Chinese heartland mostly populated by ethnic Han people, without Tibet, Xinjiang, Mongolia, or Manchuria. The islands of Taiwan and Hainan -- the latter clearly part of modern China, the former very much disputed -- are shown with a different colour border. So far the Chinese leaders have ignored to react on this.

Use of tourists

31. Since 2012, China has adopted a new tactics to strengthen its claims in the South China Sea. It is using tourists for this purpose. In April 2012, China approved a development project to support tourism and fishing in the South China Sea. The Chinese southernmost province Hainan declared that it would develop tourism in the Paracel island chain.⁵⁹ In April, 2013 it was reported that China had sent a cruise ship with thousands of tourists to the South China Sea that was escorted by navel and other vessels to assert its claims.⁶⁰

Aggressive patrolling

32. Chinese vessels are now aggressively patrolling the area in accordance with its "Near Seas Defence" doctrine that includes Yellow Sea, East China Sea and South China Sea.⁶¹ China, after fortifying its naval outposts in the South China Sea, has established a new pattern of patrol that covers practically all disputed reefs, shoals and islets within China's nine-dash lines.⁶² In March, 2013, a four-ship Chinese naval fleet that conducted patrol and training missions on the South China Sea for sixteen days, reached Zengmu Reef, the southernmost part of China's claimed territory and conducted simulated landings near the disputed James Shoal. There an oath taking ceremony was organised.⁶³ The crew vowed to defend the South China Sea area claimed by China and maintain national sovereignty. The flotilla included

⁵⁹ <http://www.google.com/hotednews/op/article.pA?>

⁶⁰ <http://yaleglobal.yale.edu/content/winning-without-fight-south-china-sea>.

⁶¹ Carlyle A. Thayer, Chinese Assertiveness and US Rebalancing: Confrontation in the South China Sea? A paper presented at the Annual Conference of the Association for Asian Studies at San Diego on 22 March, 2013.

⁶² <http://www.globalpost.com/despatch/news/kyoto>.

⁶³ http://news.xinhuanet.com/English/china/2013-03/26/e_132263657.

Jinggangshan-an amphibious landing platform dock, this was aimed at projecting an active and increased presence of PLA (Navy) and that well trained naval personal capable of undertaking amphibious operations were present in the area. China also claimed to have used a helicopter to patrol the disputed Spratly Islands in the same month. The Chinese administration claimed that for the first time a maritime helicopter was dispatched to patrol the South China Sea that covered 800 nautical miles.⁶⁴ However, other disputants had pointed out that the Chinese aircraft and helicopters were patrolling the region even earlier.

33. China also conducted a 37-day drill with its aircraft carrier Liaoning at the end of 2013 that included aircraft, naval vessels and submarines. Zhang Zheng, the Liaoning's captain said that the drill was designed to "integrate the test, training, and combat of the aircraft carrier during this scientific research and training in the South China Sea."⁶⁵ Another naval exercise conducted in early 2014 seemed intended to assert China's sovereignty over the waters in the 9-dashed line. Two Chinese destroyers and an amphibious landing craft, the Changbaishan, possibly escorted by a submarine, first conducted a patrol off the Paracels, then sailed to James Shoal, a submerged reef some 50 miles off the coast of Malaysia that the Chinese claim as the southernmost point of their territory, where the crew took an oath to defend their nation's sovereignty. The flotilla then proceeded beyond waters claimed by China to the Indian Ocean, conducting the first exercises by Chinese military vessels in waters south of Indonesia, before sailing back north and holding live-fire drills in the Western Pacific.⁶⁶ This also reveals Chinese intentions to move towards Indian and Pacific Oceans after consolidating their position in the South China Sea.

Reorganisation of maritime security units

34. China has also reorganised its maritime security units to raise their effectiveness. In March, 2013, China merged four of its maritime units to form Chinese Coast Guards. These four units were- Chinese Maritime Surveillance belonged to the Ministry of Land Resources, Coast Guards under the Ministry of Public Security, Fisheries Police under the Ministry of

⁶⁴ <http://manilastandardtoday.com/2013/03/23/beijing-pushes-sea-aggression>.

⁶⁵ <http://www.voanews.com/content/chinas-aircraft-carrier-returns-from-south-china-sea-mission/1821831.html>.

⁶⁶ <http://online.wsj.com/news/articles/SB10001424052702304914204579392720879214320>.

Agriculture, and Marine anti-smuggling police under the General Administration of Customs.⁶⁷ The reorganisation was aimed at forming a strong force to assert the Chinese claim effectively without using military vessels. A senior Chinese Navy Official Zhang Zunshe, Vice President of the Chinese Naval Research Institute hailed the unification of China's law enforcement agencies under a new National Oceanic Administration as the creation of "iron fist" that would replace ineffective operations scattered among a number of agencies.⁶⁸ This reflects China's motive for reorganising the Coast Guards. Chinese consider that First and Second chains of Islands must be protected and the Chinese forces since the beginning of this year have been given authority to search and take necessary action against 'illegally entered ships in its territorial waters'. The increased importance of maritime security in China's security priorities, embodied in Hu Jintao's call at the 18th Party Congress for China to become a maritime power and resolutely safeguard China's maritime rights and interests, has strengthened the voice of the PLA Navy along with the law enforcement agencies. Xi echoed the importance of promoting China's maritime power at a special study session of the Politburo in July 2013 that included the two PLA members who sit on that body, Fan Changlong and Xu Qiliang. Representatives from the PLA and maritime law enforcement agencies sit on the Maritime Rights Office that was established in September 2012 to coordinate agencies within China. Xi Jinping took charge of this Office even before he assumed his post as CCP general secretary.⁶⁹

35. Chinese military exercises and training drills have become more frequent and sophisticated in line with their concept of "local wars under informationized conditions" and emphasises the importance of joint operations. Drills take place in complex electromagnetic and joint environments. The PLA now conducts frequent exercises demonstrating advances in information technology and information integration in intelligence acquisition, joint command, joint strike, and support operations. China's most recent Defense White Paper emphasized the PLA's efforts to increase "combat readiness" and strengthen realistic training.⁷⁰ China is also restructuring military concepts, doctrines and organizations. Regional countries are worried over its aggressive deployment of missiles and forces and building of infrastructure meant for

⁶⁷ <http://www.strategypage.com/dls/articles/The-Chinese-White-Fleet-Goes-Off-To-War-8-14-2013.asp>.

⁶⁸ http://www.nytimes.com/2013/07/28/world/asia/in-east-china-sea.html?rf=territorialdisputes&_r=0.

⁶⁹ http://csis.org/file/attachments/ts140313_glaser.pdf. Bonnie S. Glaser's written statement before the U.S.-China Economic and Security Review Commission, 13th March, 2014.

⁷⁰ Ibid.

armed forces as well as its stress on “No contact war”. This concept is partly based on its advanced offensive cyber capability and partly on its missile systems. A Chinese official had earlier claimed that China had acquired capability to paralyse the command and control systems of several countries which included India and US.⁷¹

Growing Chinese defence budget

36. The Chinese activities assume serious dimensions when seen in the backdrop of Chinese defence related developments. The Chinese defence budget has been increased substantially over the years and the official budget in 2014 was raised by 12.2% over the budget of 2013 from \$ 119.5 to \$ 132 bn.⁷² A recent Pentagon report pointed out that the Chinese military spending in 2013 exceeded \$145 bn.⁷³ It is well known that the actual budget is about 40% to 100% more than the official budget. The USA’s report on “Military and Security Developments involving the People’s Republic of China, 2011” assessed, “However, the pace and scope of China’s sustained military investments have allowed China to pursue capabilities that we believe are potentially destabilizing to regional military balances, increase the risk of misunderstanding and miscalculation and may contribute to regional tensions and anxieties. Such capabilities could increase Beijing’s options for using military force to gain diplomatic advantage, advance its interests or resolve military dispute in its favour.”⁷⁴ A study by Ronald O’Rourke (08-08-2013) for the US Congressional Research Service entitled “Chinese Naval Modernisation: Implications for the US Navy Capabilities: Background and Issues for Congress” clearly points out that Chinese naval modernisation is aimed at developing its anti-Access and anti-Denial capabilities (meant for US) and also for asserting or defending its territorial claims in the South China Sea and East China Sea.⁷⁵

37. Under the circumstances, it is natural to view this increase in the Chinese defence budget with suspicion by its neighbours. Their suspicions are fuelled by the statements of the

⁷¹ The author has explained the changes in the Chinese military concepts in his article “Implications of Chinese defence budget for its neighbours.” Chanakya Blog, 12th March, 2014, Times of India, New Delhi.

⁷² <http://www.economist.com/news/china/21599046>.

⁷³ The Hindustan Times, 7th June 2014, New Delhi.

⁷⁴ <http://www.defense.gov/news/newsarticle.aspx?id=65130>.

⁷⁵ <http://www.fas.org/spg/crs/row/RL33153pdf>.

Chinese leaders. Just before the announcement of this budget, the Chinese Vice-Foreign Minister Fu Ying warned "If some countries wish to provoke or wish to damage ... regional peace and the regional order, then we must make a response and an effective response at that. The point of this response, is to, on the one hand, maintain China's territory and sovereignty, and on the other hand to maintain the regional order and peace."⁷⁶ This clearly reveals the intentions of China to enhance its defence budget continuously. With its aggressive actions and statements, China is confirming the fears of its neighbours that it intends to dominate the region not merely economically but also militarily.⁷⁷

Acquisition of new weapons and technology

38. The Chinese acquisition of new weapons and technology are also alarming that are meant to strengthen its Anti-Access and Anti-Denial Strategy. China's missile capabilities increased substantially which is reflected in the growth of number of missile units. In the last ten years, its short range missile units have increased more than seven times indicating the number of missiles added in the Chinese store since the year 2003. Its long range missiles have impressive range though the number has not increased much in the last two years. China is also replacing its liquid fuel missiles with solid propellant missiles. There had been 30% increase in cruise missiles in 2010 alone. Pentagon has described that China has "the most active land-based ballistic and cruise missile programme in the world".⁷⁸ According to a document prepared by the Project 2049 Institute, "The People's Republic of China is developing capabilities that would alter the strategic landscape in Asia-Pacific region and beyond."⁷⁹ Authoritative Chinese writings and assessments by security experts indicate intensified efforts towards research and development of increasingly accurate and longer range strike systems that can be launched from Chinese territory against land and sea based targets through the Asia Pacific region in a crisis situation. China's growth of missile stockpile is viewed by its

⁷⁶ <http://www.theguardian.com/world/2014/mar/04/china-will-defend-itself-military-spending-budget-sovereignty-us>.

⁷⁷ Ibid.

⁷⁸ <http://www.defence.gov/news/newsarticle.aspx?id=65130>.

⁷⁹ Mark Stokes, "China's Evolving Conventional Strategic Strike Capability", prepared for the Project 2049 Institute-a think tank.

http://project2049.net/documents/chinese_anti_ship_ballistic_missile.asbm.pdf.

neighbours as well as Western countries as a threat to the balance of power in the region. Quoting a report by the Federation of American Scientists, a news item reported that 'China continues to deploy four new nuclear capable ballistic missiles (DF-21, DF-31, DF-31A and JL-2) including the one that can be launched from submarines, causing fear among its neighbours and the US'.⁸⁰ A Chinese newspaper (PLA Daily) in December, 2012 claimed that the Chinese submarines and crew during a training exercise had hit all the targets.⁸¹ Ya Long naval base has underground submarine pens. The patrolling by Chinese submarines is a source for concern not only for the involved parties but also for US and other countries using South China Sea. In June 2013, Japanese Ambassador to US K. Sasae described China's "spectacularly active" naval posture coupled with "massive" military build-up in Asia is part of a pattern of belligerent behaviour towards Japan and other neighbours over maritime disputes.⁸² Chinese deployment of Anti-Ship Ballistic Missiles and operationalization of its air-craft carrier-Varyag have also been noted with concern by its neighbours. The then Indian Naval Chief Admiral Nirmal Verma remarked on 2nd December, 2011, that China's new anti-ship ballistic missile, if fully functional, posed "a different category of threat and certainly requires a different measure to counter it". He further noted that 'Jin class of submarines with its ballistic missile capability and underwater endurance levels have compelled other maritime powers to see what the Chinese intentions with such platforms and weapons are'.⁸³ Other nations in South China Sea, while have been cautious in not openly criticising the Chinese military build-up, have taken steps to increase their capabilities.

Changes in the nuclear doctrine

39. Changes in the Chinese nuclear doctrine, indicating the possible use of nuclear weapons to get back its territories, too pose a serious threat to China's neighbours. In the last few years, it has become clear that China has no intention to follow the doctrine of "No First Use" (NFU) of nuclear weapons at least in the regions, which it claims as its own territory. The security experts analyse that tactical nuclear weapons of China are incompatible with its

⁸⁰ The Times of India, 5th November, 2011, New Delhi.

⁸¹ <http://ajw.asahi.com/article/special/pla/AJ20120125003a>.

⁸² <http://www.bloomberg.com/news/2013-06-2013/china-military-build-up-worrisome-japan-s-u-s-ambassador-sya.html>.

⁸³ The Times of India, 3rd December, 2011, New Delhi.

declared NFU doctrine. This raises an important issue whether China would use nuclear weapons to ensure its control over the islands in the South China Sea or not. Since China has agreed to support the South East Asia Nuclear Weapon Free Zone (SEANWFZ) and is bound not to attack non-nuclear weapon States, it would appear that China would not use it. However, going by the logic of the change in the doctrine, it can be said that if China feels that “its territory in South China Sea” is attacked by US or any other power even with conventional weapons, it could use nuclear weapons. The “No First Use” is not applicable for safeguarding its own territory. It may be added that this concept was developed to safeguard the Chinese interests in Taiwan. Since the U shaped line in the Chinese maps reflects the Chinese perception that all the islands covered in it belong to China, this change in the nuclear doctrine would appear to be relevant for the disputed islands in the South China Sea. In any case, the nuclear weapons are meant to strengthen Chinese deterrence.

Chinese occupation of features in South China Sea

40. China has gradually occupied new features in the South China Sea. Initially, it used force to occupy features but later changed this policy. In 1974, China fought with South Vietnam, when it was under military pressure and occupied islands in Paracel.⁸⁴ In 1988, it had clashes with Vietnam in Spratly islands and occupied Johnson Reef and in this clash about 80 Vietnamese soldiers died.⁸⁵ After this, China began to look for suitable opportunities to occupy features without clashes. In 1995, it occupied Mischief Reef. And in 2012, it occupied Scarborough Shoal. Aerial photographs taken on the 31st August, 2013, reflect that China has started construction activities at Scarborough Shoal.⁸⁶ It may be recalled that China had constructed facilities in Mischief Reef after its occupation in 1995. Thus China continues to build facilities which can be used by military in Spratly and Paracel Islands.

⁸⁴ http://www.nids.go.jp/english/publication/kiyo/pdf/2008/bulletin_e2008_2.pdf.

⁸⁵ Ibid.

⁸⁶ Carlyle A. Thayer, South China Sea: Chinese Stealth 'Block by Block', Thayer Consultancy background Brief, September 4, 2013.

Part 4. Conclusion

41. China's growing military power has coincided with a more aggressive tone and activities, threatening the stability of the region. The Chinese claims of its peaceful rise are seriously questioned by most countries. The Chinese attempts to project its growing power as China's peaceful rise that is not aimed against any country appear to be a ploy to obfuscate its ulterior motive of strengthening itself without arousing the suspicions of its neighbours. The Chinese assertiveness has now acquired the dimension of open aggressiveness. The continuous military growth of China, modernisation of the Chinese armed forces, Chinese aggressive actions and continuing occupation of Islands/Shoals are matters of serious concern for the stability and peace of the region.

42. The Chinese leaders of late have stressed on no compromise over the issue of sovereignty in the areas claimed by China. This makes it clear that China would not accept any dilution in the territorial claims. Chinese rigidity has increased over the years. It has not given any indication that China would do away with the restrictions imposed on foreign fishermen in the South China Sea. It is also offering areas in the South China Sea for exploration, which fall actually in the EEZ areas of other countries. It is also openly using its forces to display its intentions to use force to achieve its objectives.

43. China feels that it can violate international norms and laws without any penalty being imposed and therefore it has little incentive to behave as a responsible regional power. Lack of strong reactions from the International Community actually sends impression that the disputants as well as outside powers are not willing to do anything beyond making mild protests.

44. Under the circumstances, while no early solution to the problem can be hoped, effective and urgent measures need to be taken so as to avoid any clash between the disputants. The following steps are suggested-

- All disputants must stop using force or threat of force in the South China Sea. There should be moratorium on the use of force.
- Further occupation of reefs and Shoals must be stopped. No artificial island should be allowed to be developed.
- Militarisation of already occupied features should be prohibited.
- A binding Code of Conduct (COC) should be urgently finalised and

implemented. It may be added that though there are a number similar arrangements are there like Western Pacific Naval Symposium (WPNS), Code for un-alerted Encounters at Sea (CUES), and Convention on International Regulations for Preventing Collisions at Sea (COLREGS) but none of them is sufficient or appropriate keeping in view the unique conditions in the South China Sea. Hence a separate Code is essential though they may take applicable rules from the above.

- Efforts should be made to make UNCLOS effective in the area and the disputants should be encouraged to make use of international arbitration mechanism. The Philippines efforts in this regard should be supported. This also underlines the need for ratification of UNCLOS by US.

- International Community has to act as one entity to ensure that severe penalty is imposed on the violators of the international norms. Nations like US, Russia, Japan, India and Australia need to act as one entity to use all leverages of pressure and incentives to change the Chinese stance. The Chinese policy of unilaterally changing the status quo has to be brought to an end. So far outside nations have been reacting separately to the incidents. Trade with China provides a strong leverage to them to pressurise China. This should be utilised to by international Community both as a pressure point and as incentive to China to restrain its aggressive activities.

- International Community should also assist the weaker powers in the region to build their capacity for maritime security.

Contested Space: National and Micronational Claims to the Spratly/Truong Sa Islands - A Vietnamese Perspective

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Abstract: The archipelago located in the eastern Pacific Ocean around 4-11 degrees North and 109-117 East, known in English language as the Spratly Islands, in Vietnamese as the Truong Sa Islands has been subject to contesting claims that have intensified in recent decades with the growing perception that the area has substantial sub-surface oil and/or mineral deposits that could prove a lucrative asset to whichever country can establish a definitive claim over and related exploitation of them. Following an account of Vietnam's historical presence in the area, the paper discusses some of the more fanciful micronational claims that have been made over the region and Vietnamese efforts to consolidate their claim to sovereignty in the face of contesting claims from other regional powers.

Introduction

The Spratly (henceforth referred to as Truong Sa) Islands are located in the marine area referred to in Vietnam as the Bien Dong (Eastern) Sea and in the West as the South China Sea, between 4-11 degrees North and 109-117 East. The archipelago contains hundreds of scattered islands, isles, shoals, banks, atolls, cays, and reefs (Cordner, 1994; Gjetnes, 2001; Thomas & Dzurek, 1996). Among those, are some islands with relatively significant size, including Itu-Aba (Ba Binh in Vietnamese)¹, Spratly island (Truong Sa), North-East Cay island (Song Tu Dong), Southwest Cay island (Song Tu Tay), Thitu island (Thi Tu), Loaita island (Loai Ta), Namyt island (Nam Yet) and Sin Cowe island (Sinh Ton). The area of this region is about 180,000 square kilometers and the total land area of these islands and reefs is around 10 square kilometers (Nguyen, 2012). The Truong Sa Islands are adjacent to the western Philippines, east of Vietnam, south of China and Taiwan and north-west of peninsular Malaysia (McDorman, 1993).

¹. Itu-Aba is the largest island. It is only 1.4km long and 400 metres wide, with an area of 50 hectares (Cordner, 1994; Dzurek, 1996).

While there are many competing national claims over the Truong Sa Islands, its surrounding seas and resources; Vietnam has produced substantial historical documentation and juridical evidence to establish that it had a significant and dominant presence in the Truong Sa Islands that pre-dates any modern claims by other countries and that it has been continuously exercising its sovereignty over the area for many centuries. The bases of other countries' claims is varied and includes historical associations, claims of first discovery and/or arguments relating to countries' continental shelves (Cordner, 1994).

I. Cultural and Historical Background

Vietnam has a long history of involvement with the waters of Bien Dong and has had a highly developed sea-orientated culture for over a thousand years that is recorded in various cultural contexts (Pham et al, 2010). Indeed this involvement is commemorated in several ancient stories, such as that of a resourceful father named Lac Long Quan, who, in legend, took fifty children to the coast and taught them the skills of fishing and the art of tattoos to scare off sea creatures (PTG, 2010). Additionally, the theory about ancient Vietnamese people had known and lived on islands many centuries ago can be seen through the legend of "The Watermelon Island". The story tells about Prince Mai An Tiem who was deported to an isolated island in the far ocean by the King Hung of Vietnam and discovered the delicious fruit the watermelon (Tran, 2002). We can also recognize the name of "Bien Dong" was mentioned usually in the folk-songs and common sayings of Vietnamese, such as:

- "If husband and wife get along well together,

They would easily drain of even the Bien Dong's waters!"

- "Our debt of gratitude to our father is like a soaring high mountain!

Our debt of gratitude to our mother is like the Bien Dong immense waters!" (Cited in Pham, 2009, p. 2).

In terms of more formal documentation of Vietnamese presence in the Truong Sa Islands, there is considerable documentary evidence dating back to the 17th Century that supports Vietnam's claim to historical prominence in the region². The first (extant) Vietnamese

² Including *Toan Tap Thien Nam Tu Chi Lo Do Thu* ('Route Maps from the Capital to the Four Directions') (sometime in the 17th century), *Phu Bien Tap luc* ('Miscellaneous Records on the Pacification of the Frontiers') (1776), *Lich Trieu Hien Chuong Loi Chi* ('Collection of Regulations under Successive Dynasties' (1821), *Hoang Viet Du Dia Chi* - ('A Geographical Treatise of Imperial Vietnam') (1833), *Dai*

document to formally record Vietnam's sovereignty over the Bien Dong archipelagos was a volume entitled *Toan Tap Thien Nam Tu Chi Lo Do Thu* ('Route Maps from the Capital to the Four Directions') written by Do Ba Cong Dao sometime in 17th Century (Kelly, 1999; Nguyen, 2012). It refers to the Truong Sa and Hoang Sa (Paracel) archipelagos by a single name, Bai Cat Vang ('Golden Sandbank'), and identifies them as part of Binh Son district, Quang Nghia prefecture³, noting that, "*In the middle of the sea is a long sandbank, called Bai Cat Vang, with a length of 400 li, spanning the middle of the sea from Dai Chiem to Sa Vinh Seaports*" (Cited in The National Boundary Commission of Vietnam, 2011, p. 8). In *Phu Bien Tap Luc* ('Miscellaneous Records on the Pacification of the Frontiers')⁴, a book prepared by Scholar Le Quy Don, the two archipelagos were identified as part of Quang Ngai prefecture:

In Quang Ngai district, off the coast of An Vinh village, Binh Son subdistrict, there is an island called Cu Lao Re stretching over 30 dams⁵. The Tu Chinh settlement, as it is called, has been established here and the people there grow beans. It takes half a day by boat to get there. Further off, there are Dai Truong Sa islands where sea products and ship-wrecked cargoes are available to be collected by the Hoang Sa detachment. It takes three days and nights to reach there by boat. They are near an area called Bac Hai. (Cited in Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1981, p. 8).

In addition, *Giap Ngo Binh Nam Do* ('A map of Southern Vietnam') drawn in 1774 by the Duke of Doan, Bui The Dat and a Vietnamese publication entitled *Dai Nam Nhat Thong Toan Do* ('Maps of Vietnam during the Nguyen Dynasties by Phan Huy Chu') published in 1838; clearly indicate that Hoang Sa - Van Li Truong Sa as part of Vietnamese territory⁶ (Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1988; Nguyen, 2012).

Van Li Truong Sa ('The Ten thousand-li long sandbank') was also described in *Viet Su Cuong Giam Khao Luoc* ('A Brief History of Vietnam') (1877) by Nguyen Thong, who relates that:

Nam Nhat Thong Toan Do – ('A Vietnamese Atlas') (1838), *Dai Nam Thuc Luc Tien Bien va Chinh Bien* ('Truthful Accounts about Dai Nam's Former and Present Dynasties') (1844 - 1848) and *Dai Nam Nhat Thong Chi* – ('A Geography of Unified Dai Nam') (1882 - 1945).

³ Now known as Quang Ngai province.

⁴ *Phu Bien Tap Luc* is a book on the history, geography, and administration of Southern Vietnam under the Nguyen Lords (1558 - 1777).

⁵ *Dam* is an ancient unit of measurement of Vietnamese people. It is equal to half a kilometre.

⁶ Those ancient maps are similar to Eastern Sea nautical charts drawn by Portuguese and Dutch from the 16th Century on that identify the islands as Vietnamese. (Pham, 2009).

Van Li Truong Sa belongs to Quang Ngai province. Junk sailing eastward take just 3 days and 3 nights to reach there... The sand bank stretching from the East to the South, up and down, is as long as a hundred thousand of li, among which are the areas deep enough for ships to anchor. On the bank there's source of freshwater and a variety of birds most which are unknown. There is an old tiled temple and a sign with the engraved inscription 'Van Ly Ba Binh'⁷ (Nguyen, 2012, p. 107).

In addition to territorial documentation, another important aspect of Vietnamese sovereignty over the region is its history of sustained management and exploitation of the region's resources. In the periods referred to above, Vietnamese administrations established military outposts in Bien Dong and naval support for these that was also used to collect taxes from visiting foreign vessels and to survey sea routes and draw maps of the region (Pham et al., 2010). Records relate that in the 17th Century Vietnam's Nguyen rulers⁸ sent a flotilla of boats each winter to collect various goods from the region (Cited in The National Boundary Commission of Vietnam, 2011, p. 2).

The exploitation and management of the region was also recorded in more detail in *Phu Bien Tap Luc* (1776):

The Nguyens used to form a 70-strong Hoang Sa detachment made up of An Vinh villagers. It was sent on duty in the third month of every year, taking along enough food for six months. It sailed in five fishing boats and reached the islands after three days and nights voyage. There, the men were left free in their gleanings. They were able to catch birds and fish for additional food. At times they were able to gather from wrecked ships such things as swords, silver or gold ornaments and coins, rings, brassware, tin and lead ingots, guns, ivory, beeswax, chinaware, woolens... The Nguyens also formed Bac Hai teams recruited from among Tu Chinh villagers in Binh Thuan province or the villagers of Canh Duong... The team were placed under the control of the Hoang Sa detachment

⁷ The sign translates as 'calm sea for a thousand Li'. Li is an old length measurement unit, equivalent to 0.5 km.

⁸ The Nguyen rulers (1558 - 1777) were feudal rulers of Dang Trong (Southern Vietnam), while the Trinh Lords ruled Dang Ngoai (Northern Vietnam). Both of these feudal houses nominally swore their allegiance to the Le Imperial Dynasty.

commander (Cited in Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1981, p. 11).

Over fifty years later *Dai Nam Thuc Luc Tien Bien* ('Truthful Accounts about Dai Nam Former Dynasties') (1844) detailed the activities of a Hoang Sa detachment of 70 men, recruited from An Vinh villages⁹, who spent five months in the region collecting materials from wrecked ships.

Evidence suggests that the economic exploitation of Truong Sa resources existed from at least the period of the Nguyen Lords (1558 - 1777) and through the Tay Son (1786 - 1802) and Nguyen Dynasties (1802 - 1945). During the Nguyen Dynasties, in particular, the emperors made a concerted effort to consolidate Vietnam's sovereignty over the two offshore archipelagos. In 1816, Emperor Gia Long formally claimed Vietnamese sovereignty over Truong Sa and Hoang Sa archipelagos, with later Nguyen emperors directly administering, exploiting and mapping the region as part of Vietnam's internal territory (Nguyen, 2012). Vietnamese management also included concern about the safety of foreign vessels navigating in their vicinity. For example, in 1833 Emperor Minh Mang wrote a letter to the Ministry of Public Works to warn of dangers faced by foreign vessels in the region, stating that:

recently, foreign merchant ships have often been caught in danger there. Preparations should be made for a team to go there next years to plant trees. The trees will grow up into a luxuriant vegetation that would allow navigators to recognize the areas and avoid shipwrecks. This will be for the benefit of many generations to come. (Cited in Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1981, p. 13).

The Truong Sa Islands' English language name derives from Richard Spratly, an English whaling captain who was one of the European mariners who sailed through the region in 1843 and affixed his name to Truong Sa island, with that name also being adopted by British authorities for the wider archipelago (Hancox and Prescott (1995: 14-15).

II. Micronational Claims

As the above accounts suggest, the Truong Sa Islands are located in an area crisscrossed by shipping routes connecting regional ports and through which European colonial ships also transited from the 17th to 20th centuries. This, combined with the limited settlement on the

⁹ The soldiers in the attachment and brigades were carefully recruited from fishing families from coastal areas who were well qualified for activities on the sea (Nguyen, 2012) .

island's few rocky outcrops, has led to some bizarre attempts to assert sovereignty over them by Europeans. The best known - but historically most murky - of these was the claim reputedly made by a British naval captain, usually referred to as James George Meads¹⁰, in the late 1870s that has been reported in various sources. The most detailed account of this is provided in Samuel Pyeatt Menefee's seminal publication on island micronations 'Republics of the Reefs' (1994), drawing on references to a document and affidavit allegedly filed at the US Embassy in Manila in 1971 that was referred to in a previous source (Menefee, 1994; Samuels, 1982). Accepting the authors' accounts at face value, Meads' claim for sovereignty over the islands appears to have been a personal and opportunistic one. Rather than claiming the area for the British Crown he sought to exercise a personal claim over it. From this point on the narrative begins to become ever more fanciful with a younger relative, Franklin Meads apparently claiming an independent 'Kingdom of Humanity' in the region in the early 20th Century and with individuals allegedly settling on the islands until being forced to leave by Japanese invaders during World War Two¹¹. Subsequent Internet accounts have embellished this story further and have identified a micronational entity named the 'Republic of Morac-Songhrati-Meads' that allegedly established a "government in exile" in Australia in the 1980s - 1990s (See Bethge, 2005). The Republic's current website¹² prominently states that:

While the Republic is a new presence on the web, we have a long and proud history dating back over one hundred and twenty years. We also seek your support in our moves to regain sovereignty over our archipelagic paradise from the illegal occupying forces of nations like China, Taiwan and Vietnam who, in complete disregard of international laws and conventions, have invaded our nation and stationed troops throughout the Morac-Songhrati-Meads archipelago. Click here to see the damage caused by invading armies, read about our struggle for Self-Determination and Freedom and to find out what you can do to help us regain our nation. (nd: online)

Further bizarre micronational claims have also been made, including one by a French swindler operating under the name of the Count Othmar di Schmieder Rocca-Forozata, in the

¹⁰ Although British Royal Navy records indicate that a Captain Mead (ie surname without the final 's') commanded a corvette named Modeste in the South China Seas between 1878-1891. See, for instance, the Modeste's chronology documented online at: www.pdavis.nl/ShowShip.php?id=119 - accessed January 2014.

¹¹ Although no evidence of any such habitation has come to light.

¹² www.angelfire.com/ri/songhrati/ - accessed January 2014.

early 1970s and subsequent claims made by entities named the Kingdom of Colonia St John¹³ and the Republic of Thaumaturgy¹⁴, which appear to primarily exist in dubious Internet entries. The one thing that is clear about this bizarre series of micronational claims is that their most concrete existence has been folkloric and that these notional micronations have had close to absolute zero influence on any aspect of the complex territorial dispute over the islets of the region that have occurred since the end of World War II. Indeed, few Vietnamese have any idea of their 'existence'. In only one case, that of Tomas Cloma's 1947 claim in the south east of Truong Sa (discussed in Section III below), has a micronational claim had impact at a macro-national level.

III. Post-War Disputes

As discussed in Section I, a continuous tradition of resource exploitation dating back to the 17th Century; cartographic and documentary evidence of Vietnamese perceptions of their (undisputed) inclusion of the region within their national sphere of influence; a lack of rival national claims on the region; and the lack of contestation of the 1816 declaration of Vietnamese sovereignty over the Truong Sa and Hoang Sa archipelagos; provide a clear underpinning of Vietnam's historical inclusion of the regions within its national boundaries prior to the establishment of a French 'protectorate' over Vietnam in 1884. During its 'protectorate' France also consistently affirmed colonial sovereignty over the archipelagos; protested any actions or incidents that violated this sovereignty; co-ordinated naval patrols in the archipelagos in order to ensure security and committed customs ships to combating smuggling¹⁵(Kelly, 1999). From 1930, French naval units were stationed on the main Truong Sa islands and on December 21st 1933, the Governor of France's Cochinchina territory, M.J. Krautheimer, signed a decree incorporating the Truong Sa islands within Ba Ria Province (Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1988). French naval forces subsequently ejected Chinese ships and personnel from parts of the islands in 1938, only to be ejected themselves in 1942 by Japanese invasion forces. Japanese occupation forces withdrew in 1945 and the Chinese navy temporarily replaced them until France pressured them to withdraw in 1946.

¹³ See www.colonia.asia/index.htm - accessed January 2014.

¹⁴ See www.oocities.org/thaupm/ - accessed January 2014.

¹⁵ From 1930, French naval units were stationed on the main Truong Sa Islands (Ministry of Foreign Affairs - Socialist Republic of Vietnam, 1988)

The roots of modern debates about sovereignty issues can largely be identified to have emerged out of the traumatic period of post-colonial conflict following the defeat of Japan in 1945, its withdrawal from Indochina and Vietnam's sustained battle for independence from France and later the civil war in which South Vietnamese forces were supported by the United States. The 1951 San Francisco Peace Treaty, which served to officially end the Pacific War (1941-45) and was intended to resolve various related sovereignty issues (such as those concerning the Truong Sa Islands) was understood by a French sponsored Vietnamese delegation to recognise its historical claim. However the absence of Taiwan and China from the treaty conference (due to disputes over which was the single legitimate government of China¹⁶) meant that neither of the Chinese governments felt that issues regarding their claims to the area had been resolved (Dzurek, 1996).

Following the end of World War II, the withdrawal of French colonial forces and the fragmentation of Vietnam into the socialist north and capitalist south in 1954; the Saigon Administration, and later on the Provisional Revolutionary Government of the Republic of South Vietnam, continued to exercise control over Truong Sa, reaffirmed its sovereignty and annexed this archipelago to Phuoc Tuy province. The Saigon Administration also built sovereignty steles (monumental slabs) on major islands to materially assert sovereignty (Nguyen, 2012) .

Besides Vietnam, China and Taiwan also claim all of Truong Sa archipelago and their surrounding waters (McDorman, 1993), while the Philippines and Malaysia claim sovereignty over portions of Truong Sa, and Brunei claims one reef (Cordner, 1994; Joyner, 1998). Although Vietnam considers the whole of Truong Sa region as part of its national territory, some of the other claimant countries have sought to pursue their claims by occupying areas of the archipelago. Since 1988, China has occupied nine reefs¹⁷ (Joyner, 1998) and Taiwan has occupied the largest island, Ba Binh (referred to by Taiwan as Taiping island), based on a claim made in 1947 (McDorman, 1993). Malaysia also occupies four reefs¹⁸ while Brunei has claimed

¹⁶ At this time both the Communist regime in Beijing, who controlled continental China, and the Nationalist regime, which had retreated to Taiwan after defeat by Communist forces on the mainland, claimed to be the representative government for all of China/Taiwan.

¹⁷ As Dzurek (1996) notes, with the occupation of Mischief in 1995, China expanded its outposts in the area to seven, including South Fiery Cross Reef, Cuarteron Reef, Johnson Reef, Chigua (Hughes Reef), Gaven Reef, Subi Reef, Mischief Reef.

¹⁸ Mariveles Reef, Ardasier Reef, Swallow Reef, Louisa Reef (This reef is a feature Brunei itself claims presumably because of its proximity within 200 nautical miles of Brunei).

Louisa Reef (Dzurek, 1996; McDorman, 1993). In 1988 Vietnam established military outposts on 21 islands, reefs, shoals and cays and between 1989 to 1991, Vietnam positioned four more outposts on land formations¹⁹ (Thomas & Dzurek, 1996).

In addition to those areas discussed above, a further region is controlled by the Philippines due to that country's strategic acquisition of a micro-national claim made by one of its citizens. In 1947 Tomas Cloma, a Filipino fishing fleet operator, asserted that a group of Truong Sa islands to the west of Palawan island in the Philippines were previously undiscovered and did not belong to any regional nation. He named the group as the Kalayaan ('Freedom') Islands and declared the region to be a free autonomous territory in 1956, with a capital on Patag island. Vietnam refuted the claim and Taiwan also responded by sending a naval force to Taiping island, located on the Tizard Bank area, to restrict Cloma's fleet's operations in the area. Cloma nevertheless retained his claim to the area until 1978, when he was pressured into ceding his claim over it to the Philippine Government. In tacit (and opportunistic) recognition of the legitimacy of Clomas's claim, the Philippines then incorporated the islands within their national territory by establishing Kalayaan as a municipality of Palawan island province. Since 1978 the Philippines has maintained a small population there (currently numbering around 200) based on Pagasa island (which is also the location for the municipality's air-strip) despite Vietnam's claims for sovereignty over the whole Truong Sa area (Baker and Weincek, 2002).

Conclusion

Since Vietnam's re-unification in 1975, based on the historical evidence summarised in this article and on the basis of the 1982 United Nations Sea Convention on the Law of the Sea (UNCLOS); the Vietnamese Government has claimed a significant portion of Bien Dong, including all the Truong Sa and Hoang Sa archipelagos, based upon a Exclusive Economic Zone (EEZ)²⁰ of over one million square kilometres and on the continental shelf principle (Nguyen, 1998). These historically rooted claims continue to be opposed by other regional powers (and by the fanciful micronations represented in various websites) and may yet be the

¹⁹ Rifleman, Prince of Wales, Vanguard and Prince Consort banks. In 1992, Vietnam adjusted the continental shelf claim to identify a mainland shelf, which incorporates Vanguard and Prince of Wales Banks (Dzurek, 1996).

²⁰ Articles 55 - 75 of the 1982 UNCLOS define the concept of an EEZ is an area up to 200 nautical miles beyond and adjacent to the territorial shelf.

cause of significant regional tensions and flashpoints unless international arbitration can be arranged through the agencies of bodies such as the United Nations in which evidence of continuity of historical presence and administrative responsibility can play more of a role than opportunistic occupation and intransigence.

Bibliography

Bethge, W. (2005). 'Putative States in the Spratly Archipelago', online at: www.insights-philippines.de/states.htm - accessed January 2013

Cordner, L.G. (1994). 'The Spratly islands dispute and the law of the sea', *Ocean Development & International Law* v25 n1: 61-74

Dzurek, D.J. (1996). *The Spratly Islands dispute: Who's on first?* Durham: International Boundaries Research Unit

Gjetnes, M. (2001). 'The Spratlys: Are They Rocks or Islands?', *Ocean Development & International Law* v32 n2: 191-204

Hancox, D and Prescott, V. (1995). 'A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst those Islands', *Maritime Briefing* v1 n6: 14-15

Joyner, C.C. (1998). 'The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea', *International Journal of Marine & Coastal Law* v13n2, 193-236

Kelly, T.C. (1999). 'Vietnamese claims to the Truong Sa Archipelago'. *Explorations: A graduate student journal of Southeast Asian Studies* v3n1: 35-52

McDorman, T.L. (1993). 'The South China Sea Islands Dispute in the 1990s A New Multilateral Process and Continuing Friction', *The International Journal of Marine and Coastal Law* v8 n2: 263-285

Menefee, S.P. (1994). 'Republics of the Reefs: nation-building on the continental shelf and in the world's oceans', *California Western International Law Journal* v25 n1: 81-111

Ministry of Foreign Affairs - Socialist Republic of Vietnam. (1981). *The Hoang Sa and Truong Sa Archipelagoes Vietnamese territories*, Hanoi: Socialist Republic of Vietnam

----- (1988). *The Hoang Sa and Truong Sa Archipelagoes and International law*, Hanoi: Ministry of Foreign Affairs

Nguyen, T.H. (2008). *The 1982 Sea Convention and the sea strategy of Vietnam*, Hanoi: The National Political Publishing House

Nguyen, T.Q. (2012). *The Hoang Sa and Truong Sa archipelagoes, part of Vietnam's territory, from the standpoint of international law*, Ho Chi Minh City: Ho Chi Minh City general publishing house

Nguyen, C.V. (1998). 'Viet Nam - Sustainable exploration and protection of fisheries resources and the environment', Report of a Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Kuala Terengganu, Malaysia, June 29th - July 3rd 1998, online at: <ftp://ftp.fao.org/docrep/fao/field/006/X1352E/x1352e10.pdf> - accessed January 2014

Pham, T.T. (2009). 'Eastern Sea Disputes and United States Interests', *Pacific Form CIS Insights and Issues* v9 n13, online at: csis.org/files/publication/issuesinsights_v09n13.pdf - accessed January 2014

PTG. (2010). Lac Long Quan and Au Co: The Legend of Ancient Vietnam, online at: <http://www.vietnam.com.article/lc-long-qun-and-u-c-the-legend-of-ancient-vietnam.html> - accessed January 2014

Pham, L.V et al. (2010). Chien luoc bien Viet Name - Tu quan diem den thuc tien, ('Vietnam's Marine Strategy: From theory to practice'), Hanoi: National Political Publishing House

Samuels, M.S. (1982). *Contest for the South China Sea*, New York: Methuen

The National Boundary Commission of Vietnam. (2011). *Historical documents on Viet Nam's sovereignty over Hoang Sa and Truong Sa islands*

Thomas, B.L and Dzurek, D.J. (1996). 'The Spratly Islands Dispute', *Geopolitics and International Boundaries* v1 n3: 300-326

Tran, L. D. (2002). *Strategic planning and standards for ecotourism development in Vietnam*. Paper presented at the 6th ADRF General Meeting: Policy and planning of Tourism Products Development in Asian Countries, Bangkok. online at: http://www.xuvn.com/vietnam%20tourism/Vietnam%20Ecotourism/Tran_Lam_paper.pdf - accessed January 2014

The South China Sea Conflict: Great Powers' Behavior and the Role of United Nations

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Abstract: The disputes and conflicts in the South China Sea since 1974 have never shown a declining trend in the level of tensions as well as its complex nature. Recently, China has deployed a large drilling rig in the exclusive economic zone and continental shelf claimed by Vietnam has pushed tensions in the region to a higher level, threatened regional peace, maritime security, and freedom of navigation. Failure to reduce tensions and manage conflicts this time may lead to wars. This paper points out the four most likely scenarios showing that the South China Sea issue may be acceptable. However, all of these scenarios will demonstrate the outdated international institutions in dealing with disputes and conflicts in the South China Sea in particular and other similar issues in general globally.

Keyword: dispute, conflict, South China Sea, great power, big three, behavior, UN, Charter, UNCLOS.

Introduction

This paper does not deal with the details, the nature, and the history of the arguments in the South China Sea (or SCS) – known as the East Sea in Vietnam and neither does it focus on analyzing the potential resources in these waters and the causes of the economic or political disputes/conflicts. Instead, it provides brief information about the escalation of the disputes and the levels of acts of the great powers in the world related to the issues of SCS since 1974¹ to now, the paper concentrate on clarifying their thinking, attitude, and behavior.

¹ The year of 1974, China expelled the former South Vietnam from the Paracel islands.

Disputes in SCS, which are not only simply economical issues (the water is a very rich)² but also related to political issues regarding seven nations' overlapping claims (China, Vietnam, the Philippines, Malaysia, Indonesia, Brunei Darussalam and Taiwan), are very complex. China, claims nine-dashed line, (or Cow's tongue line) lays almost all of SCS, is also a nation holding the biggest number of arguments, and conflicts with neighbors in the region,³ especially with the Philippines and Vietnam.⁴ The Philippines and Vietnam are small nations, thus they have used to avoid military confrontation with China and use all measures and means to try to pursue the peaceful resolutions to the disputes in SCS. However, they are facing four unwanted scenarios. In the context and perspective like that, the behavior bearing the powerful-abused nature of the great powers in the past has shown more clearly than ever. Meanwhile, the United Nations (or UN) and other international organizations do not seem to fulfill their duties. If the Philippines and Vietnam were the light-weighting opponents on the boxing floor of SCS outside the law or Cats in the jungle, China would be a heavy-weighting one or a Tiger. Therefore, in the 21st century, mankind can hardly regard them as being civilized: *"the world passed ten thousand years of evolution but still be wild; more than seven billion human beings no Saints yet."*

Which scenario is for the disputes in the South China Sea?

The Philippines has recently initiated an international arbitration case under the United Nations Convention on the Law of the Sea (or UNCLOS) over Chinese claims of sovereignty to the Spratly Islands and Scarborough Shoal (or Scarborough). The procedure takes months, and Scarborough became immediate the naval garrison of China after an encounter with the Philippines military blitz in April 2012 until an arbitrator' specific judgment can be reached. Moreover, the latest dispute occurred in May 2014, when China deployed the giant drilling rig Haiyang 981 (or H981) on the continental shelf and the exclusive economic zone (or EEZ) of Vietnam.⁵ China was also accused of sinking a Vietnam fishing boat and deploying a number of vessels, including warships around the rig. Therefore, a solution of bringing it to the

² This area is very rich in energy resources (11 billion barrels of oil and 190 trillion cubic feet of natural gas) and is one of three busiest of global trade flow (5.3 trillion U.S dollars every year); (<http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/>, accessed May 16, 2014 at 01h20).

³ <https://endtimebibleprophecy.wordpress.com/tag/vietnam/>, accessed May 19, 2014 at 10h40.

⁴ "Island Grabbing in Asia." *Foreign Affairs*. 4 Sept. 2012. Web. 29 May 2014, http://www.foreignaffairs.com/articles/138093/michael-t-klare/island-grabbing-in-asia?cid=soc-twitter-in-snapshots-island_grabbing_in_asia-091612, accessed May 22, 2014 at 20h.

⁵ <https://johnib.wordpress.com/tag/south-china-sea/>, accessed May 26, 2014 at 23h20.

international court under UNCLOS has mentioned. Logically, these events could result in the following four scenarios:

▪ *The first is “War to Occupy”*: Parties use force to settle disputes and China is now setting a military force at Scarborough and in Vietnam’ EEZ where H981 deployed. In the 20th century, this scenario took place several times. There were two typical military clashes involving the most serious disputes in the SCS: 1) China occupied Crescent⁶ of Paracels⁷ of Republic of Vietnam in January 1974; and 2) China sank three ships of Vietnam in March 1988 near Johnson Reef.^{8,9} So far, China has been the only claimant using force and threats of using violence to settle disputes in SCS.

▪ *The second is “Loss in Peace”*: China with the strength of a great power would put tension on the Philippines and Vietnam by using economic punishments, which gives them a lesson in potential costs of confronting against China. In reality, China has pressured the Philippines by using a number of trading hurdles that temporarily halted the export value of the Philippines in May 2012, around \$35 million.¹⁰ Therefore, the Philippines and Vietnam must accept the status quo or be significantly damaged to their economies.

▪ *The third is “Partial Withdrawal”*: this seems to be the best for the Philippines and for Vietnam too, which means that after China performs her military power to test the Philippines’, Vietnam’s and the international community’s reaction, she will actively withdraw the force out of Scarborough and H981 out of Vietnam’s EEZ. Nevertheless, in reality, this does not mean that conflicts will be resolved. It will stay the same as a mode of “punch and massage,” China occasionally will be aggressive and will provoke the Philippines and Vietnam as ever before.

⁶ Crescent Group consists of eight islands that form a crescent-like structure from west to east enclosing a deep central lagoon.

⁷ The Paracel Islands, known as *Xisha Islands* in Chinese and as *Hoàng Sa Archipelago* in Vietnamese, is a group of islands in the South China Sea controlled by the People's Republic of China and claimed by Taiwan (Republic of China) and Vietnam.

⁸ Leszek Buszynski, “The South China Sea: Oil, Maritime Claims, and U.S.—China Strategic Rivalry”, *The Washington Quarterly* - Spring 2012, Volume 35, Issue 2, 2012, pp. 151; (<http://dx.doi.org/10.1080/0163660X.2012.666495>).

⁹ [http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/,](http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/) accessed May 27, 2014 at 22h45.

¹⁰ [http://yaleglobal.yale.edu/content/standoff-south-china-sea,](http://yaleglobal.yale.edu/content/standoff-south-china-sea) accessed May 28, 2014 at 22h50.

▪ *The fourth is “Corporate to Sink”*: China and the Philippines cooperate on the development of resources at Scarborough. This scenario is more likely to happen because China found that the lawsuit would put her at a disadvantage, so she seemed softer, offering compromise proposals and seeking measures to prevent the lawsuit.¹¹ However, the Philippines may not accept “*anything on joint development is dead in the water.*”¹² The resource sharing is often proposed as a solution to deescalate tensions by scholars and politicians, which might be first suggested as the “*setting aside Dispute and pursuing joint development*” by Deng Xiaoping in 1978 for the East China Sea dispute.^{13,14} In fact, the joint development of resources on the disputed water is not easy because there are no laws or regulations governing it and the cooperation will lead to the sharing of benefits among parties unsatisfactorily. In such situations, the advantages always belongs to more powerful partners on economics, politics, diplomatic, so the cooperation will be lack of stable and sustainable development. *No one can make equal cooperation on unclear ownerships* because the issue is not only economic disputes but also the national sovereignty. The failure of the following cases demonstrates this: the 2002 Australia-East Timor Joint Development Agreement (or JDA) in the Timor Sea; the 2008 China-Japan JDA on the Chunxiao field; The 2009 Malaysia-Brunei JDA.¹⁵

No matter what the scenario is happening to Scarborough and Vietnam’s EEZ, these acts are also in the strategic intentions of China in order to make the nine-dashed line come true. Of course, the other nations will not give up their sovereignties.

¹¹ <http://www.southchinasea.com/analysis/709-how-will-china-handle-the-lawsuit-of-the-philippines.html>, accessed May 29, 2014 at 22h50.

¹² Crisis Group interview, Manila, October 2011 was cited in “Stirring up the South China Sea (II): Regional Responses”, *Crisis Group Asia Report N°229*, 24 July 2012, pp.36.

¹³ Patrick M. cronin, “Flashpoints: The Way Forward in the East and South China Seas,” *East and South China Seas Bulletin #12*, March 18, 2013, pp. 2.

¹⁴ Deng Xiaoping – Vice Premier of China, suggested the solution of “setting aside Dispute and pursuing joint development” to Fukuda (Japan’ PM) in 1978, http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml, accessed May 30, 2014 at 23h20.

¹⁵ Tara Davenport and others, “Conference on Joint Development and the South China Sea”, *Conference Report*, June 2011, pp. 21.

Why has the South China Sea disputes never been solved by UNCLOS?

With the two disputes related to Scarborough and the position of H981 in Vietnam's EEZ, the best resolution has to base on evidences and international law to prove its sovereignty. It helps to settle the present situation and avoid military confrontation between the nations concerned. However, the long-running arguments and the increasing tensions in SCS may clearly show the weakness of UN and restrictions of UNCLOS and UN Charter.

UNCLOS not been a powerful law yet

The event that the Philippines filed a legal action against China in February 2013 has shown some limitations of UNCLOS to handle the SCS disputes as following:

- UNCLOS comprises an exceptional article, Article 298,¹⁶ which permits a State to reject the application of the convention's compulsory dispute settlement procedure to several categories of disputes:¹⁷ *“disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations.”* China has made a declaration under this article since signing UNCLOS, and now can prevent the Philippines' case. Law is a system of rules and guidelines serving as a mediator of relations between people, and all without exception must obey. In case of unavoidable exceptions, only specific ones could not be abused or easily brought about the more complex situations in future;

- UNCLOS comprises an optional article, Article 287,¹⁸ which permits a State to be free to choose four of the following means to settle the disputes: (a) the International Tribunal, (b) the International Court of Justice, (c) an arbitral tribunal, and (d) a special arbitral tribunal. While these arbitration mechanism is always-present inadequacies *“allow the parties a degree of control over who judges their case,”*¹⁹

¹⁶ Article 298: Optional exceptions to applicability of section 2.

¹⁷ SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS.

¹⁸ Article 287: Choice of procedure.

¹⁹

http://www.cnas.org/files/documents/publications/CNAS_Bulletin_Dutton_TheSinoPhilippineMaritimeRow_0.pdf (The Sino-Philippine Maritime Row: International Arbitration and the South China Sea, By Peter a. Dutton.)

China might use this article because she has the strength of great power that would affect the arbitrators;

- UNCLOS lacks provisions, mechanisms of preventing the disputes or the risk of disputes that shows the potential effects to the common interests of humankind. For example, China invaded Paracels in 1974 or submitted a map to UN including the nine-dashed line territorial claim in SCS in 2009; furthermore, UNCLOS lacks authority to decide sovereignty disputes over land features such as islands and rocks. It applies only in cases of disputes arising from maritime jurisdiction.²⁰

- Although UNCLOS was created in 1982 and has gone into effect since 1994, it was refused to sign/ratify by some, including the United States who holds the largest sea fields on the planet.^{21,22} This can lead to the arguments regarding a nation's regular activities on international waters without being adjusted under UNCLOS, and to a precedent for other nations to follow as a trend as "living outside the law" in a world of legality.

In general, UNCLOS used to be a collection of regulation of sufficient power to adjust the most disputes in SCS in the past. Nevertheless, the problem is that the claimants did not obey UNCLOS.

Claimants did not respect UNCLOS

As an international law, UNCLOS should remain in force until it is complete. Furthermore, UNCLOS itself comprise provisions to govern appropriate behavior related to Article 74 and Article 83, this convention has a number of guidelines related to the status of islands, continental shelves, exclusive economic zones, enclosed seas, and territorial limits. The states with overlapping claims must resolve disputes under negotiations in good faith.

Therefore, stakeholders must be responsible to the law, however, almost all of the states in the region have not applied UNCLOS, even violated it and other international laws in recent

²⁰ <http://yaleglobal.yale.edu/content/standoff-south-china-sea>, accessed May 31, 2014 at 23h50.

²¹ Wong, Kristina. "Rumsfeld still opposes Law of Sea Treaty." *The Washington Times*, 14 June 2012.

²² Dr Emmanuel Yujuico, "The real story behind the South China Sea dispute", *International Affairs, Diplomacy and Strategy @ LSE*, http://www.lse.ac.uk/ideas/programmes/southeastasiaprogramme/pdfs/sa_southchinaseadispute.pdf, accessed June 2, 2014 at 20h55.

years. In particular, China, with the recent acts, seems to ignore UNCLOS and violate or do not obey other international laws strictly. China claiming sovereignty and deployment of military forces in Scarborough and Vietnam's EEZ,... is a violation of Article 279, UNCLOS; Article 2 (3), Article 33 (1), UN Charter. Thus, UNCLOS is invalid. This might be the reason why the article on the Economist's Banyan recently stated: "*Force majeure: In the contested waters of the South China Sea, China Seems Able to do whatever it wants.*,"²³ has a quite negative comment: "*And Even if the Philippines wins the case, the court has no power to enforce the judgment; China will simply ignore it.*"

This is a concrete manifestation of the behavior of a major power; China has been the only claimant to resort to force in the dispute when it removed South of Vietnam from the Western Paracels in January 1974 and when her naval vessels sank three Vietnamese ships in 1988;²⁴ as Dutton analyzes that China has challenged the international law instead of applying UNCLOS, they have based on uncertain historical factors, "nine-dashed line."²⁵ This is a typical behavior of a great power in SCS. In history of humankind, this behavior has repeated in its nature.

To sum up, UNCLOS was not strong enough to adjust the dispute and bypassed by some claimants, especially China, an emerging great power.

The powerful behavior of Great Powers

"Earth provides enough to satisfy every man's needs, but not every man's greed."^{26,27}

-Mahatma Gandhi-

An individual person, one state, or one nation all has its own selfish and greedy nature proportional to the strength of the power. Once they get stronger, they will acquire resources,

²³ <http://www.economist.com/node/21602726/print>, accessed June 2, 2014 at 22h10.

²⁴ Leszek Buszynski, "The South China Sea: Oil, Maritime Claims, and U.S.—China Strategic Rivalry", *THE WASHINGTON QUARTERLY - SPRING 2012*, pp. 151, <http://dx.doi.org/10.1080/0163660X.2012.666495>

²⁵ Patrick M. Cronin, Peter A. Dutton, "Cracks in the Global Foundation: International Law and Instability in the South China Sea", *Cooperation from Strength The United States, China and the South China Sea (Center for a New American Security)*, January 2012, pp. 69.

²⁶ <http://allaboutgandhi.com/178/2013/09/15/earth-provides-enough-to-satisfy-every-mans-needs-but-not-every-mans-greed-mahatma-gandhi-2/>, accessed June 3, 2014 at 18h50.

²⁷ http://thinkexist.com/quotation/earth_provides_enough_to_satisfy_every_man_s_need/181709.html, accessed June 3, 2014 at 19h20.

land, and economic influence outside of their borders in order to expand their size, power, and wealth by force.²⁸

In the 21st century, China has been emerging as a great power balancing with the United States and Russia. All have the ability to exert all their influence on a global scale, possess military and economic strength, as well as diplomatic and soft power influence. China has its economic strength to pass Japan as not only the world second largest economy but also the nation with great hunger for energy to keep growing. The Big Three (the United States, Russia, and China) are not different from the One (the United States, Soviet Union, and Great Britain) in the World War II. Its nature has not changed, still abusing power. If the United States dominates the Caribbean and abuses of her power in the Middle Eastern, and Russia expresses power in the Eastern Europe then China today finds itself in a similar situation in SCS.²⁹

Facing the violation of China in SCS, what action will the United States and Russia take to stop? According to Peter Howard, “*Generally, a great power can be defeated militarily only by another great power*”.³⁰ However, a war between the Big Three now is not real, and may lead to the world war, which is not encouraged by humankind. Therefore, if no action were taken by the United States and Russia in response to China’s violation, China would be called *evil*, the United States and Russia as *destroyers* by Albert Einstein: “*The world will not be destroyed by those who do evil, but by those who watch them without doing anything.*”^{31,32} So, some measures may be taken as follows:

- *Military intervention*: If Japan and the Philippines were involved in military confrontation, the United States would be obligatory to consider military action under defense treaties.³³ Then, what about Vietnam and other claimants who are not the great powers’ allies? Will the United States or Russia interfere to stop China? Even in the case of military support, it is also is the last resort, and of course, not good for

²⁸ Ross Hassig, *Mexico and the Spanish Conquest* (1994), pp. 23–24, ISBN 0-582-06829-0 (pbk)

²⁹ http://www.foreignpolicy.com/articles/2011/08/15/the_south_china_sea_is_the_future_of_conflict, accessed June 3, 2014 at 20h15.

³⁰ Peter Howard, "Great Powers". *Encarta*, MSN, 2008. Archived from the original on 2009-10-31. Retrieved 2014-5-28.

³¹ <http://www.goodreads.com/quotes/935864-the-world-will-not-be-destroyed-by-those-who-do>, accessed June 4, 2014 at 21h35.

³² <http://www.quotes.net/authors/Albert+Einstein>, accessed June 4, 2014 at 21h50.

³³ [http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/#/](http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/), accessed June 5, 2014 at 22h10.

every participant. If military action is not under control, the risk of a world war is great. In that case, the Third World War, a nuclear war, will take place, which was humorously described by Albert Einstein: “*I don’t know about the World War III but if there is a World War IV, then it will surely be fought with sticks and stones.*”^{34,35}

▪ *Economic sanction*: the Philippines and Vietnam surely could respond to a rise in tensions by imposing economic sanctions on China, which, however, will not harm China’s economy. In contrast, this will damage for other small-sized economies. Will the United States be able to impose sanction on China as same as on Russia recently³⁶ when the Big Three are the nations having extensive trade ties? This sanction will really harm both China and the United States as the case occurred in 2012 between China and Japan resulted from the disputes of Diaoyu/Senkakus Island.³⁷ And what about Russia? Russia has the same issues as China; in addition, Russia has just signed the biggest gas deal worth and exported a huge number of weapons to China.³⁸

▪ *Trade-off benefit*: were the United States and Russia to intervene in military and put economic punishments on China, they would take diplomatic actions, in which, the Big Three would compromise the claimants’ benefit. This is not a surprise because in the past, there were a number of trade-offs between great powers, such as: the Big Three (the United States, United Kingdom, Soviet Union) discussed Europe's post-war reorganization at Yalta Conference in 1945; the dual superpowers (the United States, Soviet Union) and other members of UNSC compromised the possibility of restoring peace in Indochina in 1954 at Genève Conference;³⁹ the trade-off between the United States and China on Taiwan in 1970s to now; recently, Russia has stuck in the mire in Ukraine was besieged by the United States and the European Union. Conflicts and disputes between the U.S. and Russia with the West will last. Therefore,

³⁴ <http://www.quotes.net/authors/Albert+Einstein>, accessed June 6, 2014 at 22h00.

³⁵ Calaprice, Alice (2005). *The new quotable Einstein*. Princeton University Press. p. 173. ISBN 0-691-12075-7.

³⁶ <http://online.wsj.com/news/articles/SB10001424052702304163604579529281448543274>, accessed June 6, 2014 at 22h50.

³⁷ <http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#!/>, accessed June 7, 2014 at 21h55.

³⁸ <http://www.economist.com/news/leaders/21602695-vladimir-putin-pivots-eastward-should-america-be-worried-best-frenemies>, accessed June 8, 2014 at 19h20.

³⁹ "Indochina - Midway in the Geneva Conference: Address by the Secretary of State". *Avalon Project* (Yale Law School). May 7, 1954. Retrieved 29 April 2010.

Russia desperately needs China for trade and business. At the same time, Russia also needs its political and economic affiliation with China to deal with the West.

Kirkland and Ellis's conclusion might wrap it up: "*It is simpler to recognize that international legal norms outstripped the interests of countries, and so there was no incentive to uphold them.*"⁴⁰

The weak role of the United Nations

To date, the UN have had no actions in response to the SCS disputes yet, although China violated the Article 279, UNCLOS (which stipulates that States Parties shall settle any dispute between them related to the interpretation or application of this Convention by peaceful means); and Art. 2 (3), Art. 33 (1), UN Charter,⁴¹ and may ignore the judgment of arbitrator if the Philippines wins the case. Meanwhile, China is one of the five permanent members of the United Nations Security Council (UNSC) who has responsibility to maintain international peace and security in accordance with the principles and purposes of the United Nations.⁴²

As a rule, when the members of UNSC get stronger UN will become weaker; a more effectively multilateral organization will limit the great powers' power, and of course, this leads to the situation that the mightiest governments, specifically the five members of UNSC are usually opposed to robust institutions and often use their power to block changes when necessary.⁴³

The weakness of UN has showed not only in handling the SCS disputes and recent events (like: Ukraine' political crisis; the East China Sea disputes; North Korea' Nuclear Test;...) but also in controlling the elimination of the wars and conflicts in the world. The Second World War (WWII) finished and UNSC established in 1946, no world war anymore but regional wars and serious conflicts are raising, above all, the prospect of a major war involving nuclear weapons. (see Chart 1.1)

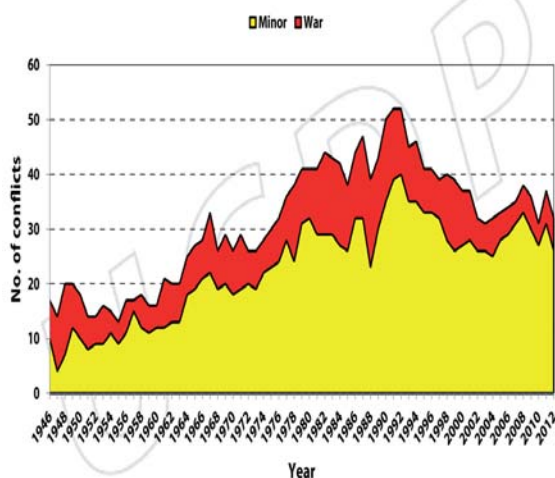
⁴⁰ Kirkland and Ellis, "Putin's triumph in Crimea: implications for international law", June 2, 2014, <http://ericposner.com/putins-triumph-in-crimea-implications-for-international-law/>, accessed June 9, 2014 at 22h50.

⁴¹ Article 279, which stipulates that: States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with 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 33, paragraph 1, of the Charter.

⁴² Matthew, R. 2012 "Environment, conflict, and peacebuilding", *Handbook of global environmental politics*, Edward Elgar Publishing, Cheltenham, United Kingdom, 2012.

⁴³ <http://www.globalpolicy.org/un-reform.html>, pa. 3, accessed June 9, 2014 at 23h10.

Chart 1.1: Wars and Armed Conflicts by Intensity, 1946-2012



(Source: http://www.pcr.uu.se/digitalAssets/66/66314_1conflict_intensity_2012.jpg, accessed June 6, 2014 at 21h20)

Not all wars are caused by the great power but always related to its major role, in which, some are intervened directly or promoted by the great power.⁴⁴ And the term “superpower”⁴⁵ might refer to the United States and Soviet Union in the period of cold war when most of the wars occurred, such as: First Indochina War (1946–1954); Korean War (1950–1953); Vietnam War (1957–1975); Afghan-Soviet War (1979–1989);...

The outcome of the UN’s weakness is not new. In the past, the needs of reformation of UN have been raised since very early years. Among such needs, the one concerning UNSC is a serious topic seems never ending today and has become a somber warning: “*reform or die.*”⁴⁶

The SCS crisis may not lead to a war in the coming months, but no one can be sure in the future, and somewhere on this planet, wars are still happening. People do not want wars anymore, the nations’ governments need to understand that the powerful behavior never come from people of that nation’ will but leaders’. People are not related to the leaders’ decision but must be suffered all risks: “*Although these wars were fought on different territories by various*

⁴⁴ http://en.wikipedia.org/wiki/List_of_proxy_wars, accessed June 9, 2014 at 23h30.

⁴⁵ A Superpower that is consistent with all definitions of a superpower is a nation or state that has mastered the seven dimensions of state power; geography, population, economy, resources, military, diplomacy and national identity. (*The Rise and Fall of the Great Powers* (1987) written by Paul Kennedy).

⁴⁶ <http://www.globalpolicy.org/un-reform.html>, pa. 1,2, accessed June 10, 2014 at 23h00.

groups and countries on different time periods in history; the ones who always suffered and lost were the same innocent civilians.”⁴⁷

Can the United Nations prevent the powerful behavior of Great Powers?

Hitler caused WWII then humankind had to establish UN to maintain international peace and security, and prevent a danger of WWII.⁴⁸ The weak UN has not been able to prevent the wars and conflicts in the whole world, and controlled the great powers, especially successfully settled the SCS conflicts. However, the strong UN can do. Now, the new Big Three wants to share the world once again, do mankind need to make UN stronger or let the great powers do whatever they want?

UN comprises 193 Member States and UNSC has only five Member States, including the Big Three. Therefore, strengthening UN means making UNSC weaker, only when the veto mechanism is abolished would UNSC be weak. Nevertheless, this veto mechanism was just able to be abolished by the amendment of the UN Charter, and this amendment has to be ratified by all of the permanent members of UNSC. There is no way because “*Article 108⁴⁹ gives the permanent members a veto over Charter amendments, they can trump any efforts to weaken formally their veto power.*”⁵⁰

Therefore, the peaceful future of humanity depends on the Big Three. No one wants war, mankind only hopes that the present leaders of the Big Three will become “philosopher kings” that Plato describes in *Republic*: “*Until philosophers rule as kings or those who are now called kings and leading men genuinely and adequately philosophise, that is, until political power and philosophy entirely coincide, while the many natures who at present pursue either one exclusively are forcibly prevented from doing so, cities will have no rest from evils,... nor, I*

⁴⁷ <http://www.elist10.com/worlds-top-ten-biggest-wars-in-history/>, accessed June 11, 2014 at 23h30.

⁴⁸ <http://www.un.org/en/aboutun/index.shtml>, accessed June 11, 2014 at 23h45.

⁴⁹ Article 108: Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

⁵⁰ Edward C. Luck, “Reforming the United Nations: Lessons from a History in Progress, Who Decides?”, *International Relations Studies and the United Nations Occasional Papers*, 2003 No. 1, pp. 15, <http://www.globalpolicy.org/images/pdfs/2003history.pdf>

think, will the human race";^{51,52} or becoming "virtue kings" that Confucius teaches in *The Analects*: "己所不欲，勿施於人。" (What you do not wish for yourself, do not do to others.)⁵³

People accept the social contract to give up their natural freedom to enjoy the safety and order of civilized society. All are equal before the law, and all nations have to fulfill their obligation and be equal under the UN Charter.

⁵¹ <http://www.iep.utm.edu/republic/>, (Republic 473c-d), accessed June 12, 2014 at 3h00.

⁵² http://en.wikipedia.org/wiki/Plato#The_state, accessed June 12, 2014 at 3h10.

⁵³ <http://en.wikipedia.org/wiki/Confucius#Politics>, Analects XV.24, tr. David Hinton, accessed June 12, 2014 at 3h45.

Vietnamese Foreign Policy and the South China Sea Disputes

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The South China Sea involves six disputants namely China, Taiwan, Vietnam, the Philippines, Malaysia, and Brunei. However, the main tensions are among China, Vietnam and the Philippines who are most active in defending their claims over territorial waters. The South China Sea (SCS) issue was primarily the conflict between Vietnam and China over the right to Paracels and Spratlys. Since the end of Cold War with the rapid modernization of Chinese military especially its navy force and the significant economic growth, China manifests its increasing ambition in controlling strategic area of the South China Sea. The post-Cold War era witnessed the confrontation between China and ASEAN claimants and the role of Association of Southeast Asia Nations (ASEAN) in mitigating the conflict and managing the dispute. Yet, the effects brought about by ASEAN seemed to be modest and China's growing assertiveness over its waters concern ASEAN claimants and push them to find out support from outside powers like the US, Japan, India, and Australia. The very involvement of outsiders complicates the dispute and the irresolution of the dispute makes it a regional or even international security flashpoint.

In this context, whether Vietnam employs multilateral or bilateral approaches or a mixture of both to deal with China's growing assertiveness since the end of Cold War will be discussed in this paper. I will illustrate that Vietnam applies both multilateral and bilateral approach to modify China's behavior through regional institutions and bilateral cooperation. The paper consists of two sections of which the first one deals with multilateral approach and the second deals with bilateral approach.

*** Vietnam's preferred multilateral approach and its limitations**

To deal with the South China Sea dispute, Vietnam prefers multilateral approach which may prove beneficial in several ways. First of all, Vietnam expects to use the multilateral frameworks to modify China's behaviour in the South China Sea without damage in the bilateral economic ties with China. Of the South China Sea disputants, China is the most ambitious and powerful in advancing the interests in comparison with the rest of the disputants.

It is also the largest trade partner of Vietnam. Vietnam avoids confronting China directly and attempts to approach ASEAN and ASEAN-led multilateral dialogue frameworks to seek regional support in dealing with China. In this context, Hanoi seeks to confront Beijing in an indirect manner that is via ASEAN.

Second, ASEAN's norms of consensus, non-interference in domestic issues of its members and peaceful settlement of disputes are suitable with Vietnam's objectives in foreign and national defence policies. Resolving the South China Sea through ASEAN's multilateral frameworks can help Vietnam avoid external intervention and retain its sovereignty. This is the most important goal of Vietnam's South China Sea policy.

Third, multilateral mechanisms cannot resolve the dispute then at least they can keep disputant states from further expansion or occupation in the disputed areas. ASEAN likes to support issues under the Charter. Hanoi obviously understands that ASEAN itself and other institutions in which ASEAN plays a central role at present cannot help resolve the dispute. But ASEAN's initiatives could help sustain the status quo in the South China Sea. Preserving status quo in the South China Sea is the short-term strategy of Vietnam in countering China. This can be seen as a 'delaying strategy' through which Vietnam and other claimants could buy time to consolidate their territorial claims. In the 2009 White Paper on defence, Vietnam asserted: "... While looking for a long-term solution for this issue [the South China Sea], Vietnam advocates concerned parties to self-restrain, seriously implement ASEAN-China Declaration on the conduct of parties in the South China Sea (DOC), concentrate on building of Code of Conduct (COC), reach an equal and long-term resolution for this complicated problem in order for East Sea [the South China Sea] to be always the sea of peace, amity and development" (Ministry of National Defence 2009: 19-20). Similar statement can be found in the 2004 White Paper on defence.

Vietnam's approach to ASEAN and ASEAN's initiatives toward the South China Sea dispute

The South China Sea dispute has become the focus of ASEAN's security agenda since early 1990s when Vietnam withdrew its troops from Cambodia and settlement of Cambodia issue was reached the Paris Peace Accord. In the Cold War period, ASEAN did not take any official position in the South China Sea issue in spite of China's use of force to occupy Paracels in 1974 and naval clash between China and Vietnam in 1988 resulting in China's first foothold in the Spratly island.

This first initiative by ASEAN happened in 1992 when the Philippines held the chairmanship of ASEAN. The U.S's withdrawal from Subic Bay naval base (Philippines) in the

early 1990s created a 'power vacuum' in Southeast Asia and made the area specially the Philippines vulnerable to China's development. Therefore, in order to prevent China's further development, the Philippines with its chairmanship of ASEAN actively pushed ASEAN to take a stance in the issue (Tuan 2011). At the 25th ASEAN Ministerial Meeting in Manila, Philippines, ASEAN adopted Declaration on the South China Sea. The Declaration acknowledged that the negative development in the sea would directly affect regional peace and stability and at the same time it called for peaceful means in resolving the differences and cooperation in the area. It also called on all concerned parties to refrain from using force and urged parties to practice restraint and to apply TAC rules (ASEAN 1992).

The situation in the South China Sea dispute became a regional flashpoint only when China in late 1994 occupied Mischief Reef which was claimed by the Philippines (Thayer 2013: 76). The incident pushed ASEAN to take a strong stand toward the dispute. In the Statement by the ASEAN Foreign Ministers on Recent Developments on the South China Sea issued on 18 March 1995, they stated that: "We, the ASEAN Foreign Ministers, express our serious concern over recent developments which affected peace and stability in the South China Sea... We call upon all parties to refrain from taking actions that destabilize the region and further threaten the peace and security of the South China Sea. We specifically call for the early resolution of the problems caused by recent developments in Mischief Reef" (cited in Tuan 2011). Subsequent ASEAN documents continued to express concern over the issue and stressed the importance of exercising self-restraint as well as efforts to find an early resolution for the differences by peaceful means consistent with principles of TAC and Manila Declaration of 1992 (ASEAN, 1995a; 1995b).

In July 1995, Vietnam joined ASEAN which marked significant change in Vietnam's South China Sea policy. Since then Vietnam started strategy of multilateralization of the dispute. Vietnam actively involved in ASEAN's management of the dispute as well as preventing conflict escalation. After the Mischief Reef incident ASEAN agreed on the idea of the code of conduct as a way to manage relationship with China and prevent further occupation by Chinese (Buszynski 2003: 350). The Philippines proposed the code of conduct in August 1995 (ibid.: 350). Buszynski argues that the code of conduct aimed at two goals. First, it was expected to bring about unity among ASEAN states over the SCS issue which was assumed to show division between claimants and non-claimants. The second goal was to shape China's behaviour in cooperative manner (ibid.: 351).

The idea of a regional code of conduct in the South China Sea was endorsed by ASEAN foreign ministers at the 29th ASEAN Ministerial Meeting (AMM) in Jakarta in July 1996. In ASEAN thinking, the code of conduct “will lay the foundation for long term stability in the area and foster understanding among claimant countries” (ASEAN 1996). Vietnam and the Philippines were assigned to draft the code of conduct to submit to the ASEAN Senior Officials Meeting for discussion (Buszynski 2003: 354).

Due to many irresolvable differences between ASEAN disputants themselves and between ASEAN state members and China, they could not reach any agreement on the code of conduct. In that context, Malaysia made a move to overcome the deadlock by proposing a declaration on a code of conduct at the 35th AMM in Brunei in July 2002. The declaration was considered a concession to China and less binding than a code (ibid.: 356). Despite disagreement from the Filipinos the declaration was endorsed by ASEAN foreign ministers and China accepted the proposal of a declaration on 27 July (ibid.: 356-357). In November 2002, ASEAN states and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC). The DOC reaffirmed the importance of the South China Sea to the regional peace, stability, development and prosperity. The parties committed to pursue peaceful settlement for their differences on the basis of 1982 UNCLOS, TAC and the five peaceful coexistence principles. The document set out cooperative activities which related parties could undertake and rule of self-restraint. More importantly, the parties concerned expressed their commitment to work on a code of conduct on the basis of consensus (ASEAN 2002).

Although the DOC was only a political text with no binding provisions and it did not provide any mechanism to resolve the dispute, for ASEAN “there was some elation as China for the first time had signed a multilateral declaration over the South China Sea”, Buszynski asserts (Buszynski 2003: 357). This seemed the first step to advance a binding code of conduct. The Declaration was also a signal that to a certain extent China could accept multilateral framework dealing with the South China Sea issue. In addition, it also expressed ASEAN’s role, efforts and commitment to promoting peace, security and prosperity in the area as well as managing the dispute.

Besides efforts to promote a regional code of conduct, Vietnam attempted to influence ASEAN through raising the South China Sea issue at ASEAN Informal Summits. The Hanoi Plan of Action which was endorsed by the second ASEAN Informal Summit in Kuala Lumpur on 15 December 1997 included four separate points addressing the issue. The main content of discussion focused on effort to pursue a peaceful settlement for the South China Sea, to promote

confidence-building measures, to encourage parties concerned to comply with DOC, and to promote a regional code of conduct (ASEAN 1997). This effort did not continue through to the Hanoi Plan of Action in 2010 endorsed by ARF Senior Officials Meeting where maritime security in general was discussed without naming the South China Sea.

In the ASEAN-China SOM of 2004 in Kuala Lumpur, ASEAN and China decided to establish the ASEAN-China Joint Working Group (JWG) (Thuy 2010: 105-106). In the first meeting, they discussed ASEAN's draft guidelines of implementation of the DOC which proposed ASEAN consultation prior meeting with China. However, China insisted that sovereignty and jurisdiction disputes must be resolved bilaterally by parties directly concerned (Thayer 2013: 77). The guidelines to implement the DOC were adopted in July 2011 after ASEAN removed the point on prior consultation from the ASEAN draft guidelines (Thayer 2013: 77). Assessing the outcome of the Guidelines, Vietnam's vice foreign minister Pham Quang Vinh stated "significant and as a good start for both parties to work together to continue dialogue and cooperation, with their view to further promote peace, stability and confidence in the region" (Khalik and Nurhayati 2011). Liu Zhen Min, assistant of Chinese foreign minister also said "this is an important milestone document in the cooperation among China and ASEAN countries. Now, we have a bright future that we're looking forward to for future cooperation" (ibid.) Despite the uncertainty of whether China accepts a binding code of conduct, ASEAN continued its effort to negotiate with China to adopt a final code. At ASEAN Senior Officials Meeting in 2012, ASEAN made a draft of COC which was approved at ASEAN Ministerial Meeting in July (Shoji 2012: 20).

Despite ASEAN's initiatives in managing the dispute and preventing escalation, the tension in the sea was sparked again since 2007 due to China's aggressive actions toward Vietnamese vessels. The tension reached a peak in May 2014 because of Chinese oil rig operating in Vietnam's EEZ which resulted in anti-China demonstrations in Vietnam. With Vietnam's attempt to lobby ASEAN and to raise the incident at 24th ASEAN Summit, ASEAN responded to the incident by issuing ASEAN foreign ministers' statement on recent developments on the South China Sea at the 24th ASEAN Summit on 10 May 2014 in Nay Pyi Taw, Myanmar. In the statement, they expressed their "serious concern over the on-going developments in the South China Sea, which have increased tensions in the area". They urged all parties concerned to adhere to international law including UNCLOS, practice self-restraint and not resort threat or use of force. Especially, ASEAN foreign ministers stressed the need of early conclusion of COC (ASEAN 2014).

Vietnam's internationalization of the South China Sea dispute

Ciorciari and Weiss define Vietnam's strategy of internationalization of the issue as involving the US and other major European powers notably European Union (Ciorciari and Weiss 2012: 64). To my view, Vietnam's attempt to internationalize the dispute also lies in their initiatives to bring the issue to international legal institutions. In this way, Vietnam was quite successful in internationalizing the dispute via ASEAN Regional Forum (ARF) when it held the chairmanship of ASEAN in 2010. The ARF plays as the only Asia-Pacific wide forum in which state members discuss regional security issues in a comprehensive manner. This is a forum for its members to express their positions on certain issues which will lead to regional consensus (Severino 2008: 27).

According to Thayer, in 2010 Vietnam attempted to establish a united front against China on the South China Sea issue. In a series of ASEAN meetings in the first half of 2010 in Hanoi, Vietnam tried to put the issue on the agenda and push forward a binding code of conduct for the Sea (Thayer 2010: 126). In 17th ARF meeting, Vietnam together with ten other members joined the US to raise the South China Sea issue and maritime security (Thayer 2010: 131).

The content of discussion within 17th ARF meeting was not public but in the remark at press immediately after the meeting, the U.S Secretary Hilary Clinton asserted that the US has a national interest in freedom of navigation in the SCS (Clinton 2010). She also added that the US supports territorial disputes resolution through diplomatic process complying with UNCLOS principles and they do not support any claimants. The US supports the 2002 DOC and encourages the parties to reach a full code of conduct.

Vietnam's attempt to internationalize the dispute and the intervention of the US in the issue were opposed by China. On 30 July, spokesperson for Chinese Ministry of Defence declared that: "China opposes the internationalization of the South China Sea issue. At the same time, China will, in accordance with the requirement of international law, respect the freedom of relevant countries to conduct navigation and flights on the South China Sea as compatible with the requirement of international law" (cited in Thayer 2010: 132).

Apart from ARF, the Shangri-la dialogue is another forum useful for Vietnam's effort of internationalization of the dispute. In the key note address at 12th Shangri-la Dialogue, Vietnam's Prime Minister, Nguyen Tan Dung addressed security challenges of Asia-Pacific region with emphasis on the South China Sea issue. At the same time, he stressed the role of the U.S as well as of China in maintaining the regional peace and security (Dung 2013).

Emphasizing the role of the US as a Pacific nation in maintaining and enhancing peace and security in the Asia-Pacific region implies that the US has right and obligation to intervene in the regional security-related issues. At the 13th Shangri-la Dialogue's plenary session in 2014, Vietnamese defense minister Phung Quang Thanh delivered a speech on managing strategic tensions. He raised China's illegal placement of oil rig HD 981 in Vietnam's EEZ and urged China to withdraw the rig (Thanh 2014).

The year 2009 marked a change in Vietnam's South China Sea policy when Vietnam-Malaysia's joint submission was made to Commission on the Limits of the Continental Shelf (CLCS). This indicated Vietnam's new approach to legal institutions in seeking moderation from third parties – international bodies. The joint submission was sent to CLCS on 6 May 2009 basing on Article 76, paragraph 8 in UNCLOS (visit Oceans and Law of the Sea website for detail). The submission was objected to by both China and the Philippines. On 7 May 2009, China sent two notes to the secretary-general of the United Nations urging the CLCS not to review the joint submission. At the same time, China attached the nine dash lines map to their notes. The Philippines sent a note showing that claims by Vietnam and Malaysia in the submission overlap with that of the Philippines (Thao and Amer 2011: 254).

Limits of multilateral approach

In confronting China, Vietnam can make use of collective diplomacy of ASEAN to promote multilateral mechanisms and encourage China to involve with these multilateral frameworks. This helps to consolidate Vietnam's claims and position at negotiation table. However, the most challenging problem that Vietnam faces is the question of intra-ASEAN unity. Of ASEAN state members, there are only five countries involved in the dispute. In addition, most ASEAN countries have close economic relations with China. Hence, some of them remain neutral in the dispute while some others showed their unwillingness of confronting China. At 17th ARF meeting in 2010 in Hanoi, while six of ten ASEAN states joined the US to raise the SCS dispute and maritime security, Cambodia, Laos and Myanmar kept silent and Thailand was the most assertive in arguing not to confront China (Thayer 2010: 131). The division among ASEAN highlighted at ARF foreign ministers meeting in Phnom Penh in 2012. The divergence over the dispute led ASEAN, for the first time, to fail to issue a joint statement as usual. The Philippines wanted to include the Scarborough Shoal in the text while Vietnam insisted on mentioning the dispute over both Paracels and Spratlys. However, Cambodia – chairman of ASEAN in that year refused to include any reference to the dispute in the text and argued that the disputes between China and other ASEAN disputants were the bilateral

problems and not problems between China and ASEAN as a whole. The Cambodian stance was explained by the Philippines as the result of billion dollars of China's investment in Cambodia (Chakraborti 2012: 292).

Moreover, ASEAN disputants themselves have different positions on the issue. Therefore, establishing a united front against China in ASEAN is really difficult. In negotiating process of COC the difference between Vietnam and the Philippines over the area of dispute which the code would be applied to led the two countries to make their own draft of the code as discussed above. In addition, while the Philippines wanted to make a formal treaty Malaysia objected this. Indonesia shared the concern with Malaysia and called for a political and not legal text (Buszynski 2003: 354-355).

Another challenge facing Vietnam's multilateral approach is the lack of ASEAN's capability in resolving the sovereign and territorial dispute. The multilateral mechanisms Vietnam deploys are mainly ASEAN-led dialogues frameworks. ASEAN's initiatives are based on the norms of non-intervention, consensus, and consultation. But these norms seem to be challenged by China and in some case ASEAN had to appease China. For example, when ASEAN negotiated the Guidelines of Implementation of 2002 DOC with China, it had to remove the principle of prior consultation before meeting with China which had been approved by ASEAN before. Assessing the role of ASEAN, Scott points that "the so-called ASEAN Way has not yet generated long-term conflict resolution, only short-term conflict prevention which nonetheless represents a degree of conflict management" (Scott 2012: 1025).

The recent incidents in the SCS have also manifested ASEAN's weakness in managing tension between China and ASEAN. Non-binding agreements between ASEAN and China did not prevent China from taking assertive or even aggressive actions toward the SCS. The latest incident between China and Vietnam over Chinese oil rig operating in Vietnam's EEZ led ASEAN to a joint stance over the issue but this has not reduced tension in the Sea. This led Vietnam to adopt another approach toward the dispute. In the following section, Vietnam's bilateral approach to the issue will be examined.

*** Enhancing bilateral relations and national self-interest**

Vietnam whilst trying to assuage China's claim to the SCS through diplomacy and enhanced economic ties since 1990s it has also strategically hedged against China's rise and growing assertiveness. In its hedging strategy it has adopted a policy of bilateralism in an

attempt to restrain China. This section will examine Vietnam's management of its bilateral ties with China, the US, the Philippines, Japan, India, and Australia.

The Vietnamese-Chinese relationship

Vietnam manages to develop comprehensive cooperation with China aiming at two main goals. The first one is to enhance close economic ties with China which helps Vietnam develop its national economy. The second is that bilateral cooperation will encourage two sides to resolve their differences especially toward the SCS dispute through negotiation and avoid military confrontation.

In November 1991, Vietnam and China normalized the party-to-party relation and state-to-state relation (Cheng 2011: 381). The two sides agreed to establish five guiding principles in party-to-party and state-to-state relations namely independence, autonomy, complete equality, mutual respect, and non-intervention in internal affairs of each other (Le 2008). In the early years of normalization, the main problems in their bilateral relations were land and maritime border demarcation in the Gulf of Tonkin, fishery, and, of course, the SCS dispute (Le 2008; Amer 2004; Guan 1998). During the visit to Vietnam in 1993, Jiang Zemin proposed a set of rules for solving common issues through negotiation as well as guiding the bilateral relations: "clarify the direction, proceed step by step, accord priority, consult in friendly manner" (translation by Cheng 2011: 382) ("phuong huong ro rang, tung buoc tien len, dai cuc lam trong, huu hao hiep thuong").

Vietnam's membership of ASEAN and normalization of relations with the US in 1995 had an important impact on Vietnamese foreign relations. Vietnam tried to promote bilateral relations with various states especially great powers on the basis of balancing relationship with great powers. Vietnam deployed a policy that avoids economic as well as security dependence on great powers (Le 2008).

In 1999, in a visit to China by Vietnamese General Secretary Le Kha Phieu the two communist parties released a joint communiqué which adopted a sixteen-character guideline in bilateral relations "good neighborhood, comprehensive cooperation, long-term stability, future-orientation" (lang gieng huu nghi, hop tac toan dien, on dinh lau dai, huong toi tuong lai). Since 1999 Vietnam-China relations have improved considerably. Both countries attempted to create comprehensive relations. Regarding to border issues, the land border dispute was settled by the Treaty on Land Borders signed on 30 December 1999 and border marker planting was completed by the end of 2008. The Treaty on the Demarcation of the Gulf of Tonkin was

concluded in 2000. Vietnamese Vice-Prime Minister and Foreign minister Pham Gia Khiem asserted that these events created favourable conditions for resolving the South China Sea dispute as well as consolidating mutual trust (Pham 2009). These events also allowed the two sides to reach a comprehensive strategic cooperation partnership in June 2008. The relationship between Vietnam and China has been developed sharply on most of aspects like economy, defence, culture, education.

By 2012, mutual trade between Vietnam and China reached USD 41.173 billion of which value of China's export to Vietnam was USD 28.785. China's direct investment in Vietnam was registered at USD 4.525 billion in 871 projects. China ranked at 14 of 96 investors in Vietnam (Hoa and Thuy 2013: 22-24). The defence relation between the two sides also improved with normalization but this improvement proved ultimately to be modest. From 1991 to 2010, there were seven visits at ministerial level between the two countries. In 1991, a Chinese warship made a visit to Vietnam for the first time since 1975 but this type of visit did not continue after that and was only resumed in 2008. Besides, Vietnamese naval ships visited Zhanjiang port in Guangdong province on two occasions in 2009 and 2011. The two states also conducted some joint patrols in the Gulf of Tonkin (Thayer 2011c: 354-355).

It can be seen in the post-Cold War era most problems, especially border disputes, were resolved through bilateral negotiations. These achievements accompanied by fast growth in bilateral trade gave Vietnam the credible hope that they could achieve peaceful settlement for the SCS dispute.

However, Sino-Vietnamese relations have deteriorated in recent years due to the tension and lack of progress over the South China Sea issue. Recent incidents in the SCS have included: China's unilateral fishing bans, China's seizure of Vietnamese fishing boats, China's cutting the cable of Vietnamese seismic ships, China's oil rigs stationed in Vietnam EEZ happened between 2008 to early months of 2014. Vietnam, with its experience of being dominated by China historically combined with asymmetric nature of the relationship makes Vietnam increasingly cautious about its Northern neighbour's motives (see Womack 2006). In this context, the Vietnamese Communist Party introduced two guiding concepts namely 'doi tac' (subject of cooperation) and 'doi tuong' (subject of struggle) in 2003 (Hiep 2013: 343). This led Vietnam to different perception of China. China belongs to the 'subject of cooperation' category. But this concept also means that cooperation and struggle are conducted at the same time (vua hop tac, vua dau tranh). Therefore, in relationship with China, "Vietnam sleeps with its China eye open" (Womack 2006: 229). All these things push Vietnam to seek alternative

approaches to deal with China in the SCS. The following parts examine how Vietnam improves its relations with regional and external powers to hedge against China.

Vietnam's improving relations with the US

Since the normalization of the US-Vietnamese relations, economic ties with the US developed fast after normalization, defence cooperation between the two countries only improved in recent years. Several scholars believe that Vietnam's effort to enhance defence relations with the US lies in a strategy of hedging against China over the SCS issue (Thayer 2008). At present, the US plays the role not only of a large trading partner of Vietnam but also as the only effective counter-balance to China's power in the SCS. The US became Vietnam's largest export market, biggest investor and third largest trade partner (Hanh 2010).

Military ties have been strengthened through: visits by military officials at high level; port calls; military personnel training programs; and joint non-combat military exercises (Hiep 2013: 358). According to an agreement concluded between Vietnam and the US in 2003, the two sides would exchange alternative visits by their defence ministers every three years. But on the sidelines of the ASEAN Defence Ministers Meeting Plus in late August 2013 in Brunei, Vietnamese defence minister invited his US counterpart, Chuck Hagel to visit Vietnam in 2014 and Hagel accepted. Thayer believes the visit signals that the three-year cycle visits have come to an end and will be replaced by more frequent contact (Thayer 2013). In August 2010, the Aircraft-Carrier George Washington travelled along the coastline of Vietnam and received visits from high-ranking Vietnamese military officials (Hong 2013: 35). From 2010 to 2012, US naval vessels arrived at Cam Ranh Bay for repair on five occasions. The US naval supply ship USNS Richard E. Byrd got repaired three times in Cam Ranh Bay (Hang 2012). In 2012, the US defence secretary Leon Panetta visited the USNS Richard E. Byrd which was at Cam Ranh Bay for periodic maintenance and reassured the Vietnamese that the US firmly committed to ensuring freedom of navigation and protection of maritime rights in the regional sea lanes. In addition, the secretary declared the purpose of his visit was to strengthen defence relationship between the US and Vietnam (cited in *Defence Update*, 2012).

In August 2011, Vietnam and the US signed the first military agreement establishing a military medical partnership (*America's Navy* 2011). On 19 September 2011, Vietnam and the US signed the Memorandum of Understanding on Advancing the Bilateral on Defence Cooperation which set out five areas of priority: regular high-level dialogues between the two defence ministries, maritime security, search and rescue, humanitarian assistance and disaster

relief and peacekeeping (Thayer 2013). In July 2013, the two states launched the US-Vietnam Comprehensive partnership in an attempt to enhance bilateral relations. In a visit by Secretary of State John Kerry to Vietnam in December 2013, the Secretary committed to providing Southeast Asia states with “32.5 million USD in new US assistance for maritime enforcement”. Of which the US planned to give 18 million USD to Vietnam including funding for the purchase of five new patrol vessels (Tiezzi 2013). Vietnam and the US held some joint military exercises in the SCS but these were constrained to non live-firing and non-combat exercises. In 2013, Vietnam hosted the third naval exchange activity in Da Nang consisting of salvage and disaster training (Thayer 2013).

For Vietnam, the improvement of this relationship aims at increasing the US naval presence in the SCS. This policy pressures China to accept multilateral arrangements within an ASEAN-led dialogue framework. Buszynski argues that “in a situation where a dominant power has a clear advantage over weaker states, a balance of power is required as a prerequisite for the negotiation of norms of behaviour. Without that balance there would be no incentive for the dominant power to accept constraining norms of behaviour” (Buszynski, 2003: 343).

Despite the improvements reached in the defence ties, the ties between the two countries are still limited. There are several reasons for Vietnam’s gradual and cautious development of its defence relationship with the US. First, this defence tie offers Vietnam another option for the SCS in case of China’s aggressive determination to occupy the SCS or if multilateral frameworks fail to resolve the dispute. At the same time, Hanoi wants to send a message to Beijing that Chinese assertiveness could lead Vietnam to an alternative approach. Second, while improving its relationship with the US, Vietnam also tries to avoid provoking China if it feels threatened by Vietnam-US military ties. Third, Vietnam seeks to avoid dependence on any great powers in resolving its problems.

Vietnam’s bilateral cooperation with the Philippines, Japan, India and Australia

Although Vietnam and the Philippines have overlapping claims in the SCS and differences in negotiating the terms of the Code of Conduct (COC), recently the two countries have expanded their cooperation toward the SCS. Their efforts can be interpreted as action against China’s growing assertiveness. Walden Bello argues that Vietnam-Philippines cooperation in the SCS started in 2009 and stemmed from China’s aggressive territorial claim [via the nine dash line map] (Bello 2014). Aspects of the relationship that have been enhanced include diplomatic-political relations, defence cooperation and joint maritime activities.

Sharing the concern over Chinese assertiveness, Vietnam and the Philippines have been intensifying their diplomatic interaction within the ASEAN multilateral cooperative framework in an attempt to reach a binding code of conduct. In addition, they increasingly support each other in managing potential conflict as well as exploring cooperative mechanisms. Both countries have actively participated in building up the DOC and continued efforts to draft a COC. Bensurto shows that “During Vietnam’s chairmanship of ASEAN in 2010, the Philippines showed unequivocal support for Vietnam’s leadership in trying to come up with implementing guidelines of areas of cooperation envisioned by the DOC-South China Sea” (Bensurto 2010). In 2011, Manila proposed a ‘Zone of Peace, Freedom, Friendship and Cooperation in the South China Sea’ and President of Vietnam Truong Tan Sang promised to support the Philippines’ proposal (Mogato 2011).

Defence interaction between Vietnam and the Philippines has also improved over the last few years. On 26 December 2010, Hanoi and Manila concluded a Memorandum of Understanding on Defence Cooperation with emphasis on military reciprocal visits, information exchanges on anti-terrorism, military personnel training, search and rescue assistance, and cooperation in developing military equipment and technology. In 2011, the two countries agreed strengthen maritime security between the Philippine Coast Guard and the Vietnamese Maritime Police. Navy cooperation between the two sides began in 2012 when the Philippine Navy Flag Officer in Command and Vietnam’s People’s Army Navy Commander signed a Memorandum of Understanding on the Enhancement of Mutual Cooperation and Information Sharing. This opened the potential for cooperation in building ships. The two chiefs also signed an agreement on Standard Operating Procedures on Personnel Interaction in the Vicinity of Southeast Cay and the Northeast Cay Island. The agreement included joint maritime patrols in disputed waters. In 2013, foreign ministers of the two countries met in Manila and reviewed progress in defence cooperation. The result of the meeting was the renewal of 2010 Memorandum of Understanding (Thayer 2014).

In 1994, Vietnam and the Philippines established the Joint Oceanic and Marine Scientific Research Expedition in the South China Sea (JOMSRE-South China Sea) focusing on bilateral confidence-building measures in the SCS (Bensurto 2010). In 2010, the two sides signed three Memorandums of Agreement (MOA) not only dealing with various maritime and ocean issues but also formulating confidence-building measures (ibid.). In 2011, the two countries agreed to create a hotline to deal with maritime issues like piracy, disaster response, smuggling, and marine resources protection (Mogato 2011).

Bello argues: “The Philippines and Vietnam are natural allies in their common struggle against China’s drive for hegemony in East Asia. Already partners in ASEAN, the two are likely to be driven closer together by Beijing’s increasingly brazen displays of power as it enforces its claim to some 80 percent of the South China Sea” (Bello 2014). By contrast, the gradual development in defense cooperation between Hanoi and Manila led Thayer to the conclusion that this defence partnership will not develop into an informal military alliance against China (Thayer 2014). Though Vietnam will not form a formal front against China with the Philippines as well as other claimants because of the sensitivity of Sino-Vietnamese relations, Vietnam will enhance the solidarity among ASEAN claimants and provide them with informal support.

By contrast with the Philippines, Japan is a major power in Asia and is involved in the SCS issue though it is a non-claimant state. Zhao Hong argues that Japan’s involvement in the SCS issue reflects its worries about the linkage between the South and East China Sea. China’s assertiveness in the SCS may have implication for the East China Sea and Senkaku dispute between Japan and China. In addition, China’s increasing assertiveness in the South and East China Sea is understood as a signal of Chinese expansionism in the Japanese view (Hong 2013: 37). Moreover, Japan holds a big concern over the sea lane security in the SCS because the SCS lanes play a critical role in the economic activities of Japan. The fear of any interruption of maritime trade flow in the region and concern over Chinese expansionism pushes Japan to play an active role in the SCS issue. Understanding the role of Japan in regional security and Japanese interest in the region, Vietnam has sought support from Japan to consolidate its claim in the SCS.

In 2010, Japan and Vietnam launched a strategic partnership. Kurashige reported in 2011 that, “Japan and Vietnam have agreed to reinforce their defence cooperation in the light of China’s increasing influence in the South China Sea, where Hanoi is locked in a territorial dispute with Beijing”, defence ministers of the two countries signed a memorandum on defence cooperation and exchange. The two ministers agreed to cooperate in resolving the SCS issue. This is only the second defence cooperation memorandum between Japan and Southeast Asian states after a similar one with Singapore (Kurashige 2011). At the meeting between Japanese Prime Minister Shinzo Abe and Vietnamese President Truong Tan Sang on 18 March 2014, the two leaders signed an agreement to expand the bilateral maritime security relations against a backdrop of an expansionist China. The Agreement established an ‘extensive strategic partnership’ between the two. According to an analysis from *Jane’s Defence Weekly*, the

increasing strategic relations between Vietnam and Japan aims at restraining China's growing assertiveness in its near seas (cited in USNI News Editor, 2014). In the latest Shangri-la Dialogue which was held from 30 May to 1 June 2014, Abe reaffirmed to support Vietnam in its efforts to resolve the issues through dialogue (Abe 2014).

With the increasing tension in the SCS, India as a regional major power is also targeted by Vietnam. India has not only great interest in maritime trade routes in the SCS (about 55% of India's trade goes through the Malacca Strait (Keck 2014) but resents a China's support of Pakistan in the border dispute between India and Pakistan (Buszynski 2011). To get India involved in the SCS issue, Vietnam offers India joint exploration of oil and gas in the SCS. During the visit by Vietnamese president Truong Tan Sang to New Delhi, PetroVietnam signed an oil cooperation agreement with India's Oil and Natural Gas Corp (ONGC) (Buszynski 2011). In a state visit to India by Party General Secretary Nguyen Phu Trong from 19-22 November 2013, the two countries signed eight pacts. Notably, Vietnam offered India seven oil blocks in the SCS. India promised to assist Vietnam in modernization of its defence and security forces. Both countries agreed that defence cooperation was a key pillar of their strategic partnership. India has agreed to train 500 Vietnam's submariners and transfer four naval ships under \$100 million credit lines (the Hindu 2013).

On 22 July 2011, while India's naval vessel INS Airavat was entering Nha Trang, China warned it to keep out of 'Chinese waters'. The Indian Foreign Ministry claimed that "India supports freedom of navigation in international waters, including in the South China Sea, and the right of passage in accordance with accepted principles of international law" (cited in Buszynski 2011). When China protested against the exploration of ONGC near Paracels, ONGC took the stance that Vietnam's claims were in accordance with international law and that it would continue the projects (Buszynski 2011).

Vietnam has also established a comprehensive partnership with Australia since 2009 followed by a Memorandum of Understanding on Defence Cooperation signed by the defense ministers of two countries. The Memorandum provided a framework to promote cooperation between Vietnam and Australia in strategic dialogue, military training exercises, humanitarian assistance and disaster relief (*Bao dien tu Dang Cong san Viet Nam* 2010). The first Joint Foreign Affairs Defence Strategic Dialogue between Australia and Vietnam was organized on 21 February 2012 in Canberra. Hiep points that the dialogue is "a strategically meaningful move for Vietnam against the backdrop of increasing tensions in the South China Sea" (Hiep 2012). In August 2012, the Australian Defence Minister, Stephen Smith, called for a peaceful

settlement of the SCS disputes (*Australia network news* 2012). Making stronger ties with Australia is not only beneficial for Vietnam in dealing with China's ambitious claims in the SCS but also in term of economic development. In 2010, bilateral trade reached US\$4.1 billion and Australia is the fifth largest export market of Vietnam. Besides, Australia is a major aid donor of Vietnam (Hiep 2012). The relations between Vietnam and Australia have grown quite slowly but Australia will be a potential valuable partner of Vietnam when Australia seeks to play a greater role in the region.

In conclusion, in dealing with the South China Sea dispute, Vietnam has consistently pursued a peaceful settlement to counter China's claim and to restrain its aggressive actions. Efforts of Hanoi in using multilateral framework and enhancing its bilateral relations with regional and external powers target to shape and modify China's behaviour in a good manner. In term of multilateral approach, Vietnam actively influenced ASEAN and promoted ASEAN's multilateral dialogues where regional security issues are addressed. At the same time, Vietnam quite successfully used ASEAN to engage China in these dialogues. Despite several differences among ASEAN members over the issue, their efforts to set these differences aside has been increasingly clear. The success in issuing the Manila Declaration on the South China Sea in 1992 and the ASEAN-China DOC in 2002 clearly illustrate these efforts. The ongoing attempt of ASEAN in producing a binding code of conduct is a commitment of ASEAN to peaceful settlement of the issue. In this multilateral context, ASEAN Regional Forum witnessed a lot of Vietnam's efforts to regionalize and internationalize the dispute. Vietnam and the Philippines successfully engaged the US in the issue. This multilateral approach has, to an extent, illustrated effectiveness in mitigating the tension and preventing conflict in the SCS. However, the obvious limitation of this approach is that it does not consist of any mechanisms for resolving the dispute. Besides, the fragmentation of ASEAN unity is another obstacle preventing ASEAN to take a strong stance over the issue.

In bilateral approach, Vietnam consolidates its relations especially enhance economic ties with China. On the one hand, this helps to develop Vietnam's economy because at present, China is the largest trade partner and a promising export market. On the other hand, increasing economic interdependence between the two countries will reduce possibility of an arm conflict.

However, Beijing's growing assertiveness over the issue led Vietnam to improve its relationship especially military ties with the US, the former enemy. Vietnam's approach to the US is not merely a strategy of hedging against a rising China but is to keep more than one option open in case of China's unwillingness of resolving the dispute peacefully. However,

Vietnam has to be very careful in balancing its relations with China and with the US to gain this purpose without provoking Chinese. Sharing the serious concern over Chinese aggressiveness, the Philippines is another subject of cooperation in Vietnam's South China Sea strategy. Besides, other regional and external powers namely Japan, India, and Australia are potential actors in Vietnam's hedging against China. Vietnam has gradually enhanced relationship with these powers.

References

Abe, Shinzo (Japanese Prime Minister). 2014. 'Shangri-la Dialogue keynote address'. International Institute for Strategic Studies. Singapore. Accessed on 4 June 2014. Available at: <https://www.iiss.org/en/events/shangri-s-la-s-dialogue>

America's Navy. 1 August 2011. U.S., 'Vietnam establish formal military medical partnership'. Accessed 15 May 2014. Available at: http://www.navy.mil/submit/display.asp?story_id=61899

ASEAN. 1992. *ASEAN Declaration on the South China Sea*.

ASEAN. 1995a. *Joint communiqué of the twenty-eight ASEAN ministerial meeting*. Bandar Seri Begawan, Brunei.

ASEAN. 1995b. *Bangkok Summit Declaration*. Bangkok, Thailand.

ASEAN. 1996. *Joint communiqué of the 29th ASEAN Ministerial Meeting*, Jakarta, Indonesia.

ASEAN. 1997. *Hanoi Plan of Action*. Kuala Lumpur, Malaysia. Accessed 15 March, 2014. Available at: <http://www.asean.org/news/item/hanoi-plan-of-action>

ASEAN. 2002. *Declaration on the Conduct of Parties in the South China Sea*. ASEAN's website. Accessed 15 March, 2014. Available at: <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>

ASEAN. 2014. *ASEAN foreign ministers' statement on recent developments on the South China Sea*. Nay Pyi Taw, Myanmar. Accessed 19 May 2014. Available at: <http://www.asean.org/news/asean-statement-communicues/item/asean-foreign-ministers-statement-on-the-current-developments-in-the-south-china-sea>

Australia Network News. 2012. 'Australia calls for South China Sea resolution'. Accessed 20 May 2014. Available at: <http://www.abc.net.au/news/2012-08-30/an-australia-urges-peaceful-resolution-in-south-china-sea/4231850>

Bao dien tu Dang Cong san Viet Nam (Communist Party of Vietnam online newspaper). 2010. 'Australia and Vietnam deepen defence cooperation'. Accessed 20 May 2014. Available at: http://www.dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30253&cn_id=428285

Bello, Walden. 2014. 'A budding alliance: Vietnam and the Philippines confront China'. *Foreign policy in focus*. Accessed on 10 May 2014. Available at: <http://fpif.org/budding-alliance-vietnam-philippines-confront-china/>

Bensurto, Henry S. 2010. 'Cooperation in the South China Sea: the view on the Philippines-Vietnam cooperation on maritime and ocean concerns'. Paper presented at the 2nd workshop on the South China Sea. Ho Chi Minh city, Vietnam.

Buszynski, Leszek. 2003. 'ASEAN, the Declaration on Conduct, and the South China Sea'. *Contemporary Southeast Asia*. Vol. 25(3): 343-362.

Buszynski, Leszek. 2011. 'Internationalization of the South China Sea: conflict prevention and management'. Paper presented at the third international workshop on the South China Sea. Hanoi. Vietnam.

Cheng, Joseph Y. S. 2011. 'Sino-Vietnamese relations in the early twenty-first century'. *Asian survey*. Vol. 51(2): 379 – 405.

Chakraborti, Tridib. 2012. 'China and Vietnam in the South China Sea dispute: a creeping 'conflict-peace-trepidation' syndrome'. *China report*. Vol. 48(3): 283-301.

Clinton, Hillary Rodham. 2010. 'Remark at press availability'. *US Department of State*. Accessed 28 March 2014. Available at: <http://www.state.gov/secretary/20092013clinton/rm/2010/07/145095.htm>

Ciorciari, John D. and Weiss, Jessica Chen. 2012. 'The Sino-Vietnamese standoff in the South China Sea'. *Georgetown journal of international affairs*. Vol. 13(1): 61-69.

Defense Update. 2012. 'Cam Ranh Bay is the prize, are lethal weapons the cost?'. Accessed 10 May 2014. Available at: http://defense-update.com/20120606_cam-ranh-bay-is-the-prize-are-lethal-weapons-the-cost.html#.U4a09fl_szQ

Dung, Nguyen Tan (Vietnamese Prime Minister). 2013. 'Key note address at Shangri-la Dialogue'. International Institute for Strategic Studies. Singapore. Accessed 10 February 2014. Available at: <https://www.iiss.org/en/events/shangri%20la%20dialogue/archive/shangri-la-dialogue-2013-c890/opening-remarks-and-keynote-address-2f46/keynote-address-d176>

Hang, Thanh. 2012. 'Bo truong quoc phong Hoa Ky Leon Panetta tham Viet Nam' (The US defense general Leon Panetta visits Vietnam). *Bao dien tu Chinh phu nuoc Cong hoa xa hoi chu nghia Vietnam* (Online newspaper of the Vietnamese Government). Accessed 25 April 2014. Available at: <http://baodientu.chinhphu.vn/Home/Bo-truong-Quoc-phong-Hoa-Ky-Leon-Panetta-tham-Viet-Nam/20126/139823.vgp>

Hiep, Le Hong. 2012. 'Australia and Vietnam deepen their strategic partnership'. *EastAsiaforum*. Accessed 20 May 2014. Available at: <http://www.eastasiaforum.org/2012/03/21/australia-and-vietnam-deepen-their-strategic-relationship/>

Hiep, Le Hong. 2013. 'Vietnam's hedging strategy against China since normalization'. *Contemporary Southeast Asia*. Vol. 35(3): 333-368.

Hoa, Nguyen Thi Phuong and Thuy, Nguyen Thi. 2013. 'Quan he Viet Nam-Trung Quoc nam 2012' (Vietnamese-Chinese relations in 2012). *Nghien cuu Trung Quoc* (Journal of Chinese studies). Vol. 2(138): 20-31.

Hong, Zhao. 2013. 'The South China Sea dispute and China-ASEAN relations'. *Asian Affairs*. Vol. 44(1): 27-43.

Keck, Zachary. 2014. 'India wades into the South China Sea'. *The diplomat*. Accessed 10 May 2014. Available at: <http://thediplomat.com/2014/03/india-wades-into-south-china-sea-dispute/>

Khalik, Abdul and Desy Nurhayati. 2011. 'South China Sea guidelines agreed'. *Jakarta Post*. Accessed 15 May. Available at: <http://www.thejakartapost.com/news/2011/07/21/south-china-sea-guidelines-agreed.html>

Kurashige, Nanae. 2011. 'Japan, Vietnam agree on defense cooperation'. *The Asahi Shimbun*. Accessed 10 May 2014. Available at: http://ajw.asahi.com/article/behind_news/politics/AJ2011102515718

Le, Tuan Thanh. 2008. 'Quan he chinh tri giua Viet Nam – Trung Quoc tu sau binh thuong hoa quan he toi nay' (Political relationship between Vietnam and China since the normalization to present). Institute for Northeast Asian studies. Accessed 20 April, 2014. Available at: <http://www.inas.gov.vn/339-quan-he-chinh-tri-giua-viet-nam-trung-quoc-tu-sau-binh-thuong-hoa-quan-he-den-nay.html>

Ministry of National Defense (Vietnam). 2009. *Quoc phong Viet Nam* (Vietnam's national defense – White Paper on defense). Hanoi.

Mogato, Manny. 2011. 'Manila, Hanoi forge cooperation in the South China Sea'. *Reuters*. Accessed 20 May 2014. Available at: <http://www.reuters.com/article/2011/10/26/us-philippines-vietnam-idUSTRE79P2WA20111026>

Pham, Gia Khiem (Vice Prime Minister and Foreign Minister of Vietnam). 2009. 'Hoan thanh phan gioi cam moc bien gioi tren dat lien giua Viet Nam va Trung Quoc – su kien co y nghia lich su trong dai' (Completing land border markers planting between Vietnam and China – a great historical event). *Bao dien tu Dang Cong san* (Communist Party of Vietnam online newspaper). Accessed 20 April, 2014. Available at: http://123.30.190.43:8080/tiengviet/tulieuvankien/tulieuedang/details.asp?topic=168&subtopic=463&leader_topic=981&id=BT26121232956

Scott, David. 2012. 'Conflict irresolution in the South China Sea'. *Asian Survey*. Vol. 52(6): 1109-1042.

Severino, Rodolfo C. 2008. 'ASEAN'. Singapore: Institute of Southeast Asia Studies.

Shoji, Tomotaka. 2012. 'Vietnam, ASEAN, and the South China Sea: unity or diverseness?'. *NIDS journal of defense and security*. No. 13: 1-20.

Storey 2013

Thanh, Phung Quang. 2014. 'Phat bieu cua Bo truong quoc phong Viet Nam tai Shangri-la' (Speech by Vietnamese Defense Minister at Shangri-la Dialogue). *VnExpress*. Accessed 4 June 2014. Available at: <http://vnexpress.net/tin-tuc/the-gioi/tu-lieu/phat-bieu-cua-bo-truong-quoc-phong-viet-nam-tai-shangri-la-2998454.html>

Thao, Nguyen Hong and Amer, Ramses. 2011. 'Coastal states in the South China Sea and submissions on the outer limits of the continental shelf'. *Ocean development and international law*. Vol. 42(3): 245-263.

Thayer, Carle A. 2008. 'The structure of Vietnam-China relations, 1991-2008'. Paper presented at the 3rd International conference on Vietnamese studies, Hanoi. Vietnam.

Thayer, Carle A. 2010. 'Recent developments in the South China Sea: grounds for cautious optimism'. In *The South China Sea: towards a region of peace, security and cooperation*. Ed. Dang Dinh Quy. Hanoi: The Gioi Publisher: 117-140.

Thayer, Carle A. 2011a. 'Chinese assertiveness in the South China Sea and Southeast Asian responses'. *Journal of current Southeast Asian Affairs*. Vol. 30(2): 77-104.

Thayer, Carle A. 2011b. 'Security cooperation in the South China Sea: an assessment of recent trends'. Paper presented at Conference on the South China Sea: Towards a Region of peace, cooperation and progress. Hanoi, Vietnam.

Thayer, Carle A. 2011c. 'The tyranny of geography: Vietnamese strategies to constrain China in the South China Sea'. *Contemporary Southeast Asia*. Vol. 33(3): 348-369.

Thayer, Carle A. 2013. 'Vietnam gradually warms up to US military'. *The diplomat*. Accessed 18 May 2014. Available at: <http://thediplomat.com/2013/11/vietnam-gradually-warms-up-to-us-military/>

Thayer, Carle A. 2014. 'Is a Philippine-Vietnam alliance in the making?'. *The diplomat*. Accessed 10 May 2014. Available at: <http://thediplomat.com/2014/03/is-a-philippine-vietnam-alliance-in-the-making/>

The Hindu. 2013. *Vietnam offers India seven oil blocks in the South China Sea*. Accessed on 20 May 2014. Available at: <http://www.thehindu.com/news/national/vietnam-offers-india-seven-oil-blocks-in-south-china-sea/article5372744.ece>

Thuy, Tran Truong. 2010. 'Nhưng dien bien gan day o Bien Dong: tu tuyen bo toi quy tac ung xu' (Recent developments in East Sea (South China Sea): from the Declaration to Code of conduct). In *Bien Dong: huong toi mot khu vuc hoa binh, an ninh va hop tac* (East Sea: towards a region of peace, security and cooperation). Ed. Dang Dinh Quy. NXB The gioi. Hanoi, Vietnam.

Tiezzi, Shannon. 2013. 'Vietnam, the US, and China: a love triangle?'. *The diplomat*. Accessed 20 May 2014. Available at: <http://thediplomat.com/2013/12/vietnam-the-us-and-china-a-love-triangle/>

Tuan, Ha Anh. 2011. 'ASEAN and the disputes in the South China Sea'. Paper presented at the third international workshop on the South China Sea: Cooperation for regional security and development. Hanoi, Vietnam.

Womack, Brantly. 2006. *China and Vietnam: the politics of asymmetry*. Cambridge: Cambridge University Press.

Nationalism in East Asia: Causes and Effects on Conflict Resolution in the East Sea

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Abstract: This paper analyzes the rising waves of nationalist sentiments and consciousness recently in East Asia, in particular China, Vietnam, the Philippines, Indonesia, Thailand, and Cambodia. This phenomenon is highly significant against the backdrop of rival territorial claims by many countries over the Liancourt Rocks in the Japan Sea, the Pinnacle Islands in the Eastern China Sea, and the Spratly and Paracel Islands in the South China Sea. What explains the new nationalism? What risks does nationalism create for regional peace, development, and security? This paper tries to answer these important questions by placing the phenomenon in its historical and international context of East Asian politics after the Cold War.

Introduction

There was a time from the 1940s through the 1960s when the themes of nationalism and communism dominated the study of politics in East Asia (Emerson, Mills and Thompson 1942; Schwartz 1951; Trager 1959; Brimmell 1959; Emerson 1960).¹ Throughout much of that time, nationalist struggles (led in some cases by communist parties) were raging in China, Burma, Indochina, Indonesia, and Malaya/Malaysia. These days communism is gone but nationalism is making a comeback, as evidenced in the recent protests involving Cambodians and Thais over Preah Vihear Temple, those in China against Japan over Senkaku Islands, and in Vietnam against Chinese claims over the Paracels and Spratlys Islands. In Indonesia, the last decade has seen frequent mass protests against Singapore, Malaysia, Australia, and the United States. Part of Indonesians' national identity is their Muslim identity, which has spurred massive demonstrations against U.S. wars in Iraq and Afghanistan. Yet the Philippines is perhaps the first Southeast Asian country to experience a surge of nationalism in the late 1980s when anti-Americanism led to the closure of U.S. military bases there.

¹ For convenience in this essay "East Asia" refers to both Northeast and Southeast Asia.

What explains the rise of nationalism *as a form of contentious mass politics* in East Asia since the end of the Cold War? The recent surge of nationalism has escalated tension in this region, but existing theories of nationalism offer few clues for this phenomenon. Most theories were created to explain the earlier rise of nationalism that originated in Europe around the eighteenth century and that produced modern nations worldwide out of traditional societies. These theories are helpful in accounting for the power of anticolonial movements in the early twentieth century as well as the persistence of a few secessionist movements today in the region (e.g., in Western China, southern Philippines, southern Thailand, and parts of Myanmar). But the phenomenon we focus here involves not marginal ethnic groups but major nations in Southeast Asia that have gained their independent states for decades. This phenomenon requires new explanations.

In this paper, I argue that the growth of nationalism since the mid-1980s was caused by the combination of three factors: the failure of earlier nationalist movements to fully deliver their promises; a shift in the international and regional order (the end of the Cold War and the rise of China); and a change in domestic order (political liberalization and democratization) that was also occurring across many countries in the region. The failure of the “old” nationalism is the deep cause, while the other two factors explain the timing and the mass character of the “new” nationalism.

The paper will be divided into three parts. I will first survey the history and more recent growth of nationalist movements in six major East Asian contexts (the Philippines, Indonesia, Vietnam, Cambodia, Thailand, and China). Next, I will present the theoretical arguments that explain the phenomenon. In the conclusion, I will briefly discuss the missions, impacts and risks of the new nationalism for regional peace, especially regarding the ongoing conflict in Vietnam’s East Sea. While the main mission of the new nationalism is the defense of national territory, the movements have the unintended impact of reconciling national communities once divided by Cold War ideologies. At the same time, the new nationalism may aggravate hostilities in the East Sea short of war.

Nationalism in East Asia: From old to new

At the end of the nineteenth century, most of East Asia except Japan had fallen under Western domination. Colonial states in the region were established typically in a piecemeal fashion over decades if not centuries (Tarling 2004, 59-85). Through unequal treaties and

colonization European powers and (later) Japan dominated the global trading, financial, and industrial networks in East Asia. Mines, cash crops, and textile mills were developed together with telegraphs, shipping lines, and railroads throughout the region, linking colonial capitals to far-flung villages (Owen 2005, 161-199). Although great variations existed across East Asia, incipient modern states emerged with modern bureaucracies, laws, and regulatory systems. These states also provided limited social services such as modern health care and education.

In Southeast Asia, nationalist movement as a form of modern mass politics arrived first in the 1880s in Spanish Philippines with the emergence of the “Propaganda Movement” led by educated elites. This movement asserted a new Philippine identity based on Tagalog literature and arts but did not yet advocate national independence. By the 1890s, the movement spread to lower social strata with the founding of Katipunan that voiced the first demands for Philippine national independence. During 1896-1897, an armed struggle failed to overthrow Spanish rule. After the U.S. acquired the Philippines from Spain, Filipino nationalists resumed their struggle but were defeated by U.S. forces in a drawn out guerrilla war during the next five years (Tarling 2004, 89-95; Owen 2005, 154-156).

While China was not colonized, a nationalist movement emerged there around the turn of the century in response to the humiliation caused by China’s military losses to Japan and Western powers. The movement was led by intellectuals and students who launched vicious criticisms of Chinese tradition and culture while calling for radical reforms (Chow 1960). This movement lent support to the *Guomindang* and Communist parties, which fought warlords and the Japanese during World War II while battling each other (Zhao 2004).

By the 1910s and 1920s nationalist movements began to appear in most Western colonies, including the Dutch Indies, French Indochina, and British Burma and Malaya (Tarling 2004, 97-114; Van Niel 1960, Duiker 1976; Roff 1994). By and large these movements were led by a new generation of native elites who were educated in colonial schools or in Europe. These elites were strongly influenced by Western ideals of liberty, socialism, and democracy. At the same time, they were frustrated by racism, capitalist exploitation, and political oppression under colonial rule. As Southeast Asia became integrated into European empires, developments in Western Europe, Russia, Turkey, Japan, and China also had profound impact on native elites’ thinking and imagination. Soon many began to organize, first to demand more political rights under the colonial system, then full independence for their nations. New national identities were still being formed: Vietnamese revolutionaries still dreamed of an Indochinese federation, whereas Indonesians did not separate their national identity from those of class and

religion (Goscha 1995; Shiraishi 1992). Yet the new identities were powerful enough to motivate millions of Chinese and Southeast Asians during and after World War II to fight and sacrifice for national independence.

Fast forward to twenty years later, by the 1960s China had reemerged as a powerful state in East Asia, challenging both superpowers while supporting communist movements around the world. By then all of Southeast Asia had become independent nations. Colonial rule yielded to independent states either through wars against colonial masters (Indonesia, Vietnam), or through peaceful transfers of rule to native elites (Cambodia, the Philippines, Burma, Brunei, Malaya, and Singapore). Thus the old nationalism accomplished its grand mission of liberating East Asians from the colonial yoke. Thanks to a fierce nationalist struggle, millions of Indonesians today are bound together in a relatively stable political entity (Kahin 1952; Reid 2010). In China, the anti-Japanese resistance (1937-45) and anti-American-assist-Korea military campaign (1950-53) brought significant popular support to the Chinese Communist Party (Johnson 1962; Zhao 2004). Massive Western armies were defeated at the hand of Vietnamese communists cum nationalists who created a cohesive modern nation-state in the process (Woodside 1974). Modern Malaysia, Singapore, and the Philippines also have developed into viable states thanks in no small part to nationalism (Roff 1994; Hill and Kwen 1995; Stanley 1974).

Just when communism achieved its hegemony in China in the mid-1960s, Mao Zedong launched the violent Cultural Revolution to eliminate his political opponents (White 1989). This campaign caused massive social chaos and a near collapse of the Chinese state. A decade before the end of the Cold War, most Chinese had become disillusioned with communism as a result of the Cultural Revolution (Zhao 2004, ch. 6). After Deng Xiaoping rose to power in the late 1970s, he set China on a pragmatic course aimed at economic modernization rather than communist revolution. Yet economic difficulties in the late 1980s contributed to massive popular resentment, culminating in a large student protest at Tiananmen Square.

The military suppression of the Tiananmen protest was successful but at the same time brought widespread condemnation and sanctions from the West. Unable to return to the bankrupt communist doctrine, pragmatic Chinese leaders responded by turning to nationalism as a new means to legitimize the regime (Zhao 2004; Wang 2012). They launched a nationwide patriotic education campaign in the early 1990s to inculcate patriotism in the minds of youth. The campaign, which is still going on today, emphasizes themes such as China's greatness as a nation, the urgency of redressing the "century of national humiliation" at the hands of Japan and the West, and the Chinese Communist Party as the inheritor and defender of national interests

(ibid.). By the late 1990s, the campaign had shown initial success with massive spontaneous student protests against the U.S. in major Chinese cities when American warplanes mistakenly bombed the Chinese Embassy in Belgrade and killed three Chinese journalists (Gries 2004). In recent years Chinese leaders have pursued more aggressive policies against Japan and the Association of Southeast Asian Nations (ASEAN) countries in the territorial disputes in the Japan Sea and Vietnam's East Sea. These policies have received strong popular support as they symbolize the new status of a powerful China not to be bullied or humiliated by Japan, the West, and their allies.

Chronologically the Philippines was where post-Cold War nationalism first reappeared in Southeast Asia. Through the 1970s to the mid-1980s, Ferdinand Marcos ruled the Philippines as a dictator (Abinales and Amoroso 2005, chapter 8). He placed the country under martial laws, suppressed opposition groups, and battled communist and Islamic insurgencies in the south. Together with Thailand, Malaysia, Singapore, Indonesia and South Vietnam, the Philippines under Marcos served as a key link in the U.S. strategy to contain communism in Southeast Asia. Because Marcos was valuable as a close ally, American administrations from Carter to Reagan did their best to support him despite his regime's rampant corruption and gross violations of human rights. As the opposition coalesced around Corazon Aquino in the mid-1980s, U.S. support for Marcos enraged democratic activists and brew Filipinos' anti-American sentiments (Thompson 1995).

After Marcos was overthrown, these sentiments would transform into popular demand for U.S. troops to leave the Philippines (Brands 1992). While anti-American protests had occurred in the 1960s (Meadows 1971), this time they were not linked to radical communist groups. Although the Aquino government wanted to renew the leases of the bases (with higher rents) to the U.S., many conservative elites were ambivalent about the values of those bases (Yeo 2011, chapter 2). In 1991, the Philippine Senate voted to end the leases, and for the first time in Philippine history the country did not host any foreign military bases.

In early 1995, the Philippine government discovered that China had secretly occupied and fortified Mischief Reef, which was only 150 miles off Palawan Island and which was part of the Spratly Islands claimed by the Philippines (and Vietnam). This Chinese move triggered closer defense cooperation between the Philippines and the U.S. After the terrorist attacks in September 11, 2001, the Philippines welcomed back US troops to train the Philippine military in counterinsurgency and counterterrorism (De Castro 2009, 404-408). The greater U.S. military presence in the Philippines has sparked new waves of protests. More recently Sino-

Philippine relations have improved following China's offers of aid and investment. There have also been protests against China, not only for its continuing encroachments in the South China Sea, but also for its involvement in the graft scandal related to business deals signed by former President Arroyo Macapagal (ibid. 408-417).

General Suharto differed from Marcos in many ways, not the least in the general's greater success in bringing economic growth to Indonesia (Elson 2001). Yet the Suharto regime was also a dictatorship that maintained strict control over Indonesian society. Under Suharto, the expression of popular sentiments was allowed only through government channels. Early in his rule Suharto suppressed Islamic demand for political participation and forced Islamic groups to profess loyalty to Pancasila, the state doctrine (Effendy 2003). By the early 1990s, he began to court Muslim support and opened up the political sphere for Islamic identity to be expressed (Hefner 2000). Externally, Suharto was not as close to the U.S. as Marcos was, but he was fiercely anti-communist, having risen to power under special circumstances in which hundreds of thousands of communists were killed (Crouch 1978). While Indonesia did not support the American war in Vietnam, it was much closer to the West than to the Soviet bloc (Leifer 1983).

After the financial crisis struck Indonesia in 1997, the Suharto regime quickly lost its legitimacy in the face of enormous street protests. Since Suharto stepped down in 1998, Indonesia has seen a sharp, sometimes violent, resurgence of Islam. Yet there was more to the movement than an effort to assert religious belief. Since the 1920s, Islamic identity has become a part of many Indonesians' national identity (Vu 2010, chapter 9). The Dutch were opposed both because they were foreigners and because they were infidels. Although many Muslim Indonesians adhered to Pan-Islamism, prominent Muslim leaders such as Mohammad Natsir and Mohammad Roem chose to collaborate with nationalists such as Sukarno and Hatta during the Japanese occupation (1942-1945). The bargain among these leaders created an Indonesian state that was not an Islamic state but still had a religious character.² Suharto initially suppressed Muslim identity after his rise to power, but in the last decade of his rule reversed that policy and supported an Islamic role in nation building (Liddle 1996). This union of Islam and the nation in Indonesian imagination has guided numerous mass protests in the last decade against the U.S. wars in Iraq and Afghanistan (Perwita 2007). These protests both expressed Indonesian Muslims' solidarity with their fellow Muslims viewed as being victims of the U.S.

² The first principle of Pancasila, the five principles on which the Indonesian state is based, proclaims a belief in God.

and asserted the identity of Indonesians as a Muslim nation in opposition to Western domination. These protests have sometimes strained Indonesia's relations with the U.S. against the wish of Jakarta.

Muslim groups not only protested against the U.S., they also joined other groups to demonstrate against Singapore, Australia, and even fellow Muslim Malaysia, in response to policies or statements that were perceived as harmful or insulting to Indonesia. An issue that has recently concerned Indonesians involves the abuses of Indonesian workers and maids by Singaporean and Malaysian employers. In 2009, a series of abuse cases of Indonesian maids in Malaysia triggered massive protests in Indonesia, resulting in the Indonesian government's moratorium on the recruitment of maids to Malaysia. This ban was not lifted until the end of 2011 after Malaysia agreed to a number of measures to improve the working conditions of Indonesian maids (*The Jakarta Post*, 10/21/2011).

Unlike in Indonesia, the recent surge of nationalism in Vietnam is primarily directed at China. Vietnam fought a border war with China in early 1979, followed by many armed clashes until 1988. While precolonial Vietnam had fought imperial China, the conflict between the two communist powers in the 1980s was not primarily about China's domination but about the Vietnamese invasion of Cambodia whose Khmer Rouge leaders were allied with China (Chen 1987; Evans and Rowley 1990). China also punished Vietnam for the latter's harsh treatment of ethnic Chinese and for its military alliance with the Soviet Union. Although Vietnam was able to resist China, by the late 1980s it had sunk into a deep economic crisis due to misguided socialist policy, the Western economic embargo, the costly occupation of Cambodia, and the reduction of Soviet aid (Vo 1990). A new generation of Vietnamese leaders decided to embark on economic reform which essentially meant rural decollectivization, the end of central planning, the acceptance of a domestic market economy, and the opening up of Vietnam to Western trade and investment (Fforde and de Vylder 1996).

When the Soviet bloc collapsed, Vietnamese leaders responded by tightening political control and restoring relations with China in the spirit of socialist solidarity (Vuving 2006). Externally Vietnam joined the ASEAN in 1995 and normalized relations with the U.S. in the same year. Thanks to economic reform and a favorable global environment, Vietnam has achieved rapid growth in national income. The country now trades widely with the West and has joined the World Trade Organization. Until recently Vietnamese leaders have seen China as a reliable comrade in an ideological struggle against American imperialism. While U.S.-Vietnam relations have warmed up considerably, significant mistrust of the U.S. still exists

within the top Vietnamese leadership, concentrated especially within its security and propaganda apparatus.

Anti-China sentiments emerged in Vietnam around 2005 (Thayer 2009). After Vietnam and China signed a new border treaty, news about the territorial concessions Vietnamese negotiators made to China was circulated inside Vietnam and on the internet and drew sharp outcries. At the same time, China stepped up its claims on sovereignty over the Paracels and Spratlys by arresting and shooting at Vietnamese fishermen in the contested areas. The Vietnamese government's efforts to appease China while covering up these embarrassing events enraged many Vietnamese intellectuals and youths who organized spontaneous protests in Hanoi and Ho Chi Minh City in 2007 and 2008. Anti-China feelings have run feverishly high ever since, brewing in private conversations and on the internet. In 2009 when it was reported that Chinese companies had been given licenses to exploit mineral and forest resources in many strategic locations in Vietnam, a website was founded by three intellectuals who collected thousands of signatures for a petition specifically against Chinese involvement in bauxite mining projects in central Vietnam (Thayer 2010). In the summer of 2011, hundreds of protesters marched in Hanoi for eleven Sundays over twelve weeks against China's alleged encroachment on Vietnam's sovereignty in Vietnam's East Sea. Although being violently suppressed spontaneous protests have taken place again in 2012 and 2014.

Like Vietnamese who resent their domineering neighbor to the north, Cambodians have long harbored deep resentment of Thailand and Vietnam, both of which once colonized their country and annexed large chunks of the ancient Khmer kingdom. In the words of John Tully (2002, 242), Cambodian nationalism "contained a thick strand of envy" from its inception. Anti-Vietnamese riots broke out in the early 1970s that led to thousands of ethnic Vietnamese being killed. Under the Khmer Rouge, the murder of ethnic Thais and Vietnamese was systematically practiced (Kiernan 1996). However, throughout the 1980s Cambodia was occupied by Vietnamese troops and its government, led by pro-Vietnam communists, was a client of Vietnam.

Since the first free elections supervised by United Nations peacekeeping forces in 1993, anti-Vietnamese and anti-Thai sentiments have returned. Opponents to the Vietnam-backed Cambodian People's Party (CPP) led by Hun Sen have sought to incite anti-Vietnamese feelings to weaken Hun Sen. Thanks to deft political maneuvers and use of military, Hun Sen was able to maintain and even consolidate his domination over Cambodian politics (Hughes 2003). The opposition still survives thanks to its ability to win some seats in elections and to

Western pressure that keeps Hun Sen from doing away with all democratic institutions (e.g., a critical English-language media).

Yet election years have been extremely tense times as political parties juggle in anticipation of the polls. It was in this context when anti-Thai riots broke out in Phnom Penh in early 2003. Rioters burned down the Thai embassy and looted several Thai-owned businesses in Bangkok. The reason was a statement allegedly made by a Thai movie star about Thai ownership of Angkor Wat (Chachavalpongpun 2009, 456). Although Hun Sen criticized the statement on radio a day before the riots erupted, he denied his government's involvement and blamed the opposition, which also denied any involvement. Five years later, the 2008 elections also formed the background against which Cambodia's clash with Thailand over the Preah Viheah Temple took place. While Cambodian military was no match for the Thais in any serious conflict, Hun Sen responded to Thai protests (see below) by sending troops to the temple area and by insulting Thai authorities (Chandler 2010).

Historically nationalism in Siam/Thailand has never been as intense as in its neighbors Cambodia and Vietnam. Siam was not colonized, and national awareness developed in part thanks to Siamese kings who sought to build a modern nation-state in the early twentieth century. King Vajiravudh in particular created the formula "Nation, Religion, King" which centered on Thai identity and which tied the nation to Buddhism and the monarchy (Vella and Vella 1978, 177-179; Tarling 2004, 115). Since its early days, Thai nationalism has often been expressed through anti-Chinese and anti-Western sentiments (Callahan 2003, 495). Sino-Thais who control much of Thai economy have historically been targets of riots (Wasana 2009). France and Britain were resented for forcing Siam to sign many unequal treaties and for seizing territories considered to belong to Siam (these territories are today part of Laos, Cambodia, and Malaysia) (Owen 2005, 350-355). Yet during the Cold War Thailand was a close American ally and Western influences on Thailand were widespread.

After the financial crisis in 1997 that wrecked the Thai economy, nationalist anger re-emerged among some elites, occasionally directed against Sino-Thais, but mainly against the West (Callahan 2003). These elites resented the International Monetary Fund (IMF)'s austerity programs imposed on Thailand. They were also infuriated by the takeover of heavily indebted Thai firms at cheap prices by foreign corporations. Those nationalist sentiments did not form a mass movement, but they contributed to the success of Thaksin Shinawara whose party was named "Thais love Thais" (Thai Rak Thai). After becoming Prime Minister, Thaksin canceled IMF programs but maintained a close relationship with the U.S.

Thaksin was overthrown by the military in 2006, but his party under the leadership of Samak Sundaravej regained power in 2007. In 2008, the People's Alliance for Democracy (PAD), a coalition of many groups that opposed Samak, launched a challenge against his government by organizing protests against Cambodia's claim for sovereignty over the Preah Vihear Temple located along Thai border with Cambodia (Hughes 2008). The temple had been ruled by the International Court of Justice in 1962 to belong to Cambodia, and Samak government did not contest Cambodia's claim to it when the Cambodian government submitted an application to the United Nations for the temple to be acknowledged as a World Heritage Site. The protests, which were supported by the Democrat Party then in opposition status, led to brief gun battles near the temple between Thai and Cambodian troops, causing three deaths. The issue contributed to the dissolution of the Samak government later that year, to be replaced by a new government led by Democrat Party leader Abhisit Vejjajiva. As Prime Minister, Abhisit continued the hard line, leading to another clash between the two militaries in February 2011 that caused several casualties on both sides. Despite the coming to power of a new pro-Thaksin government since late 2011, the conditions in the temple area remain tense.

The new nationalist movements in East Asia are not completely new in the sense that their discourse frequently seeks to appeal to traditional patriotism (Vietnam, Cambodia) as well as anticolonialism and anti-Westernism (China, the Philippines, Indonesia). These themes were the hallmarks of the old nationalist movements of the 20th century. Yet the new phenomenon is unfolding with different forms in a different domestic, regional, and international context. Now that colonial powers have long gone, the enemy of the nation is different for most cases. Enmity is now primarily directed at neighboring countries as well as national governments and elites—with two exceptions. In the Philippines, the U.S. remains a main target of nationalist animosity. In China, the government is largely supported by popular nationalism, which harbors anti-American sentiments besides ill-will toward Japan and Vietnam. With new enemies to confront, the goal of the new movements in East Asia now involves not the national right to self-determination but national pride and the integrity of national territories. The struggle clearly marks a new, higher phase of national development as relationships among countries in the region deepen through greater economic and cultural interaction. That new socio-economic context is also reflected in the new movements' methods of street protests and mobilization through online media. Whether these methods enhance the mass character of the new movements awaits future research.

Explaining the new nationalism

What explains the post-Cold War resurgence of nationalism in East Asia? A brief review of theories about the causes of nationalism is sufficient to suggest their limited relevance to the phenomenon we examine here. Most theorists focus on the “old” nationalism of past centuries that is credited for giving birth to modern nations and nation-states. The main debate pits “modernists,” who consider nations as modern constructs, against “perennialists,” who claim a larger role for primordial identities in shaping modern nations. Among modernists, Ernest Gellner (1983) believes that nations were created out of a need in modern industrial societies for a high culture that is specialist, literate, and based on a standardized mass educational system. Benedict Anderson (1983) argues that nations emerged in modern time as a result of the decline of sacred monarchies and cosmological script communities, a revolution in the concept of time, and “print-capitalism” which fostered anonymous reading publics. In contrast, Anthony Smith (1987) from the perennialist camp posits that ethnic identities predated modern nations and shaped the formation of national communities. Although a modernist, John Breuilly (1983) treats national identity not as a belief but as material for political mobilization. Breuilly argues that nationalism appeared in eighteenth-century Western Europe as a political reaction to absolute rulers’ efforts to consolidate their states. Beginning as a demand for political representation by excluded groups, nationalism would spread beyond Europe and be adopted by those who were excluded because of their cultural identities.

The above theories offer convincing explanations for the rise of nationalism in the first half of the twentieth century in East Asia. The role of modern education in fostering new national consciousness in semicolonial China and colonial Southeast Asia is well documented (Tarling 2004; Fitzgerald 1996). The rise of modern national consciousness in China, Indochina, Malaya, and the Dutch Indies occurred at the same time with the spread of vernacular languages, the appearance of newspapers and novels, and the development of modern industries, telecommunication, and means of transportation. The modernists are generally correct, yet perennialists such as Smith have a point: new national identities for people inhabiting on *mainland* Southeast Asia were strongly conditioned by pre-existing identities. The new Burmese identity was built around a Burman core. The Indochinese identity lingered on a decade after the French had been overthrown by the Japanese, but eventually came apart and was supplanted by three precolonial identities (Annamese, Khmer, and Lao).

By focusing on politics, Breuilly's framework is uniquely useful for explaining not only the old nationalism but also the ongoing struggles for self-rule in western China, southern Philippines, southern Thailand, northern Burma, and Papua New Guinea (Tarling 2004, 214-221). Those struggles involve ethnic minorities who are politically excluded and who yearn for their own states. They are responses to the sometimes brutal efforts of modernizing states in China, Indonesia, the Philippines and Thailand to expand their control over borderland areas (Zhao 2004, ch. 5; Thomas McKenna 1998; McCargo 2008). The importance of ethnic identities in those struggles also underlines Smith's point about the difficulties facing modern nations built on a multiethnic base (Zhao 2004).

Yet existing theories can only partially explain the post-Cold War surge of nationalism in East Asia. Modernists are particularly silent about what happens to nationalism once it has emerged. Perennialists like Smith can point to traditional rivalries and conflicts going back for centuries between Chinese and Vietnamese and between Cambodians and Thais. Yet Smith's framework cannot explain the ebb and flow of post-independence nationalism. The theory also misses much of the political dynamics between the state-led nationalism in China since the 1990s, the dynamics between the Vietnamese government and anti-China protesters, and the manipulation of nationalist sentiment by Thai and Cambodian elites. Smith can't say much about anti-Americanism in China, Indonesia, and the Philippines.

We therefore need to move beyond existing theories to examine the growth of nationalism in East Asia since the mid-1980s in its context. In particular, I argue that the phenomenon was caused by the conjunction of three factors: the failure of earlier nationalist movements to fully deliver their promises; a shift in the international and regional order (the end of the Cold War and the rise of China); and a change in domestic order (political liberalization and democratization) that was also occurring across many countries in the region. The failure of the old nationalism is the deep cause while the other two factors explain the timing and the mass character of the new nationalist movements.

The first cause of the new nationalism has to do with the failure of the old nationalism to deliver many of its promises. It is true that the old nationalism succeeded in liberating East Asia from Western domination, but one should not overlook its significant failures. First, nationalism in most cases simply replaced European governors-general with indigenous dictators or oligarchs. For decades, East Asians chafed under dictators (Ferdinand Marcos in the Philippines, Ne Win in Burma, Sukarno and Suharto in Indonesia) and totalitarian communist regimes (China, Vietnam, Laos since 1975, Cambodia during 1975-1993). Khmer

Rouge leaders killed far more Cambodians than French and Americans ever did. Burmese people are poorer and more oppressed under Ne Win and his successors than they were under British rule. Vietnam's communist regime exploited peasants through collectivization more than the French colonial state was ever able to. Mao's policies caused colossal catastrophes for China more than all imperialist powers had ever done. The Suharto regime was more repressive toward Islam in its first two decades than the infidel Dutch colonial regime had been. Postcolonial state oppression and exploitation in China, Cambodia, Indonesia, Burma and Vietnam were not simply the result of state building efforts as had been the case of absolute monarchs in Breuilly's framework. Rather, they primarily originated from extremist ideologies that claimed to be nationalist but in reality destroyed national unity through class, ethnic, or religious persecutions. In these cases it can be said that nationalist movements failed to resist and ended up being "hijacked" by rival ideologies (communism in China, Vietnam, and Cambodia; anti-communism in Indonesia; and "Buddhist socialism" in Burma). This point will become clearer when we discuss below how the end of the Cold War contributed to the recent surge of nationalism.

The second failure of the old nationalism was its inability to break the dependency on the former colonial master (the Philippines) or to solve territorial disputes with neighbors (China, Vietnam, and Cambodia). After its failed struggle against the U.S. in the 1900s, Filipino elites fully cooperated with the American colonial regime (Tarling 2004, 93-97; Abinales and Amoroso 2005, 125-127). Some even requested the U.S. to annex the Philippines as one of its states. Filipino autonomy was largely achieved in the 1930s with the collaborating elites competing for votes in local elections. The Philippines was granted independence by the U.S. following the end of World War II on the condition that American economic and security interests were protected (Abinales and Amoroso 2005, 171-173). The failure of Filipino elites in cutting ties with its former colonial master has been a prominent theme in the postcolonial nationalist discourse (Bankoff and Weekley 2002, chapter 3).

The old nationalism also failed to fully settle border disputes. Following the Second World War the Cambodian government was able to reclaim two western provinces (Battambang and Siem Reap) from Thailand. In 1962 Cambodia secured a ruling from the World Court on the Preah Vihear Temple but not the land surrounding the temple. Cambodian failure in fully resolving territorial disputes with its neighbors is a common problem facing newly independent countries and a common cause for the continuation of nationalism after independence in Africa and elsewhere (Barrington 2009, 15-19).

The case of Vietnam is quite different. For decades its communist leaders viewed communist China as a close comrade and big brother. Until the early 1970s, they accepted China's claims of sovereignty over the Paracels and Spratlys despite the fact that many of those islands had been Vietnam's territory in the colonial period and were under the control of the Saigon regime at the time. An example is a 1958 diplomatic note signed by Premier Pham Van Dong of North Vietnam which essentially concurred with China's territorial claims in the South China Sea. When Chinese forces attacked and expelled Saigon's troops stationed in the Paracels in 1974, Hanoi did not utter a single word of protest. China is using these events in support of its claims, while the Vietnamese government has failed to offer a convincing explanation for what happened.

The failures of the old nationalism are a deep but insufficient cause for the new nationalism in East Asia. An equally important cause is a shift in the international and regional order as a result of the end of the Cold War and the rise of China. It is not a coincidence that the resurgence of nationalism occurred by the end of the Cold War (Jager 2007). The Cold War had origins in Europe but East Asians were not pawns in the hands of the superpowers as commonly believed (Vu and Wasana 2009). Rather, many East Asian elites truly believed in either Western democracy or Soviet socialism, and worked hard to enlist the support of one of the superpowers for their partisan cause. Ho Chi Minh went to Moscow in early 1950 asking Stalin for a Soviet-Vietnamese mutual defense treaty (Gaiduk 2003). Stalin turned down the request but agreed to recognize Ho's government and delegated to Maoist China the task of helping Vietnamese communists. At the same time, Ho's rival Ngo Dinh Diem and his supporters inside and outside Vietnam pulled all strings to get the U.S. to commit to him as a man capable of defeating communism (Miller 2004). Thai government was among the first to offer troops for fighting alongside the Americans in Korea—in return for American support and alliance (Wasana 2009).

Because many East Asian elites truly believed in Cold War ideologies, they sought to harness patriotic sentiments to serve ideological causes. In North Vietnam, to be patriotic was reinterpreted to mean “to build socialism” (Vu 2009). People were made to believe that China was Vietnam's generous and beloved socialist brother despite the traditional conflict between the two countries. In South Vietnam, people were made to accept that patriotism meant a commitment to fight communism. Alliance with the West against fellow Vietnamese was considered “patriotic duties.” In Thailand, pro-U.S. military dictators frequently used nationalism as a tool to suppress leftist groups (Callahan 2003, 498). While anti-communism

was suppressed under Sukarno's formula of *Nasakom* (nationalism-religion-communism), communism under Suharto was charged of being anti-*Pancasila* or against the nation. Depending on context, nationalism was suppressed while socialist brotherhood or anti-communist fraternity was promoted. Together with ideological affinities were military and other forms of alliance, as those that linked communist Vietnam to China and the Soviet Union, those that linked the Philippines and Thailand to the U.S., and those that linked Singapore and Malaysia to Britain.

When the Cold War ended with the collapse of the Soviet bloc, surviving communist regimes (Vietnam, Laos, and Cambodia) were forced to turn to Western capitalist countries for aid and investment. Cambodia's Communist Party abandoned communism to cling to power through a transitional period from war to peace under United Nations' mediation. To implement market reform Laos and Vietnam also dropped parts of the communist orthodoxy such as collectivized agriculture and central planning. Although Laotian and Vietnamese leaders still believed in communism, it would be difficult for them to promise a communist paradise to their people (as they had done up to that point), while having to beg for foreign investment from the West. Freed from the ideological shackles of their governments, the educated publics could turn their imagination to new forms of community based on other ties, of which the most critical ones have been religion, ethnicity, and money. A similar phenomenon took place in China, even though earlier events (the Cultural Revolution and Chinese alliance with the U.S. in the 1970s and 1980s against the Soviet Union) had already eroded the grip of communism on the minds of Chinese elites.

A parallel trend occurred at the same time in anticommunist countries where the Soviet demise alleviated their governments' longstanding fear of communist subversion. With the death of global communism, rulers in these countries no longer had the motivation to propagate or enforce an anticommunist ideology (Chantasawat 2006). In fact, their capitalist elites quickly saw new opportunities for making money, as living standards in socialist countries were low and their workers were not allowed to organize independent unions. Thailand's Prime Minister Chatchai Choonhavan was the first leader of the ASEAN to visit Vietnam, calling for "turning battlefields into markets." For supporters of communism in Thailand and Malaysia, the collapse of the Soviet bloc perhaps dispelled whatever remained of the communist allure. As communist parties surrendered or were dissolved in these countries, an important barrier to the formation of national or other communal bonds was removed. The end of the Cold War thus

facilitated the opening up of ideological space for new imaginations of the nation on both sides of the Iron Curtain.

Besides the end of the Cold War, the rise of China is an important shift in the regional order that has fueled the recent surge of nationalism in China itself and in East Asia. Despite Chinese leaders' professed belief in its "peaceful rise," China's economic success has emboldened its leaders to pursue a confrontational strategy since recent years in contradiction with Deng Xiaoping's policies. China's rapid modernization of its military and its aggressive behavior in the contested territories have in turn aggravated China's relations with its neighbors (Bolt 2011). Currently China is making sweeping claims of sovereignty over most of the South China Sea, against counter claims by Vietnam, the Philippines, and Malaysia. Militarily, China is developing a blue-water navy which raises questions in the neighborhood about its long-term intentions. Economically, China's thirst for energy resources has led to its involvement in controversial mining projects in Vietnam and Indonesia. The flood of cheap Chinese goods and labor has triggered concerns in Vietnam, Thailand, Singapore, and Indonesia. China's own nationalism is increasingly militant in its rhetoric, further inflaming anti-Chinese sentiments in Southeast Asia (Gries 2004).

In Southeast Asia, the rise of China is politically significant also because of the large and powerful Chinese diaspora. China's dynamic economy has increasingly drawn back wealthy ethnic Chinese from Thailand, the Philippines, Indonesia, and Malaysia. The pull is primarily economic but also has cultural dimensions. Ethnic Chinese in Southeast Asia have had a tenuous relationship with host communities, with those in Thailand and the Philippines most integrated and those in Indonesia and Malaysia least. Closer relationship with their ancestral homeland has slowed down and even reversed the long and painful process of integration into their host societies, promising future conflicts (Shin 1989, and personal communication, March 2010).

China still has many "friendly neighbors" such as Myanmar, Cambodia, Thailand, and Vietnam, which helps stem the rise of anti-Chinese sentiments (Maung 2009; Chambers 2005; Vuving 2006). But these relationships involve many complicated issues and may not be stable. For Myanmar, the issues are China's geostrategic ambitions in the Indian Ocean, the control of resources by ethnic Chinese in Myanmar economy, and the migration of hundreds of thousands of Chinese into ethnic areas in Myanmar (Haack 2011). For Thailand, Sino-Thais have been deeply integrated into Thai society, but resentment against them still persists both among some urban elites and in rural towns (Callahan 2003; Chantasawat 2006). For Vietnam, both anti-Chinese sentiments and the dependence of Vietnamese economy on Chinese

imports are contentious issues (Vuving 2010; Thayer 2010b, 399-404; Pham 2014). As we have seen above, the Vietnamese government has failed to completely suppress the anti-Chinese movement despite its tight control over society. In the future, anti-Chinese movements may emerge in Thailand, Malaysia, and Indonesia as they have in the past, if people in those countries perceive China and ethnic Chinese as a security threat.

The wave of political liberalization and democratization that has swept through East Asia since the mid-1980s is the third factor that contributed to the recent rise of nationalism. The literature on ethnic conflict and ethno-nationalism has pointed out that democratization encourages the political mobilization of ethnic and national identities among groups competing for power.³ Although this point applies to the East Asian cases under study, it neglects the conditions that make nationalist claims appealing to people or voters in a particular countries, regardless of what the elites intend to do. The simple fact is that liberalization and democratization create conditions for greater and more sustained mass participation. Expanded popular participation in democratic politics forces political regimes to accept and carry out the popular will to some extent. In less democratic contexts, reduced state control over quasi-political organizations (e.g., student and religious associations) and over the means of communication (e.g., web blogs and facebook) facilitates the forming of horizontal networks of activists that can mobilize support for nationalist causes.

In the Philippines and Indonesia, democracy however imperfect has triumphed over dictatorship. In the Philippines, “people power I” that overthrew the Marcos dictatorship was followed by “people power II” that removed another president from office. While the Philippine government has invited the U.S. back to help with its war against Islamic separatist forces, its relationship with the U.S. is frequently targeted by demonstrators. In Indonesia, the fall of Suharto has ushered in a multiparty system, a vibrant civil society, and free media. With new freedom of press, expression and organization, mass groups in Indonesia have regularly flexed their muscles with criticisms of the government’s foreign policy. Muslim groups claiming to speak for the popular will have mobilized to express solidarity with Muslims elsewhere (Fortuna 2010, 130-

³ For example, Jack Snyder (2000, 32-39) contends that elites’ competition for popular support at the earliest stages of democratization fosters the use of nationalist appeals. The particular type of nationalism that emerges (“revolutionary,” “counterrevolutionary,” “civic,” and “ethnic nationalism”) depends on whether the interests of dominant elites are compatible with democracy, and how strong representative institutions are relative to administrative institutions.

131). Although Islamic parties in Indonesia have failed to dominate the government thus far, the expression of the popular will is not limited to institutionalized channels.

In “semi-democratic” Thailand, the liberalization of politics since 1973 and especially since 1992 has also opened up a huge political space for popular movements. We have seen above how the opposition to the Samak government seriously derailed Thai-Cambodian relations. Cambodia became formally a democracy after 1993, and although the Hun Sen regime has amassed much power, Cambodia today is still not the Cambodia under Sihanouk in the 1960s, under Khmer Rouge in the 1970s, or during the Vietnamese occupation in the 1980s. There are today regular elections when opposition parties can campaign to a limited extent and can still count on an independent foreign language media in the country. An example is Sam Rainsy, who leads the largest opposition party and who often manipulates anti-Vietnamese sentiment to challenge the Hun Sen regime’s legitimacy. Rainsy now lives in exile, but his party still has the ability to bring popular attention to the issue in the future. In communist Vietnam, political liberalization has accompanied market reform despite the government’s intention to maintain absolute control. The growth of a market economy that lies partly outside government control has led to the rise of a new middle class and intellectual stratum which, albeit small, are less dependent on the state as in the old socialist days. A market economy requires interaction with Western governments, businesses, and international institutions, which brings in and sends out information, money, and people. This economy makes it difficult for the state to keep strict control, and the recent explosion of anti-Chinese sentiments in Vietnam is clear evidence of this fact.

On the one hand, the resurgence of nationalism in East Asia reflects conditions of local history and politics, in particular the failures of the old nationalism in many areas. On the other hand, as a regional phenomenon the new nationalism bears the stamps of three regional trends: the end of the Cold War, the rise of China, and the liberalization and democratization of politics. Nationalism has not surged in every country in East Asia; nor has it been equally intense in the countries where it emerges. Yet the regional trend is unmistakable although not yet studied.

Conclusion: Missions and Impacts of the New Nationalism

The resurgence of nationalism is an important political trend in East Asia that existing theories do not provide ready explanations. In this essay I have argued that the phenomenon was caused by important failures of the old nationalism, the end of the Cold War, the rise of

China, and the wave of liberalization and democratization since the 1980s. This concluding section briefly examines the main missions of this new nationalism and the potential risks involved for East Asia.

If the main mission of the old nationalism was to save or liberate the nation from colonial domination, the most important mission of the new nationalism for Chinese, Cambodians, Thais, Vietnamese, and Filipinos appears to be the defense of national territories. This new mission is causing a massive military modernization in China and the reversal of the trend of disarmament in Southeast Asia in the 1990s following the end of the Cold War. Under popular pressure, the Vietnamese government has adopted a more assertive position on territorial issues. Vietnam was the largest customer of Russian arms in 2009, with purchases of submarines and other military gadgets. The signs of an arms race are conspicuous. During 2005-2009, Southeast Asian countries imported twice the volume of weapons they had done in the previous five years (Weitz 2010).

An unintended impact of the new nationalism is the reconciliation of compatriots who belonged to opposing camps in the Cold War years and who were brainwashed with Cold War ideologies and their hateful messages. As the nation is resurrected in popular imagination and as the specter of communism fades, it is now possible for Indonesians to discuss the events of 1965-1966 during which hundreds of thousands of communists were massacred by the military and Muslim groups. Some modest attempts at restitution and reconciliation have been made with families of former communists and (to a greater extent) with ethnic Chinese. In communist Vietnam, the reaction to Chinese aggressive moves on the East Sea has drawn together many pro-government Vietnamese and anti-communist overseas Vietnamese three decades after the bloody civil war. In China, new history textbooks now praised the *Guomindang* regime for its vigorous resistance to Japan, rather than portraying it as an imperialist lackey as under Mao (Wang 2012, 102).

The new nationalism by itself is not sufficient to cause interstate wars in East Asia but the risks are serious, especially for the conflict in the East Sea. As a principle, nationalism fixates on territorial integrity and limits the room for state leaders to manoeuvre and negotiate. Yet the potential effects of nationalism on particular state vary due to two factors. The first factor concerns the relationship between a state and nationalism. The Chinese party-state has been leading popular nationalism since the 1990s. Taking a firm stand in territorial conflicts in the East Sea greatly enhances the legitimacy of Beijing leaders. Conflict with Vietnam and Japan helps divert attention from Beijing's policy failures in Tibet and Xinjiang. In contrast, the

Vietnamese party-state has found itself in a precarious position, having tried for years to suppress nationalist demands in order to protect Hanoi's comradely relationship with Beijing. The party-state has been denounced by nationalists who accuse it of kowtowing to Beijing. Conflict with China has eroded the power of those Hanoi leaders who are ideologically loyal to Marxism-Leninism, and created a deep cleavage within the party. The Philippine state is somewhere between China and Vietnam on this dimension. It does not lead nationalism, nor is it an enemy of nationalist groups. Still, it enjoys greater legitimacy when confronting China, even at the risk of being more dependent on the U.S.

The second factor that accounts for the varying effects of popular nationalism is the repressive capacity of a regime. Both China and Vietnam remain strong on this dimension, which suggests the limited effects of nationalism whether it is pro-government as in China, or anti-government as in Vietnam. If nationalist demands go overboard in China, the movement would likely be effectively restrained by the state. The Vietnamese state is in a more difficult position than its Chinese counterpart because nationalism in Vietnam operates in opposition to state policy and is challenging state authority and legitimacy. However, Hanoi is strong enough to keep them under control, at least in the medium term. Yet suppression of nationalism may backfire for the Vietnamese party-state in the long term as disappointed nationalists are pushed to join forces with democracy activists to oppose the regime. Finally, the Philippine state is weak in repressive capacity but it is a democracy where protests are legitimate and generally do not threaten state power. The state has no reason to fear nor to repress nationalism.

The analysis above produces the logical conclusion that war in the East Sea would be unlikely in the medium term. China would be careful not to risk a direct military confrontation with Japan and the Philippines, where governments have domestic and U.S. backing. It would make more sense for Beijing to take advantage of Vietnamese weaknesses to push its claims most aggressively. Domestic politics would prevent Vietnam from taking a strong stand against China's claims; the ultimate outcome would be Vietnamese reluctant acquiescence to Chinese control of the East Sea.

Bibliography

Anderson, Benedict R. O'G. 1991. *Imagined communities: reflections on the origin and spread of nationalism*. London: Verso.

Anderson, Benedict R. O'G. 2005. *Under three flags: anarchism and the anti-colonial imagination*. London: Verso.

Bankoff, Greg, and Kathleen Weekley. 2002. *Post-colonial national identity in the Philippines: celebrating the centennial of independence*. Aldershot, England: Ashgate.

Barrington, Lowell W. 2006. "Nationalism & Independence." In *idem*, ed., *After independence: making and protecting the nation in postcolonial & postcommunist states*. Ann Arbor: University of Michigan Press.

Bolt, Paul J. 2011. "Contemporary Sino-Southeast Asian Relations". *China: An International Journal*. 9 (2): 276-295.

Brands, H. W. 1992. *Bound to empire: the United States and the Philippines*. New York: Oxford University Press.

Brimmell, Jack. 1959. *Communism in South East Asia; a political analysis*. London: Oxford University Press.

Callahan, William A. 2003. "Beyond Cosmopolitanism and Nationalism: Diasporic Chinese and Neo-Nationalism in China and Thailand." *International Organization*. 57 (3): 481-517.

Chachavalpongpun, Pavin. 2010. "Diplomacy under Siege: Thailand's Political Crisis and the Impact on Foreign Policy". *Contemporary Southeast Asia* 31 (3): 447-467.

Chambers, Michael R. 2005. "The Chinese and the Thais are Brothers': the evolution of the Sino-Thai friendship". *Journal of Contemporary China*. 14 (45): 599-629.

Chandler, David. 2010. "Cambodia in 2009: Plus C'est la Mâeme Chose". *Asian Survey*. 50 (1): 228-234.

Chantasawat, Busakorn. 2006. "Burgeoning Sino-Thai Relations: Heightening Cooperation, Sustaining Economic Security". *China: An International Journal*. 4 (1): 86-112.

Chen, King C. 1987. *China's war with Vietnam, 1979: issues, decisions, and implications*. Stanford: Hoover Institution Press, Stanford University.

Chow Tse-Tsung. 1960. *The may fourth movement intellectual revolution in modern China*. Cambridge: Harvard University Press.

Crouch, Harold A. 1978. *The army and politics in Indonesia*. Ithaca, N.Y.: Cornell University Press.

De Castro, Renato. 2009. "The US-Philippine Alliance: An Evolving Hedge against an Emerging China Challenge". *Contemporary Southeast Asia: A Journal of International & Strategic Affairs*. 31 (3).

Dhillon, Karminder Singh. 2009. *Malaysian foreign policy in the Mahathir era, 1981-2003: dilemmas of development*. Singapore: NUS Press.

Effendy, Bahtiar. 2003. *Islam and the state in Indonesia*. Singapore: Institute of Southeast Asian Studies.

Elson, R. E. 2001. *Suharto: a political biography*. Cambridge, UK: Cambridge University Press.

Emerson, Rupert, Lennox A. Mills, and Virginia Thompson. 1942. *Government and nationalism in Southeast Asia*. New York: International secretariat, Institute of Pacific Relations.

Emerson, Rupert. 1960. *From empire to nation; the rise to self-assertion of Asian and African peoples*. Cambridge: Harvard University Press.

Evans, Grant, and Kelvin Rowley. 1990. *Red brotherhood at war: Vietnam, Cambodia, and Laos since 1975*. London: Verso.

Fforde, Adam, and Stefan De Vylder. 1996. *From plan to market: the economic transition in Vietnam*. Boulder, Colo: Westview Press.

Fitzgerald, John. 1996. *Awakening China: politics, culture, and class in the Nationalist Revolution*. Stanford, Calif: Stanford University Press.

Friend, Theodore. 1965. *Between two empires; the ordeal of the Philippines, 1929-1946*. New Haven: Yale University Press.

Gaïduk, I. V. 2003. *Confronting Vietnam: Soviet policy toward the Indochina Conflict, 1954-1963*. Washington, D.C.: Woodrow Wilson Center Press.

Gellner, Ernest. 1983. *Nations and nationalism*. Ithaca: Cornell University Press.

Giap, Van Trung. 2011. "Thoat Trung Luan." August 13. <http://www.giapvan.net/2011/08/thoat-trung-luan.html> (accessed 1/6/2012).

Gries, Peter Hays. 2004. *China's new nationalism: pride, politics, and diplomacy*. Berkeley: University of California Press.

Haacke J. 2010. "China's role in the pursuit of security by Myanmar's State Peace and Development Council: Boon and bane?" *Pacific Review*. 23 (1): 113-137.

Hefner, Robert W. 2000. *Civil Islam: Muslims and democratization in Indonesia*. Princeton, NJ: Princeton University Press.

Hill, Michael, and Kwen Fee Lian. 1995. *The politics of nation building and citizenship in Singapore*. London: Routledge.

Hughes, Caroline. 2003. *The political economy of Cambodia's transition, 1991-2001*. London: RoutledgeCurzon.

Hughes, Caroline. 2009. "Cambodia in 2008: Consolidation in the Midst of Crisis". *Asian Survey*. 49 (1): 206-212.

Jager, Sheila Miyoshi. 2007. The Politics of Identity: History, Nationalism, and the Prospect for Peace in Post-Cold War East Asia. Working paper published by the US Strategic Studies Institute. Available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB770.pdf>

Jeffrey, Robin. 1981. *Asia--the winning of independence*. New York: St. Martin's Press.

Johnson, Chalmers. 1962. *Peasant nationalism and communist power: the emergence of revolutionary China, 1937-1945*. Stanford, Calif: Stanford University Press.

Kahin, George McTurnan. 1952. *Nationalism and revolution in Indonesia*. Ithaca: Cornell University Press.

Kiernan, Ben. 1996. *The Pol Pot regime: race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79*. New Haven: Yale University Press.

Kiernan, Ben. 2004. *How Pol Pot came to power: colonialism, nationalism, and communism in Cambodia, 1930-1975*. New Haven: Yale University Press.

Leifer, Michael. 1983. *Indonesia's foreign policy*. London: Published for the Royal Institute of International Affairs by Allen & Unwin.

Li, Chenyang, and Liang Fook Lye. 2009. "China's Policies towards Myanmar: A Successful Model for Dealing with the Myanmar Issue?" *China: An International Journal*. 7 (2): 255-287.

Liddle, R. William. 1996. "The Islamic Turn in Indonesia: A Political Explanation." *Journal of Asian Studies* 55: 3 (August): 622.

Maung, Aung Myoe. 2009. "Dealing with the dragon : the China factor in Myanmar's foreign policy." In Anthony Reid and Yangwen Zheng, ed. *Negotiating asymmetry: China's place in Asia*. Honolulu: University of Hawai'i Press.

Meadows, Martin. 1971. "Colonialism, Social Structure and Nationalism: The Philippine Case". *Pacific Affairs*. 44 (3): 337-352.

Miller, Edward. 2004. "Vision, Power and Agency: The Ascent of Ngô Đình Diêm, 1945-54". *Journal of Southeast Asian Studies*. 35 (3): 433-458.

Perwita, Anak Agung Banyu. 2007. *Indonesia and the Muslim world: Islam and secularism in the foreign policy of Soeharto and beyond*. Copenhagen: NIAS Press.

Pham, Chi Lan. 2014. "Viet nam tu le thuoc Trung Quoc the nao?" *Dat Viet*, June 7, 2014. Available at <http://baodatviet.vn/kinh-te/doanh-nghiep/ba-pham-chi-lanviet-nam-tu-le-thuoc-trung-quoc-the-nao-3041020/>

Reid, Anthony. 2010. "Revolutionary State Formation and the Unitary State of Indonesia," in Jacques Bertrand and André Laliberté, eds. *Multination States in Asia: Accommodation or Resistance*. New York: Cambridge University Press.

Reynolds, Craig J. 1991. *National identity and its defenders, Thailand, 1939-1989*. Clayton, Vic: Centre of Southeast Asian Studies, Monash University.

Roff, William R. 1994. *The origins of Malay nationalism*. Kuala Lumpur: Oxford University Press.

Schwartz, Benjamin. 1951. *Chinese communism and the rise of Mao*. Cambridge: Harvard University Press

Shin, Yoon Hwan. 1989. "Demystifying the capitalist state: political patronage, bureaucratic interests, and capitalists-in-formation in Soeharto's Indonesia." Unpublished dissertation, Yale University.

Snyder, Jack L. 2000. *From voting to violence: democratization and nationalist conflict*. New York: Norton.

Smith, Anthony D. 1987. *The ethnic origins of nations*. Oxford, UK: B. Blackwell.

Stanley, Peter W. 1974. *A Nation in the making: the Philippines and the United States, 1899-1921*. Cambridge, Mass: Harvard University Press.

Stowe, Judith A. 1991. *Siam becomes Thailand: a story of intrigue*. Honolulu: University of Hawaii Press.

Suryadinata, Leo. 2006. *Southeast Asia's Chinese businesses in an era of globalization: coping with the rise of China*. Singapore: Institute of Southeast Asian Studies.

Tarling, Nicholas. 1998. *Nations and states in Southeast Asia*. Cambridge, U.K.: Cambridge University Press.

Thayer, Carlyle A. 2009. "Vietnam and the Challenge of Political Civil Society". *Contemporary Southeast Asia*. 31 (1): 1-27.

Thayer, Carlyle A. 2010a. "Political Legitimacy in Vietnam: Challenge and Response". *Politics & Policy*. 38 (3): 423-444.

Thayer, Carlyle A. 2011. "Vietnam and Rising China: The Structural Dynamics of Mature Asymmetry". *Southeast Asian Affairs*. 2010 (1): 392-409.

Thompson, Mark R. 1995. *The anti-Marcos struggle: personalistic rule and democratic transition in the Philippines*. New Haven: Yale University Press.

Trager, Frank N. 1959. *Marxism in Southeast Asia; a study of four countries*. Stanford: Stanford University Press.

Tully, John A. 2002. *France on the Mekong: a history of the Protectorate in Cambodia, 1863-1953*. Lanham, Md: University Press of America.

Van Niel, Robert. 1960. *The emergence of the modern Indonesian elite*. Chicago: Quadrangle Books.

Vella, Walter F., and Dorothy B. Vella. 1978. *Chaiyo!, King Vajiravudh and the development of Thai nationalism*. Honolulu: University Press of Hawaii.

Vo, Nhan Tri. 1990. *Vietnam's economic policy since 1975*. Singapore: ASEAN Economic Research Unit, Institute of Southeast Asian Studies.

Vu, Tuong. 2009. "To be patriotic is to build socialism: Communist ideology during Vietnam's civil war," in Tuong Vu and Wasana Wongsurawat, eds. *Dynamics of the Cold War in Asia*.

Vu, Tuong. 2010. *Paths to development in Asia: South Korea, Vietnam, China, and Indonesia*. New York: Cambridge University Press.

Vu, Tuong, and Wasana Wongsurawat, eds. 2009. *Dynamics of the Cold War in Asia: ideology, identity, and culture*. New York: Palgrave Macmillan.

Vuving, Alexander L. 2006. "Strategy and Evolution of Vietnam's China Policy: A Changing Mixture of Pathways". *Asian Survey*. 46 (6): 805-824.

Wang, Zheng. 2012. *Never forget national humiliation: historical memory in Chinese politics and foreign relations*. New York: Columbia University Press.

Wasana Wongsurawat. 2009. "From Yaowaraj to Plabplachai: The Thai State and Ethnic Chinese in Thailand during the Cold War," in Tuong Vu and Wasana Wongsurawat, eds. *Dynamics of the Cold War in Asia*.

Weitz, Richard. 2010. "Global Insights: China's Military Buildup Stokes Regional Arms Race." *World Politics Review*, March 16. <http://www.worldpoliticsreview.com/articles/5283/global-insights-chinas-military-buildup-stokes-regional-arms-race> (accessed January 12, 2012).

White, Lynn T. 1989. *Policies of chaos: the organizational causes of violence in China's Cultural Revolution*. Princeton, N.J.: Princeton University Press.

Woodside, Alexander. 1976. *Community and revolution in modern Vietnam*. Boston: Houghton Mifflin.

Zhao, Suisheng. 2004. *A nation-state by construction: dynamics of modern Chinese nationalism*. Stanford, Calif: Stanford University Press.

Seabed Oil and Gas: Driver of Disputes or a Key to Settlement?

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This paper examines published estimates of the hydrocarbon resources thought to lie beneath the ocean floor in disputed areas of the South China Sea (SCS)¹ and, with reference to schemes that have been successful in other places, it considers what approaches if any may facilitate the equitable exploitation of South China Sea oil and gas.

Considering the seemingly endless string of provocations orchestrated by the Chinese government and China's evident disinterest in any outcome short of other nations' acquiescence to its claim of "irrefutable sovereignty" over nearly all the SCS area, a reader may reasonably ask if there is any point to this inquiry. The paper therefore also ponders Chinese intentions and behavior. In particular, it attempts to deduce the extent to which Chinese actions have been driven by a dream of untrammelled access to extensive hydrocarbon resources.

Finally, this paper considers if there are approaches to exploitation of SCS seabed hydrocarbons that may minimally satisfy the objectives of all disputants, China included. And if so, under what circumstances?

How Much Oil and Gas May Be Under the Seabed?

Publications of the US Energy Information Administration (EIA) provide the most comprehensive estimates available to the general public of the world's *proved and probable* oil and natural gas resources.

EIA defines "proved and probable reserves" as oil and gas that can be produced with existing technology if the price is high enough and the political environment is favorable.

The EIA updated its estimate for the SCS area most recently in January 2013.² The area covered by its report is shown in Figure 1; it totals just a bit more than 3.5 million square

¹ In deference to general usage, the author refers to Vietnam's East Sea in this text as the South China Sea.

² US Energy Information Administration brief, "South China Sea," updated February 7, 2013, accessed online at eia.gov/countries/regions-topics.cfm?fips=scs

kilometers.³ Once again the EIA concluded that substantial hydrocarbon deposits lie beneath the SCS. Its mean estimate was approximately 11 billion barrels of oil in proved and probable reserves, and 190 trillion cubic feet (Tcf) of gas.

Figure 1 - **The South China Sea** (US Energy Information Agency)



The EIA analysis indicated that the SCS is comparatively gas-rich: expressed in comparable energy terms, there is likely to be about three times more gas than oil, *i.e.*, about 33 billion barrels of oil equivalent.

EIA's analysis extended only to the relatively small portion of the SCS that has been explored for hydrocarbons deposits, almost all in parts of the sea near the shorelines of littoral states. It did not estimate how much oil and gas may lie in areas that have been "underexplored" as a consequence of sovereignty disputes.

³ It is approximately 2600 km from Hong Kong in the north to Singapore in the south; almost 1400 km from Manila on the east to Danang (Vietnam) on the west.

In 2010, however, the US Geological Service (USGS) made an informed guess about the South China seabed hydrocarbons still unfound. It estimated that beneath disputed parts of the SCS there may be another 16 billion barrels of oil and 145 trillion cubic feet of gas, the energy equivalent of 25 billion barrels of oil.^{4 5}

Chinese sources also publish estimates from time to time. In November 2012, the China National Offshore Oil Company (CNOOC) estimated the SCS area holds around 125 billion barrels of oil and 500 trillion cubic feet of natural gas in undiscovered resources.⁶

The mean estimate by CNOOC is thus about 2½ times the combined estimate by the US agencies (212 billion barrels of oil equivalent [bboe] vs 85 bboe.)

Many other "guesstimates" have been published over the last decade. Chinese sources have normally been bullish (one gushed about the SCS being a "second Persian Gulf")⁷ and multinational oil company experts are generally bearish. If it is assumed that the estimates of the US agencies and CNOOC are about as "right" as estimates can be until there is field testing, the 3.5 million km² expanse of the South China Sea seems to harbor oil and gas deposits on a middling scale, more like the North Sea (at best) than, for example, the Gulf of Mexico or the Persian Gulf.⁸

In the last decade, the technology for finding and producing hydrocarbons from deepwater (>450 meters' depth) and ultra deepwater (>1500 meters' depth) sites has matured to the point that drilling anywhere in the SCS (maximum depth 5567 meters) no longer presents much of a technical challenge to industry leaders.⁹ And, with oil prices now settling at US\$100

⁴ US Geological Service, Assessment of Undiscovered Oil and Gas Resources of Southeast Asia, 2010 (<http://pubs.usgs.gov/fs/2010/3015/pdf/FS10-3015.pdf>). These are mean estimates. Per USGS, there could be as little as 5 billion barrels of undiscovered but producible oil and as much as 22 billion barrels. Its analogous range for natural gas is 70 to 290 trillion cubic feet.

⁵ For an excellent discussion of the methodology and limitations of geology-based assessments, see Schofield, *Island Disputes & the Oil Factor in the South China Sea*, Current Intelligence, Vol. 5, Issue 1, December 2012.

⁶ from EIA SCS report, p.2. CNOOC is the state controlled company assigned principal responsibility for exploring for hydrocarbons off China's coast.

⁷ Schofield, *op. cit.* "There is a strong, long-standing perception of the South China Sea as a major potential repository of seabed oil and gas resources. It is a view not well supported by evidence. The South China Sea's reputation as an oil rich region arises in part from a fervent desire on the part of interested parties for this to be the case." (p.3)

⁸ Over the past 50 years, 48 billion barrels of oil and 127 trillion cubic feet of gas have been extracted from North Sea fields offshore Norway and the UK. Though substantial gas reserves remain, North Sea oil production is now in sharp decline. (BBC, February 24, 2014).

⁹ The technology isn't foolproof, however. In 2010, a combination of corner-cutting and bad luck at a test drilling site 66 kilometers off the US coast in the Gulf of Mexico resulted in the Macondo (or Deepwater Horizon) blowout, the worst environmental disaster in American history.

per barrel [159 liters] or more, there's a powerful financial incentive for multinational companies to "go offshore."

In a non-political but orderly world, the SCS would by now be attracting many billions of dollars of investment in exploration to confirm commercially viable oil and gas fields and, assuming commercially viable strikes are made, many billions more to bring those hydrocarbons to market.

Multinational oil companies are notoriously skittish, however, about working in locations where national sovereignty is in dispute.

China's Thirst for Oil

The prospective SCS "oil boom" is a matter of intense interest to Chinese strategists whose mission it is to secure the oil and gas supplies that China's fast-growing economy requires.

According to BP's annual statistical review, China consumed 3.5 billion barrels of oil and the gas equivalent of another 800 million barrels of oil in 2011. By 2030, adds BP, China's demand for oil and other liquid fuels will grow by 70% to six billion barrels annually and will be slightly greater than the US.¹⁰

Whereas the US is expected to remain nearly self-sufficient in oil and gas, China's surging demand and the very modest amount of oil and gas likely to be found in China's mainland (which has circa 1% of known global reserves), will force China to seek more and more of these fuels abroad. EIA projects that by 2040, China will import 72% of its oil and its annual gas demand will have grown from 5.2 trillion cubic feet in 2012 to about 17 trillion cubic feet, with perhaps 40 percent imported by pipeline or as liquefied natural gas (LNG).¹¹ Although there is doubtless a lot of air in all these estimates, they indicate that if all the proven and probable reserves in the SCS were recovered and shipped to China, they would satisfy less than two years of China's oil demand in 2035 but over 17 years of its gas demand.¹²

¹⁰ BP (British Petroleum Corporation) Energy Outlook 2030, January 2013, online at bp.com/content/dam/bp/pdf/statistical-review/EnergyOutlook2030/BP_Energy_Outlook_2030_Booklet_2013.pdf

¹¹ USEIA China Country Brief, February 2014, eia.gov/countries/analysisbriefs/China/china.pdf

¹² BP (British Petroleum Corporation) Energy Outlook 2040, January 2014, online at bp.com/content/dam/bp/pdf/statistical-review/EnergyOutlook2040/BP_Energy_Outlook_2040_Booklet_2014.pdf

CNOOC, China National Offshore Oil Company, is one of China's three state-owned integrated oil companies. Tasked to develop world-class deepwater exploration, development and production capabilities, CNOOC has come a long way. It acquired technology and experience while partnering with several Western companies in the exploration of medium deep prospects in the offshore basins of rivers that drain China's Guangdong province. A joint venture with Canada's Husky Oil Corporation has been most successful. Husky announced that its Liwan gas field, discovered 300 kilometers southeast of Hong Kong in 2006, is expected to produce about five billion cubic meters of gas annually by 2017.

China's first deepsea oil drilling rig, CNOOC's Haiyang Shiyou 981, was launched in Shanghai in February 2010.¹³ The rig was built at a cost of six billion yuan (then US\$982 million). Xinhua reported in May 2011 that the rig would be deployed to operate in the Reed Bank area about 125 miles west of the Philippines' Palawan Island¹⁴; that has not yet happened, however. By May 2012, HYSY 981 was drilling test wells about 320 kilometers southeast of Hong Kong at a depth of 1500 meters.¹⁵ Evidently these were dry holes. Then, in March 2014, CNOOC announced the "first breakthrough of independent deepwater exploration," almost certainly a reference to HYSY 981 activity. The well, Lingshui 17-2-1, was said to be drilled in a section of the Qiongdongnan Basin. The yellow spot in Figure 2¹⁶ indicates the well's approximate location.

Then, early in May 2014, Vietnam's coastal patrol vessels discovered that HYSY 981, screened by a flotilla of escorts, had anchored 221 kilometers off Vietnam's central coast where, according to Chinese sources, CNOOC intended to explore for oil until mid-August. (The rig's approximate location is shown by the orange spot on Figure 2.)

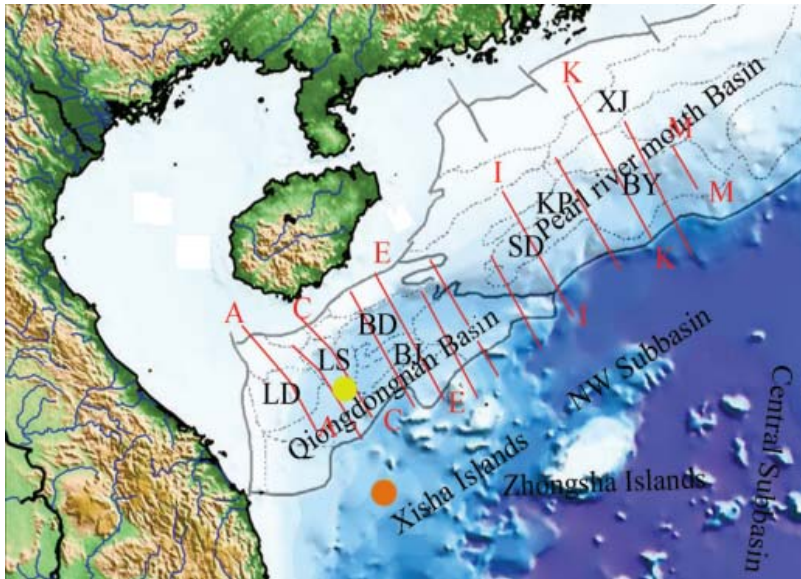
¹³ In September 2013, CNOOC bought a second rig, renamed the Nanhai 9, from the deepsea drilling multinational firm Transocean. Yet another deepsea semi-submersible, the Haiyang Shiyou 982, is under construction at a Chinese shipyard for 2016 delivery.

¹⁴ huffingtonpost.com/edsel-tupaz/china-and-the-mosquitoes_b_892040.html

¹⁵ CNOOC, quoted by Reuters, *China Deploys Oil Rig as Weapon to Assert China Sea Claims*, 11 May 2012.

¹⁶ Image from website, <http://subseaworldnews.com/2014/03/19/cnooc-discovers-gas-in-qiongdongnan-basin/>

Figure 2



China's deployment of the deep sea drilling rig into Vietnamese waters makes no commercial sense. No private company would put such a huge and costly piece of equipment into operation until extensive collection of seismic data and computer-based modelling gave reason to expect the presence of substantial hydrocarbon deposits. (It was just such data that the PetroVietnam survey vessel Binh Minh II was collecting when Chinese vessels harassed it in June 2012.) CNOOC had no such data; it had nothing more to go on than knowledge that the area off Vietnam's Quang Ngai province is adjacent to the mildly promising Qiongdongnan (Song Hong) Basin.

The HD-981's encroachment on Vietnam's EEZ continues and extends a pattern of efforts to plant China's flag on the shallow margins of the SCS, areas where experience suggests that "new oil" is most likely to be found. This year and last, China has not played favorites -- it has deployed a naval patrol as far south as James Shoal (Malaysia) and waters off Indonesia's Natuna Island and has harassed Philippine outposts south and west of the Reed Bank. The distribution of oil and gas fields throughout the SCS explains why Chinese vessels challenged seismic exploration within the Vietnamese and Philippine EEZs in 2011 and again in 2012. According to USGS, the next substantial subsea oilfields are likely to be found in the Reed

Bank area (a tablemount in the Philippines' EEZ, just northeast of the Spratly archipelago) and in the Phu Khanh "oil province" off central Vietnam (see Figure 3)¹⁷

Figure 3. Location of the Reed Bank (Philippines EEZ) and the Phu Khanh Basin (Vietnam EEZ), sites regarded by the US Geological Service as the most promising locations for new oil and gas finds.



China's quest appears to encompass a number of objectives relevant to Beijing's concept of national security. Control of oil and gas supplies is surely only one of these. Other objectives appear to include keeping the forces of potential enemies (in particular, the United States) well away from the Chinese mainland, and controlling shipping lanes that are important to Chinese commerce and vital to the prosperity of Japan and South Korea. Nor can we discount Chinese chauvinism -- a potent amalgam of historical grievances and aspiration to restore what most Chinese seem to regard as China's proper place in the world. In this vision, when smaller countries on China's periphery assume a properly deferential posture, they can count on benevolent consideration by the Beijing regime.

¹⁷ USGS, *ibid.* The map in Figure 3 is adapted from the same publication.

Is it possible to negotiate SCS resources issues with China?

Beijing has pursued what some have called a 'talk and take strategy.'

From time to time, Chinese officials have met with ASEAN representatives ostensibly to discuss a maritime code of conduct, but at these meetings they have shown no interest in reaching agreement on management of disputes even though the ASEAN side has softened its proposals.¹⁸

Beijing has consistently referred to its territorial claim as non-negotiable. It has ignored repeated requests to clarify the meaning of the "nine-dash line." We do not know whether China claims sovereignty merely over the features within that line, or of the entire seabed that it encloses.

Beijing consistently reminds that it has not agreed to be bound by UNCLOS dispute settlement procedures. It has insisted that it will only discuss territorial claims bilaterally, has condemned the Philippines' complaint to the LOS Tribunal and has warned Vietnam against a similar move.

In short, China refuses to discuss, let alone negotiate its sweeping SCS claim. At most, and only when other disputants acknowledge the validity of its claim, says Beijing, will it agree to discuss schemes for joint management of SCS resources.

Our effort to identify peaceful ways to manage conflict and resolve disputes in the South China Sea area must take these disagreeable realities into account.

Sharing the Seabed: Two examples

Many learned essays have addressed the knotty questions of how nations might divide up an enclosed sea, of how much weight to give to islands, rocks, reefs and shoals, and also indeed, how much weight to give to well-argued historical claims. Most scholars agree that there's still considerable ambiguity in international law and that notwithstanding the UN Convention on the Law of the Sea (1982), a consensus on maritime boundary issues is still elusive.

¹⁸ "By skirting hard security issues involving potential maritime conflict, the [draft COC] will likely have little impact on preventing or resolving incidents." (Brian McCartan, *Shallow Agreement in the SCS*, Asia Times, 3 July 2011). Also, *ASEAN and the SCS: Deepening Divisions*, National Bureau of Asian Research, 16 July 2012; *China warns against rush to set code of conduct in SCS*, Xinhua, 5 August 2013; *China snubs ASEAN push for SCS deal*, Reuters, 29 October 2012.

It is not hard to find successful instances of sharing seabed hydrocarbons resources, however, even in cases where the boundaries of EEZ have remained in dispute. Excellent examples in this region are furnished by agreements between Malaysia, on one hand, and Thailand and Vietnam on the other, for joint development of oil and gas deposits in and just outside the Gulf of Thailand. There are also many agreements elsewhere that are highly relevant to the SCS situation. In all of these instances, however, all the opposing claims were reasonable and the parties concerned were willing either to negotiate an equitable settlement of their claims or, if negotiation failed, to accept the result of an arbitral or judicial procedure.¹⁹

The seminal achievement in these matters was the series of agreements reached on the division of the North Sea among seven littoral countries and, subsequently, the allocation and exploitation of oil and gas resources that were discovered to straddle these maritime boundaries.

Applying principles laid down in the Geneva Convention on the Continental Shelf (1958),²⁰ the North Sea was divided as shown in Figure 4. Among the provisions of the convention was a requirement that when an exploitable pool of oil and/or gas was found -- or suspected -- to cross seabed boundaries, the parties must exercise mutual restraint, and bargain in good faith. This was a huge step forward, because until that time the prevailing rule was the so-called "rule of capture," an approach that allowed any enterprise to keep whatever oil or gas it could extract from a pool that crossed boundaries, and thus encouraged a competitive and often wasteful scramble.

Norway and the UK led the way in delineating fields discovered in the northern part of the North Sea and allocating equitable shares of the oil or gas found in each of them. The Frigg Treaty (1976) set the precedent of *unitization* -- designating a single operator for each field to manage it on behalf of all its owners.

¹⁹ Conversely, emphasizes Duong Danh Huy, if one side makes a reasonable claim but the other side makes an outrageously unreasonable one, then joint development is not possible. (Private communication to author)

²⁰ The provisions of the Continental Shelf Convention were incorporated into UNCLOS.

Figure 4.



Still today, even among nations that have accepted rules laid down in UNCLOS and ICJ interpretations of international law's regime of islands, it's quite possible to have substantial differences of opinion as to just where a seabed boundary lies. Nations naturally will choose baselines that result in the most favorable map possible. They will insist that this or that feature is really an island capable of sustaining life and therefore must be taken into account in setting a maritime boundary. Neighboring nations often will advance a contrary argument.

Such disputes have kept the International Court of Justice and the UNCLOS Tribunal busy. The courts' decisions have begun to clear up issues of how much a rock or an island ought to influence the drawing of marine boundaries. Sometimes these days, such differences can be negotiated. More commonly, however, parties have simply set the differences aside and proceeded to set up a special regime to divide resources extracted from the area of overlapping claims.

Figure 5: The Gulf of Mexico "doughnut holes."



There has arisen, in addition, the question of how to treat areas beyond the EEZs of any nation. Note, for example, the so-called "doughnut holes" in the Gulf of Mexico, shown in Figure 5. Bordered by the EEZs of the US, Mexico and Cuba, these two polygons enclose about one tenth of the total area of the Gulf -- waters as deep as 3000 meters in an area expected to be a prolific source of oil and gas.

The doughnut holes are temporary, pending agreement on their division by the Mexican and American governments, which reportedly intend to treat the entire area as an extension of their continental shelves and in due course to delimit it. It appears that there has so far been scant progress in this respect. Meanwhile, multinational oil companies, possessed of the most sophisticated deepwater drilling technology, are eager to exploit the hydrocarbon reservoirs believed to lie beneath the doughnut holes and elsewhere along the borders of the American and Mexican continental shelves.²¹

The companies have been perhaps overly confident. The largest accidental marine oil spill ever -- over five million barrels of crude oil -- occurred in deep water a few hundred kilometers south of the coast of the American state of Louisiana in April 2010. The Deepwater Horizon incident,²² described (eerily like the Fukushima Dai-ichi nuclear meltdown less than a

²¹ Javier H. Estrada Estrada, *Trans-Boundary Oil & Gas Fields between Mexico and the USA*, 2007, accessed at www.analyticaenergetica.com.

²² Deepwater Horizon was the semi-submersible drilling rig, very similar to HaiYang 981, that was destroyed when the test well it was drilling burped up highly explosive methane gas.

year later) as "a catastrophic failure in redundant safety procedures designed to protect against high pressure blowouts,"²³ reminds that drilling for oil is inherently a risky business.

The constitution of Mexico provides that only the national oil company, Pemex, may produce oil and gas from Mexican territory. Pemex also is eager to drill into the depths of the Gulf of Mexico, but it does not have the experience or sophistication of its American peers. Mexican authorities have been concerned that companies drilling laterally from the US side of the boundary may literally drain "Mexican oil" from transboundary reservoirs.

Policymakers and regulatory authorities on both sides are thus challenged to devise a regime for exploitation of Gulf of Mexico deepwater oil and gas that properly delimits the international boundaries, gives appropriate attention to environmental and safety concerns, ensures that transboundary fields are properly unitized and shared, and offers the Mexican side opportunities to "catch up" in the application of deepsea drilling technology.

Figure 6. The Deepwater Horizon on fire, Gulf of Mexico, April 2010



²³ Council on Foreign Relations (US), *US Deepwater Drilling's Future*, January 11, 2011 (cfr.org/united-states/us-deepwater-drillings-future/p22204)

Lessons for the South China Sea

Shifting now back to the focus of this meeting, what can we learn from experience elsewhere, and how can such lessons be applied to the concrete circumstances of the South China Sea?

Let us assume that the five ASEAN members²⁴ that claim some portion of the area within China's "nine dash line" agree to apply established principles of international law to settle territorial claims. Such a process predictably would lead them to the conclusion that only a few of the Spratly or Paracel archipelgo "features" are of sufficient mass and liveability to merit more than a twelve nautical mile territorial sea. (The largest features, such as Woody Island in the Paracels or Itu Aba Island in the Spratlys might merit a small EEZ, perhaps as much as 24 or 36 nautical miles.)²⁵

In that case, the SCS would look like the map in Figure 7.²⁶ Let us assume further that claims based on historical contact will be set aside in favor of rules generated by the application of international law, for example that every state's right to an EEZ is generated only by its coastal features and any offshore features that are both "above water at high tide and capable of sustaining human habitation."

Applying UNCLOS rules, the SCS area might be divided approximately as shown in Figure 8. The light green area represents the EEZ of the Philippines, the magenta area, Malaysia's EEZ, the light yellow area, Indonesia, the light blue area, Vietnam, and the darker yellow area, China. The remaining white area falls outside the 200 nautical mile EEZs of any littoral country. Note, however, that this white area can also be apportioned in the same way that Mexico and the United States propose to deal with the Gulf of Mexico doughnut holes, *i.e.*, as extensions of various nations' continental shelves.

In the very hypothetical case described above, the nations claiming authority over each sector could then authorize various enterprises to explore promising parts of the seabed therein. Whenever reservoirs are found that extend beyond the boundaries of an EEZ, these would be unitized; that is, a single entity would exploit the whole of the reservoir and production from it would be shared proportionately among those nations in whose EEZs the reservoir lies. The

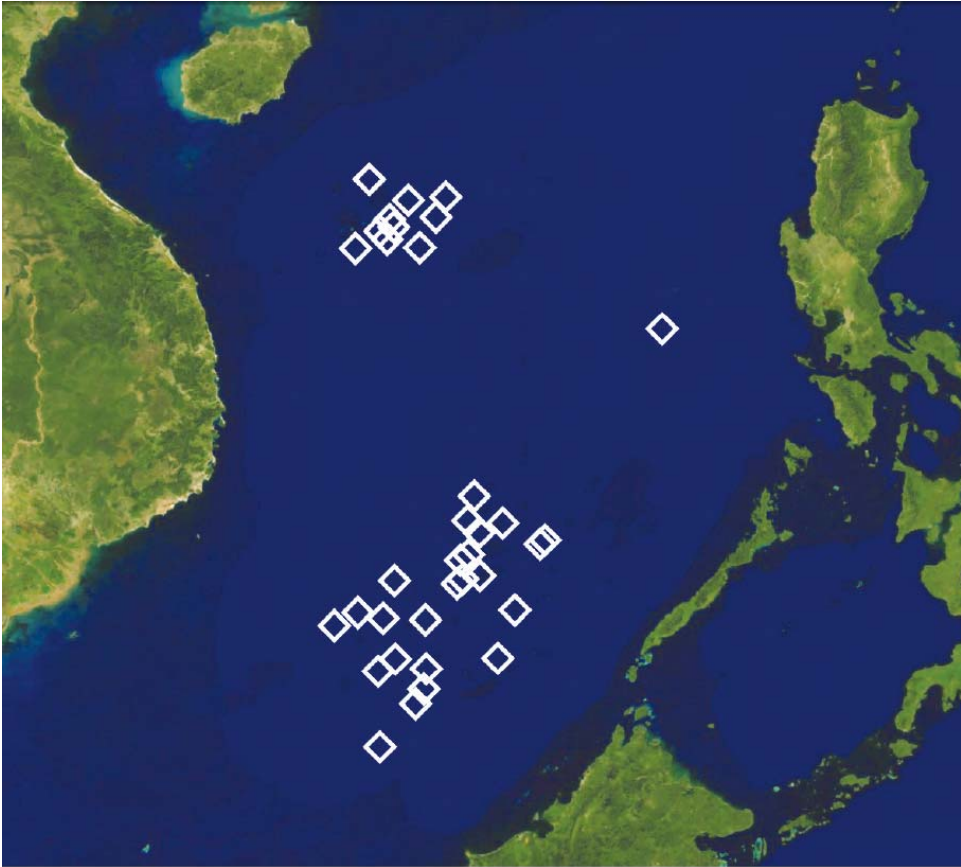
²⁴ Malaysia, Brunei, the Philippines, Vietnam and Indonesia

²⁵ Private communication from Dr. Duong Danh Huy.

²⁶ Gregory B. Poling, *The South China Sea in Focus*, CSIS, July 2013

procedures for such "delineation and apportionment" are widely understood and have been widely applied in other regions.

Figure 7. This computer-generated map shows the "location of the 50 features in the SCS that are above water at high tide and may therefore be assumed to generate an EEZ and continental shelf." (Courtesy of Greg Poling)



Note also, just as in the Gulf of Thailand and prospectively in the Gulf of Mexico, it is not essential to settle exactly where the border lies. The parties to a dispute can instead agree that while sovereign claims remain unresolved, hydrocarbons (if any are found) will be exploited under the direction of an authority that they jointly establish.

claimants jointly acknowledging China's vital interest in the oil and gas resources of the SCS? Can we imagine their governments directing the chief executives of their national oil companies to facilitate the participation of Chinese enterprises in the discovery and exploitation of such hydrocarbons resources?

CNOOC has high aspirations and evidently a sense of patriotic obligation to secure ever greater quantities of oil and gas for a rising China. Perhaps, however, CNOOC is uncomfortable playing the role of "mobile national territory and strategic weapon"²⁷ and pretending to do serious test drilling in areas it has never surveyed. It is not so far-fetched, therefore, to imagine joint development schemes in which CNOOC engages variously with Forum Energy (Philippines), Petronas (Malaysia), Pertamina (Indonesia), Petroleum Brunei and PetroVietnam and, perhaps, mutually acceptable multinational companies in search of commercially viable hydrocarbons throughout the seas stretching east and south of China's Hainan Island. Nor is it impossible to imagine also an ASEAN-approved commitment to give any enterprise that China designates "first option" to purchase hydrocarbons produced by any enterprise in the SCS area.

An arrangement like the one described fits the reality of 21st Century petroleum and natural gas markets. Physical "ownership" of coal, oil or other resources is no longer a key to national strength. What is vital now is assured market access. In the case we've explored, that means China's right of first option to buy SCS oil and gas. As long as Chinese enterprises are willing to pay as much or more as any other would-be buyer, common sense dictates that they not be shut out.

Proactive facilitation of Chinese -- *e.g.*, CNOOC's -- participation in the discovery, confirmation and exploitation of oil or gas prospects ought to be agreeable to other SCS claimants if, at the same time, Beijing acquiesces to the delineation of the SCS along the lines shown in Figure 7.

Resolving claims to the Paracels archipelago and Scarborough Shoal will be particular headaches for Vietnam and the Philippines respectively. China will not be easily dislodged. In these two areas especially, an approach commended above -- mutual shelving of claims and establishment of a joint authority to manage exploitation of hydrocarbons (and perhaps also fishing stocks) -- may prove a practical solution.

²⁷ CNOOC chairman Wang Yilin, quoted in '*Cnooc Deploys Oil Rig as Weapon to Assert China Sea Claims*,' Reuters, 11 May 2012.

Solutions like those proposed are not beyond the ingenuity of diplomats if that is the will of their political masters. However, in the SCS, oil and gas are only one element of a much more complicated game. Beijing has many interests in play. Among these are strategic rivalry with the United States and its friends and allies. Xi Jinping and his colleagues, it is said, aim to shore up the legitimacy of their rule by pushing back the US 7th Fleet and enlisting China's neighbors as junior members of a Pax Sinica.²⁸

Be that as it may, an oil and gas-centric strategy is worth trying. To the extent it succeeds, it can pave the way to a reduction of tensions across the board.

²⁸ See, for example, Peter Dutton's discussion of Chinese strategy in 'Testimony before the US-China Economic and Security Review Committee,' 4 April 2013 (uscc.gov/sites/default/files/Dutton%20Testimony,%20April%204%202013.pdf) and "Bucking Beijing," Aaron L. Friedberg's analysis in *Foreign Affairs*, September 2012 (foreignaffairs.com/articles/138032/aaron-l-friedberg/bucking-beijing)

Science and Politics in Managing East Sea Disputes

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Abstract: “Scientification” is conceptualized as a process which collects, organizes and produces systematically data, information and knowledge of a particular research subject by using scientific methodologies. This subject might have been widely mentioned and discussed before, but lacking a precise scientific foundation. “Science diplomacy” can be described as a way in which scientists, by their research products conducted through (non-)traditional diplomatic channels, spread their arguments, positions or evidences to international audience in order to shape common understandings or conceptions about a specific subject in international relations. By using “science diplomacy”, Vietnamese scholars can counter against one-sided propagandas which politically erode Vietnam’s interests as well as build up rightful perception about Vietnam’s sovereignty within the international community. Considering “scientification” as a key pillar of the East Sea policy of Vietnam, this article will examine the reasons why scholars and their researches are crucial in promoting Vietnamese advantages in the current East Sea disputes. From two aspects of internal and external factors, it will claim that a “science diplomacy” based on “scientification” is significantly necessary for Vietnam in the the context of power asymmetry between Vietnam and its giant neighbor. Then, the article will also bring into the discussion some further useful steps in order to highlight and enhance the role and effectiveness of “scientification” in the East Sea issue.

Key words: *The East Sea disputes; “scientification”; “science diplomacy”*

1. Introduction

“Scientification” is conceptualized as a process which collects, organizes and produces systematically data, information and knowledge of a particular research subject by using scientific methodologies. This subject might have been widely mentioned and discussed, but lacking a precise scientific foundation. “Science diplomacy” can be described as a way in which scientists, by their research products conducted through (non-)traditional diplomatic channels,

spread their arguments, positions or evidences to international audience in order to shape common understandings or conceptions about a specific subject in international relations. By using “science diplomacy”, Vietnamese scholars can counter against one-sided propagandas which politically erode Vietnam’s interests as well as build up rightful perception about Vietnam’s sovereignty within the international community.

Considering “scientification” as a key pillar of the East Sea policy of Vietnam, this article points out that in the context of power asymmetry between dominants and lesser states, “scientification” and “science diplomacy” might be among the best choices for Southeast Asian states (including Vietnam) to cope with the powerful China, by which they can avoid vulnerability of power disparities and can legitimate behaviors to their domestic audiences. It argues that Vietnam is now in a relatively favorable position to promote the strategy of “scientification” thanks to (i) the trend of a more multilateralism by seeking peaceful solutions, which grants smaller states “voice opportunities” in disputed affairs; (ii) its owning more “persuasive” arguments than China’s, which not only gives legitimacy for the views of Vietnam position but also contributes to a common knowledge about controversial issues.

This article is structured with three main sections. The first section examines external impacts which make “scientification” a more comprehensive strategy, especially in propaganda and law. The power asymmetry becomes the first element that should be considered, when the balance of economic power and military strength totally tilt toward China in the East Sea territorial disputes. The second element is the increasingly consolidated and expanded institutionalization which creates favorable conditions for Vietnam in its negotiating process. It also becomes a fertile land for “scientification” to expand. The last element is the “more reasonable” arguments and legal evidences from the side of Vietnam which promote the “scientification” strategy. The second part focuses on the demands of “scientification”: the relationship between scholars – the main sources that carry out the strategy – and their influence on policy-making procedure. The advantages of scholars in shaping policy will be analyzed. Then, the advantages of “scientification” in propaganda and public orientation as well as its role in differentiating between “rights” and “wrongs” in policy making and explaining procedure will also be explained in details. In those examinations, scholars are seen as an important channel for settling the maritime disputes in a peaceful manner. The last section of this article suggests some measures to promote “scientification” and “science diplomacy” which include: establishing a leading organization to coordinate research projects about the East Sea both inside and outside Vietnam; increasing capital and human resources as well as the infrastructure

for East Sea studies; strengthening research cooperation between Vietnam and foreign scholars through workshops, conferences which should be professionalized; opening some Vietnam-sponsored projects to attract research from foreign experts and last but not least, modernizing methodologies and perspectives, such as comprehensively combining materials or expanding research data for those who desire to study about the East Sea disputes.

2. The Demands of “Scientification”

What is “Scientification”? Why is it necessary to conduct “Scientification”? In this article, “scientification” is defined as an approach to international affairs through academic perspectives or through the scholar community. International politics, from financial crisis, climate change to nuclear proliferation, is becoming more and more complicated. It depends on each party’s interpretation of a particular issue or concept that decisions could be or could not be made in negotiating table. In order to achieve a desired goal, not only do we simply recapitulate information or utilize existing knowledge but we also have to put into practice a law or a theoretical understanding on a specific issue, or even propose a totally new concept about an arising issue. In both those processes, the role of scholars and their knowledge distribution to national policy-making procedure and international debates which aim to create a common background are considered important and necessary. Based on “scientification”, “science diplomacy” is viewed as a particular policy in which arguments are influenced or transferred to international forum and scholar community through academic perspectives. By attending international conferences, publishing academic works on international journals to triggering debate on hot issues in both domestic and foreign media, scholars can counter against one-sided propagandas as well as shaping common understandings or conceptions about a specific subject in international relations. In the context of East Sea disputes, the next section will examine why Vietnam need to intensify “scientification” based on internal and external perspective.

2.1 External perspective: Power and arguments

Why Vietnam should conduct “scientification” in the East Sea disputes? Considering the contemporary context, three factors should be taken into account when applying this strategy in designing Vietnamese foreign policy: (1) power asymmetry between Vietnam and China; (2) increasing support from the international community about “internationalization” of the East

Sea disputes; and (3) the more reasonable of Vietnamese legal arguments and interpretation compared to those of China.

First of all, regarding balance of power, it is hardly possible to compare Vietnam's capability to the Chinese ones, particularly in terms of economics, military and human resources. China is now the second biggest economy in the world, owning an ambition to become a maritime power rival that of the US in the future¹. The modernization of the People Liberation's Navy (PLN) is proceeding rapidly and quite comprehensively, especially marked by putting into operation the first aircraft carrier in 2012. Other maritime enforcement forces have also received huge investment for sovereign-protected missions. As the Director of the State Oceanic Administration (SOA) Liu Cigui stated that, before 2014², SOA would launch 22 more big-sized patrol vessels, some of which would join the currently East Sea fleet of marine surveillance ships. Comparing to Vietnam's 2012 defense budget of about 3,3 billions USD³, it is apparently that conducting an hard-power competition with China is impossible at the moment. An "asymmetric strategy"⁴ in military has been established in case war breaks out, which, however, could only bring to Vietnam small advantages in negotiations. The most obvious goal of the navy and coast guard modernization of Vietnam recently is to protect the maritime sovereignty and to gain the upper hand in negotiations. This strategy is of the essence, yet, it is also costly and implicitly contains two risks. The first one is budget pressure. Vietnam has to spend a large amount of foreign currency on buying weapons while their efficiency in battlefield has yet to be verified in practice. If there were no territorial disputes, those resources might be used for other development projects, such as for economic or educational sector. Military itself is a non-profit sector, especially in countries owning such a small amount of weapons and almost no ability to produce weapons like Vietnam. Hence, pressure from China makes other states, including Vietnam, to invest more and more financial resources on

¹ Mr. Li Zhaoxing, chairman of National People's Congress said on 04/03/2012 that the defense budget of China in 2012 increased 11.2% to \$106.4 billion. View http://news.xinhuanet.com/english/china/2012-03/04/c_131445012.htm, accessed 10/03/2013.

² National Institute for Defense Studies, 2012, *China Security Report 2012*, page 33, <http://www.nids.go.jp/english/publication/chinareport/index.html>, accessed 10.03.2013

³ Trefor Moss, 2012, "Chinsese Aftershock", *The Diplomat*, 26/11/2012

⁴ Gary Li, 2012, *Vietnam's Asymmetrical Strategy: Location offers Advantages over China*, defenseneews.com, <http://www.defenseneews.com/article/20120205/DEFPEAT05/302050007/Vietnam-8217-s-Asymmetrical-Strategy-Location-Offers-Advantages-Over-China>, accessed 10.03.2013.

modernizing their navy and air forces (both services require rapid modernization with huge capital) which contributes to financial burden. The second risk relates to strategies in terms of the “asymmetric strategy” aforementioned. Vietnam apparently gained many experience in guerilla tactic from the previous war with France and the US, however the navy has just been modernized and upgraded recently. Therefore, “asymmetric strategy” at sea will be a totally new experience for the Vietnamese navy. The risk is huge when both the economy and the political stability would be badly damaged because of this strategy. Thus, Vietnam should see military modernization as a minor and a long-term strategy, regarding the balance of power and economic capability compared to those of China.

The next element is the process of “internationalization” of the East Sea disputes. In Vietnam’s foreign policy towards this field, a multilateral approach is one of the important strategic choices. Hanoi’s government stated that: “In the multi-faceted dispute in the East Sea, Vietnam believes that which issue is bilateral should be resolved in bilateral manner, and which issue is multilateral should be resolved in multilateral manner between the concerned partners”⁵. Vietnam and some ASEAN states such as the Philippines and Indonesia have been gain initial success raising the East Sea disputes on open discussions in many regional political and security forums, especially in 2010 when Vietnam was the ASEAN’s President. “Internationalization” was strongly opposed by China, while other states (involved or not in the East Sea disputes) widely support it. Internationalization and multilateralization in the East Sea disputes tilt the balance of power towards a negative direction for China, while other powerful states such as the US, Japan and India also participated in regional disputes. It should be noted that power and influence of China in the region have partly held back the pace as well as the willing of ASEAN states in internationalizing the East Sea disputes. However, it seems that the Chinese pressure is not strong enough for Beijing to get any of its expectable outcomes. Since 2010, other powers like the US, Japan, South Korea or Australia in turn have raised their voices to reaffirm that the East Sea is an important water which has a strong impact on interests of many other actors, and therefore the disputes ought to be discussed and resolved through negotiations and bargaining

⁵ Statement by Foreign Ministry spokesperson Nguyen Phuong Nga, Vietnam at a press conference on 08/09/2011, see "Co gang giai quyet on thoa cac van de tren bien", VTC News, 08/09/2011, <http://vtc.vn/10-300826/quoc-te/tin-tuc/co-gang-giai-quyet-on-thoa-cac-van-de-tren-bien.htm>, accessed 06/10/2013.

processes⁶. Placing this issue in frameworks of multilateral mechanisms is a favorable condition for “scientification” and “science diplomacy” to maximize their advantages based on concrete arguments and data.

Another advantage which helps to enhance the “scientification” strategy is the more reasonable arguments of Vietnam about sovereignty and its equitable interpretation of international law. While the Vietnam’s evidence of its sovereignty is based on historical materials and maps which have been proved and confirmed in domestic and international materials, the Chinese ones have not been demonstrated in such an explicit way. Apparently, lacking of historical evidence impulses Beijing not to bring the disputes to the International Justice Court or the United Nations. In this context, China relies on two major arguments for its sovereignty claims in the East Sea. First, the definition of “historical waters” is the core idea for China to legalize its U-shaped line. A water that can be recognized as the so-called “historical water” has to meet many requirements, one of which is “the littoral state has long tradition of process, exploit and utilize that water without any objections from other states”. Beijing has utilized that definition to create the U-shaped line that covers all the East Sea, and declared that everything within the line would belong to China’s sovereignty⁷. From the Vietnam’s perspective, we have precise and comprehensive evidences to prove that Vietnamese people were the first ones who exploited and managed the islands in the East Sea from the 17th century, under control of the Nguyen lords. The second argument is called “succeeded sovereignty” based on the interpretation of the United Nations Convention on the Law of the Sea in 1982 (UNCLOS 1982) that 80% of China’s claims on the East Sea were interpreted by accepting the legal status of the Paracel and Spratlys islands⁸. As such, China perceives that all the rocks and

⁶ From the viewpoints of the U.S., Japan, Australia and South Korea see:

<http://www.state.gov/secretary/rm/2010/07/145095.htm>; http://www.mofa.go.jp/region/asia-paci/asean/conference/arf/overview_mm19th.html; <http://www.abc.net.au/news/2012-11-20/gillard-wants-code-of-CONDUCT-for-south-china-sea/4382768>;

<http://english.yonhapnews.co.kr/national/2011/07/19/32/0301000000AEN20110719006400315F.HTML>, accessed 03/10/2013

⁷ Historical waters or historical elements are arguments that Taiwan and later China use to legalize the U-shaped line. See Li Jin Ming/Li De Xia, 2003, “The Dotted Line on the Chinese Map of the South China Sea: A Note”, *Ocean Development and International Law*. July 2003, Vol. 34, Issue 3-4, 287-295

⁸ Because the Chinese government has never given a formal explanation of the U-shaped line, there are many unofficial explanations and interpretations made by scholars and researchers. One interpretation is “succeeded sovereignty” based on the legal status of islands of UNCLOS Article 121, principle No.3.

islands in the dispute area belong to their own territorial waters and Exclusive Economic Zones (EEZ) without concerning the UNCLOS. The Article 121(3) of UNCLOS states that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. In the meantime, the UNCLOS hardly interprets anything about peninsulas. However, China argues that if there is an island lying within a Chinese island’s EEZ, it will belong to China’s sovereignty and will get the same legal status as its continental territory does. Stein Tonnesson argues that: “(...) the only reasonable reading of this text is that China claims all islands inside the u-shaped line and the waters and continental shelf that can be generated by those islands on the basis of the principles laid down in the law of the sea. The extension of China’s maritime zone claims in the southern part of the South China Sea thus depends entirely on the capacity of the Spratly islets to generate extended maritime zones”⁹. By accepting the legal status of those islands, China aims to expand the overlapping zones between the China-occupied islands and other states’ EEZ in order to turn undisputed areas to disputed areas. Likewise, this will raise difficulties for the claimants to assert their claims in the East Sea disputes since China has become a “hegemon” in the region. In other words, any states that want to pass the East Sea will have to ask for China’s permission, which is not persuasive according to regulations of the UNCLOS about the regime of islands.

Analyzing three factors mentioned above, one may recognize that starting a “scientification” strategy at this very moment is essential. “Scientification” is cheap with regard to cost of operation, takes less risk and brings more advantages in terms of propaganda. Successes in the internationalization and multilateralization of the East Sea disputes in recent years have reaffirmed support and concern of the international community in this field, as well as highlighted the importance of settling the disputes through negotiations limiting incentives of China to use military muscles and leading Beijing to accept approaches favorable for Vietnam.

2.2 Internal Perspective: Prestige, Trust and National Capabilities

Enhancing “scientification” and “science diplomacy” strategy will bring up advantages, while other strategies and approaches are facing particular difficulties. For a small country,

View Tran Truong Thuy, 2012, China's U-shaped Line in the South China Sea: Possible Interpretations, Asserting Activities and Reactions from Outside, Paper presented at the conference "The Practices of the UNCLOS and the Resolution of the South China Sea Disputes "(Taipei 03-04/09/2012).

⁹ Tonnesson, Stein, 2011, *International Law in the South China Sea: Does it drive or help resolve conflict*, Paper for the Third International workshop on the South China Sea, Ha Noi.

diplomacy is an indispensable tool in protecting national interests, especially “Track 2” diplomacy or people diplomacy. If science is considered as an analytical tool to understand the world, then scientific products, based on precise information and accurate evidence, will lead us to objective assessments. In contrast, science as an instrument of political propaganda may lead to distortion of common knowledge. China, at present, according to Major General Luo Yuan, has been conducting five basic purposes on various fronts: administration, economy, military, legality and international public opinion¹⁰. However, it can be observed that China’s legality and international opinion principles are now in trouble, concerning the Beijing’s increase in military assertiveness in the East Sea disputes, which is favorable for Vietnam due to having more reasonable data and arguments. It, meanwhile, needs to consider how to strengthen and utilize those advantages in dealing with the East Sea issues. In other words, Vietnam is having advantages in arguments which is, however, still in quest of effective methods to disseminate. In this context, the “exchanging idea networks” should be diffused through various channels aiming to two purposes. The first one is to build a bridge between “science” and “policy” by professionalizing the national policy-making process which should be based on scientific evidence and knowledge. Arguments in negotiation rounds back by appropriate and comprehensive knowledge will gain an outstanding impact on the outcomes regarding to any sovereignty claims, and at the same time it can make the other side’s arguments become ludicrous and unconvincing. The second aim is to build up a common knowledge for the mass public, especially to satisfy the increasing demands of understanding the East Sea disputes. More people can bring more ideas, hence it is very necessary to create a connection between them so that the best solutions will be found. A “rich information” society is a strong one, since each member of the society can give out his or her own evaluations, comments and decisions, as well as oppose or support decisions of their community by their own wills.

Experience from many international negotiation processes prove that knowledge or work which is invented or created by academic scholars has been distributing significantly in changing the approaches and ideas of the involved parties¹¹. The negotiation process for a global treaty on climate change is an obvious example. It was not a serious issue for nations to

¹⁰ Vietnam News Agency, 07/2012

¹¹ John Lanchbery/ David Victor, 1995, “The role of Science in the Global Climate Negotiations”, in Helge Ole Bergesen, Georg Parmann, and Øystein B. Thommessen (eds.), *Green Globe Yearbook of International Cooperation on Environment and Development* 1995, Oxford: Oxford University Press, 29–39

pay any attention to the global warming until the late 1970s, when scientists with their detailed researches had warned that greenhouse effect could become a significant threat to the entire world¹². Some politicians and international organizations such as the United Nations at that time became more active and more concerned in dealing with the issue, and many meetings were set up to find suitable solutions to soften the impact of climate change. The outcome was the establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988, an organization including many leading scientists who held main responsibilities in evaluating the risks on climate change made by humankind and from that giving out suitable advices for policy makers. It is very likely to notice the deep relationship between science in one side and political process in the other side.

According to Stephen Waltz¹³, academic scholars have many advantages in shaping foreign policy:

(1) only specialists in a particular field like military affairs, diplomatic missions, global trade and finance, etc can give reliable information and insights about the concerned issues, especially about environmental issues or international security;

(2) politicians or policy-maker can just make accurate and guaranteed decisions through the advices of highly prestigious academic scholars. The East Sea dispute is considered a very sensitive issue not only for the political system but also for the whole country, therefore the policies in this issue have to be accurate and they will assure the balance of interests from many viewpoints. “Scientification” will assist policy makers in choosing the most suitable solution from the most prestigious specialists in their fields. “Science diplomacy” guarantees those diversified policies will be transferred to the public and international community for comments and feedback in order to improve the policies themselves;

(3) academic scholars will help to evaluate whether an information is accurate and or not. Each nation has its own way to control information to the public, especially regarding to foreign policy or national interests. It would be normal if the information is in good control and used for good purpose, but what will happen if that information is utilized in a wrong way and affects the interests of the people? Academic scholars will be the ones to adjust and to bring the most accurate information to the public;

¹² John Lanchbery/ David Victor, 1995.

¹³ Stephen Waltz, 2011, *International Affairs and the Public Sphere*, Institute for Public Knowledge, <http://publicsphere.ssrc.org/walt-international-affairs-and-the-public-sphere/>. Access in Sep 8th 2013.

(4) academic scholars are becoming an official channel to resolve any dispute through scientific approach and in a peaceful manner.

Four arguments mentioned above are very important in the context of Asia-Pacific's security, which is heavily affected by nationalism and the media which is not well-informed about the complicated international relations in the region. Therefore, academic scholars will play an important role in reducing the tensions through accurate and unbiased analysis. The clashes between claimant states on the disputed areas have been increasing the tensions in the public as well as the media. When the public is being confused by too many sources of information, it is the academic scholars who can use their role in "scientification" as a reliable source of information to orient public opinions. Nevertheless, the government needs to play a more active role and establishes deep coordination with scholars, for instance announcing information in a transparent way and the media is willing to publish positive and unbiased comments and ideas.

3. Policy to enhance "scientification"

If Vietnam considers "scientification" as a pillar of the East Sea policy, the government and scholars should conduct more drastic and comprehensive measures. There are four focal points that are needed to be discussed from the macro-policy perspective. First of all, Vietnam has no leading actor in sovereignty research and suitable scientific approaches for the issue¹⁴. The establishment of the East Sea Institute of the government recently is a late step but still necessary since it is perceived the biggest research institution about East Sea in Vietnam. According to Mr. Hoang Anh Tuan, Director of the Institute for Foreign Policy and Strategic Studies, Diplomatic Academy of Vietnam, Ministry of Foreign Affairs, "East Sea Institute will become a place where specialists from many fields such as security, politics, legal issues etc. gather and exchange their ideas, and enhance the capabilities to study comprehensively about the East Sea issue. These researches have contributed to strengthen Vietnam's historic and legal bases in its sovereignty claims. Nevertheless, there are many other aspects such as economy,

¹⁴ See "Thiếu nhạc trưởng trong nghiên cứu chủ quyền biển Đông", *Tuanvietnam.net*, 17.8.2012, <http://tuanvietnam.vietnamnet.vn/2012-08-16-thieu-nhac-truong-trong-nghien-cuu-chu-quyen-bien-dong>. accessed 10.03.2013.

politics, maritime security which need to be deeply studied”¹⁵. The East Sea Institute then will boost the capabilities of researching more comprehensively about many issues related to the East Sea, improve the propaganda abilities, improve the understanding of people about the issue and most importantly, assert and protect Vietnam’s sovereignty in the East Sea. However, it is not enough for Vietnam to have just a single institute carrying the main objective of studying the East Sea issue. Meanwhile, Vietnam is still deficient in human resources as well as research think-tanks and institutes in promoting the East Sea studies. The support from the government is very essential in creating a dynamic academic environment as well as forming clearly mechanisms for scientific research in general and East Sea study in particular. Therefore, it is very urgent to establish more institutes and research centers separately or within universities with the aim of promoting and enhancing the research capabilities as well as forming large and deep networks to strengthen Vietnam’s studies on the East Sea issue.

Secondly, Vietnamese researchers should build up a comprehensive approach or more precisely, a research method for East Sea studies. A skillful combination of a variety of appropriate materials will be the most effective way for Vietnam to spread out its reasonable evidences and sovereignty claims about the East Sea disputes. Vietnam’s public is always paying close attention on the discovering of new maps which affirm Vietnam’s sovereignty over the East Sea, and it always sees them as the sole evidence which creates a more favorable legal situation for Vietnam than that of China. However, maps are just one of many tools that assist Vietnamese researchers in linking the arguments together systematically. According to some researchers, the maps just have administrative function and for scholars to maximize all of their potential values and they should combine them with other materials such as historical or geographic records¹⁶. The process of researching in history and geography helps us to grasp the whole context of a relevant research, from which researchers can capture the nature of the maps in a solid way in case Vietnam uses arguments to counter those of China or defenses its stance. The researchers actually need a lot of materials to perform their works in the most effective way, especially independent researchers. Gathering all documents into a main source, sorting and

¹⁵ See the interview

at http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30257&cn_id=541547, accessed 10.03.2013

¹⁶ See “Đừng học Trung Quốc lấy sách dè người”, *Tuanvietnam.net*, 16.8.2012, <http://tuanvietnam.vietnamnet.vn/2012-08-15-pham-hoang-quan-dung-hoc-trung-quoc-lay-sach-de-nguoi->, accessed 10.03.2013

categorizing them systematically, and dividing them into headings that easily to access are considered very effective methods not only for scientists but also for those who are interested in the East Sea issues both at home and abroad.

Thirdly, it will take a lot of time to invest and develop a cluster of academic scholars who have enough abilities to conduct “scientification” and “science diplomacy”. In parallel with the preparation for the long-term need of human resource, it is also important to expand international exchanged programs and acquire opinions from foreign scholars with the aim of diffusing Vietnam’s arguments to international community in a stronger way. When the publication of scientific articles about the East Sea of Vietnam in prestigious foreign journals is somehow modest, utilizing the knowledge resources already available in other countries which are more advanced in science research will be an effective short term approach. The first benefit would be the significant increasing in the number of scientific researches about the East Sea written in English and published in prestigious foreign journals. This will partly remedy the weakness of Vietnam in compare with the huge amount of articles published in foreign journals by Chinese scholars. Although they are not written by Vietnamese scholars, those researches, which represent foreign scholars’ perspectives, would have positive, unprejudiced, and dependable arguments. The second advantage is the number of researches itself, since it could diffuse broadly Vietnam’s convincing arguments regarding to East Sea dispute. It is not only because of the prestige of the researchers themselves or the ability of them to write in English, but also because of the prestige of well-organized research units.

How to utilize effectively knowledge from every source, especially from abroad, is certainly not a simple task. A scientist who accepts to carry out a research would want to satisfy two needs. The first one is the desire to discover new knowledge, accompanied by reputation within the academic community. The second need is in regard to the financial issue, as well as the conditions to pursue good-quality researches. To be able to attract the participation of foreign scholars in the East Sea studies, through the East Sea Institute, it is very necessary to develop the "International Foundation for East Sea studies" with donations collected from various sources. With the appropriate financial resources, the Foundation will announce the research topics annually depending on the circumstances. For example, this year, the Foundation would call upon researchers to study about the East Sea dispute from historical perspectives, in the following year it can bring out the topic of comparing the legal basis between the East Sea disputes and other maritime disputes. The Foundation can also sponsor a number of scholars (both Vietnamese scholars and foreign scholars) to undertake research in

Vietnam (visiting fellows), or sponsor a number of research topics related to the East Sea dispute (research grants). The international scholars can freely select and conduct any research topics with the expense allocated for each topic. Any individual or group that receives funding from the Foundation is obliged to publish, disseminate its research products, including scientific articles monographs, edited books in English or the topics presented at conferences or workshops. The selection of topics and research scholars should be based on the decision of a Council which has clearly criteria. To ensure the objectivity of any researches, the Council should be a group of well-known diplomats and academic scholars both in Vietnam and abroad. This approach can attract the attention and participation of many foreign scientists, while ensuring the desired research orientation of Vietnam. In addition, the Foundation will have a number of mechanisms for former collaborators or researchers to build a kind of network in order to encourage scholars from any places to share their researches and participate in the next programs of the Foundation.

Vietnam Marine Planning for Environment and Sovereignty – a Reference View

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Southeast Asian Sea Research Foundation

Currently, the management of resources and the marine environment of Vietnam (VN) seas has not been well coordinated between state agencies and local authorities, between provinces and the central government.. The authors aim at the legal status of the sea and sea exploitation under the UN Law of the sea 1982 (UNCLOS 1982). The article introduces planning methods for marine space by UN's initiative and the US sea planning and propose a full reference for Vietnam to fulfill the responsibility with international environment and protect the sovereignty of VN. The planning maps here are prerequisite for the industries, provinces, islands and for national security to develop reasonably for sustainable economic development.

1- Introducing

Exploitation of marine resources increased much faster than human management. Maritime spatial planning is aimed at maintaining positive economic resources, environment and culture for the future generation by determining the appropriate spaces for the use of each country and for mankind. Also while the East Sea (South China Sea-SCS) dispute is complicated, East Sea (SCS) coastal countries are taking advantage of mapping marine planning and international publication. European countries, the US, China have their own maps of marine spatial planning. Currently, Vietnam Maritime Law was enacted; Vietnam has issued the Decree of 25/2009/ND-CP dated 6/3/2009 for the integrated management of natural resources and protection of the marine environment and islands. This legal document marks an important step towards institutionalization, resource management, protection for islands and sea environment.

There are many ways of defining of marine and coastal planning. According to UNESCO, marine spatial planning is a public process to analyze, reposition in space and time in the field of marine study with orientation of environment, economy and society, through a closely administrative processes.

Currently Vietnam has announced a number of marine planning in the coastal provinces, the islands, and the sea ports. But it would be more sufficient if we could build map-oriented development planning under the sovereignty of the waters and Vietnam exclusive economic zone to 2020 and vision to 2110 as a basis for sustainable development, affirming Vietnam's sovereignty over the sea.

There are several kinds of disputes in the East Sea (SCS) which Vietnam share major parts in terms of geography and international legal responsibility. The Thailand strait is also another issue of sea sharing which needs to be handled carefully.

China, Taiwan and Vietnam claim total Paracel archipelago. Brunei, China, Malaysia, the Philippines, Taiwan and Vietnam claim total or parts of Spratly archipelago. Nations around East Sea (SCS) claim their waters in accordance with UNCLOS 1982 and China affirms its nine-dashed line to be its historic waters which is opposed by Vietnam and other nations.

2- Major concepts of the UN Convention on the Law of the Sea 1982¹

The UN Convention on the Law of the Sea 1982 has been joined by 165 countries and the European Union as of August 2013. This is not only applicable to the maritime industry, but also has a very important role for the country 's sovereignty and guarantee the interests of the countries which possess no sea.

2.1- Baseline

Is the line for coastal nations to base on to declare the breadth of "territorial sea" toward the sea. Normally, the baseline is the lowest line of tide. November 12, 1982, Vietnam issued a statement on the baseline and the national waters (territorial waters) to the coast from the opening of the Gulf of Tonkin to the Gulf of Thailand. Vietnam declared straight baselines connecting over 12 coastal points. Details of the joints and drawings are outlined in Table 1 and Figure 3.

¹Ministry of Resources and Environment

<http://vea.gov.vn/vn/hoptacquocte/conguoc/Pages/C%C3%B4ng%20C6%B0%E1%BB%9BcLHQv%E1%BB%81Lu%E1%BA%ADtBi%E1%BB%83n.1982.aspx>, accessed 29 June 2014

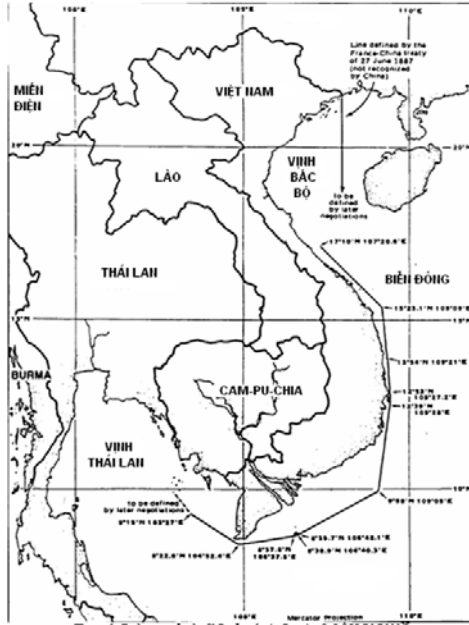


Figure 1: Baseline of Vietnam 1982

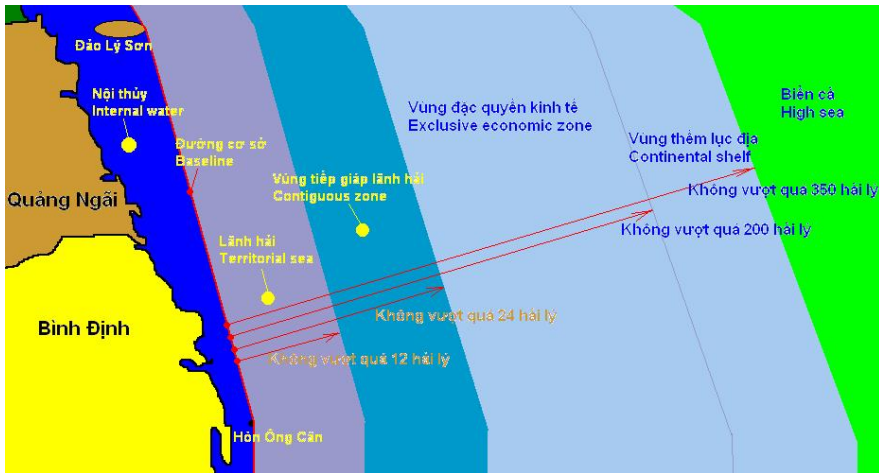


Figure 2: Outline of the waters under UNCLOS82²

² Source : Ha Nam Ninh , Legal Referral Rules Of The Sea consistent with UNCLOS Vietnam 82
<http://www.seasfoundation.org/research-documents/historical-and-legal-arguments/vietnam-arguments/450-gii-thiu-quy-ch-phap-ly-mt-s-vung-bin-vit-nam-phu-hp-vi-unclos-82> read 22/9/2011

However, location names have been adjusted to suit the changes in administration. The word N (North) means North latitude, the word E (East) means East longitude.

Codes	Position		Location
O			The lines between the baselines of Vietnam and Cambodia, in the sea
A1	N09 ⁰ 15'0	E103 ⁰ 27'0	Nhan Islet, Tho Chu archipelago, Kien Giang
A2	N08 ⁰ 22'8	E104 ⁰ 52'4	Da Le Islet, the southernmost of Khoai Islet, Ca Mau
A3	N08 ⁰ 37'8	E106 ⁰ 37'5	Tai Lon Islet, Con Dao, Ba Ria, Vung Tau
A4	N08 ⁰ 38'9	E106 ⁰ 40'3	Bong Lang Islet Con Dao, Ba Ria, Vung Tau
A5	N08 ⁰ 39'7	E106 ⁰ 42'1	Bay Canh Islet, Con Dao, Ba Ria, Vung Tau
A6	N09 ⁰ 58'0	E109 ⁰ 05'0	Hai Islet, Phu Quy Group, Binh Thuan
A7	N12 ⁰ 39'0	E109 ⁰ 28'0	Doi Islet, Khanh Hoa
A8	N12 ⁰ 53'8	E109 ⁰ 27'2	Dai Lanh Cape, Phu Yen
A9	N13 ⁰ 54'0	E109 ⁰ 21'0	Ong Can Islet, Binh Dinh
A10	N15 ⁰ 23'1	E109 ⁰ 09'0	Ly Son Island, Quang Ngai
A11	N17 ⁰ 10'0	E107 ⁰ 20'6	Con Co Island , Quang Tri

Table 1: The baseline juncture of Vietnam

According to Declaration VN1982, Vietnam has reserved the right to declare additional baselines and territorial sea for the Paracel and the Spratly.

2.2- The internal waters

are those from the baseline to the land of the coastal state. Vietnam's internal waters are the waters inside the baselines (depicted in Figure 2) and those connected to the former. *In Declaration VN1982, Vietnam has affirmed the waters of 108 degree West longitude in the Gulf of Tonkin to be Vietnam's internal waters by the characteristics of historical waters.* Vietnam has absolute sovereignty its internal waters which are considered as the extension of the territory of the country to the sea. In these areas Vietnam can impose rules on state activities. Any violation of the internal waters of Vietnam by any organizations or individuals, without the permission of the administrative authority of Vietnam government is violation of the law of Vietnam. Permit for passage could be granted by Vietnam border agency.

2.3- The territorial sea

is adjacent to internal waters. The breadth of the territorial sea depended on the choice of the coastal state government. However, as UNCLOS 1982 states the breadth of the territorial sea does not exceed 12 nautical miles (nm) from the baselines. In VN1982 declaration, Vietnam territorial sea is 12 nm in breadth where it has full and complete sovereign integrity and has the right to enforce all measures to defend its sovereignty over territorial sea. However, in the territorial sea of a country, foreign ships enjoy the right to "pass through without causing harm" (innocent passage).

2.4- The contiguous zone

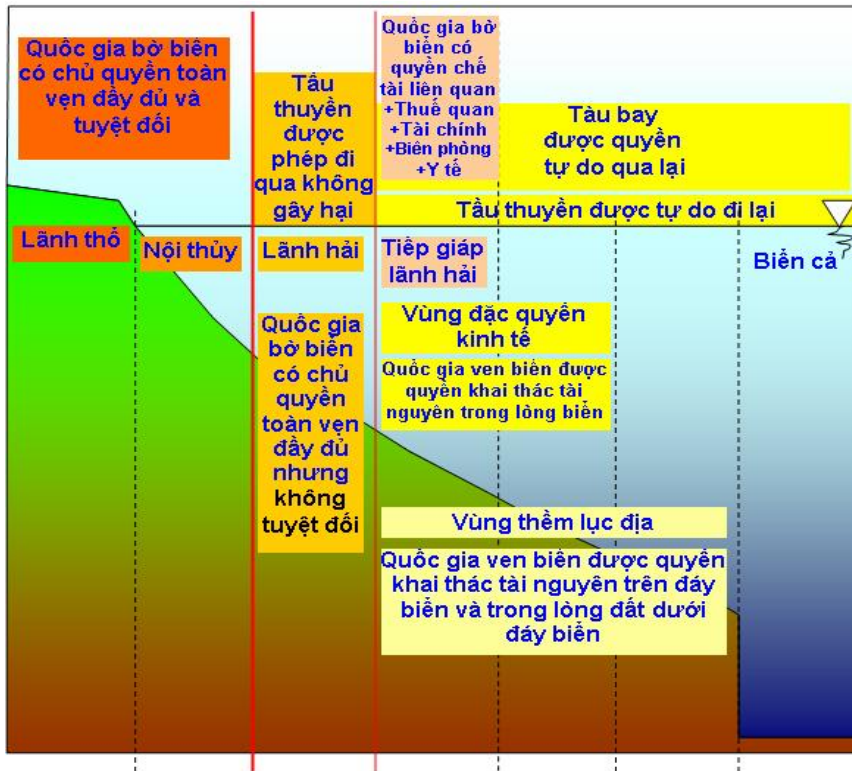
Adjacent to the territorial sea, this zone is calculated from the outer edge of the territorial sea extending to a distance of 24 nm from the baselines. In VN1982 declaration, Vietnam affirms the width of territorial waters of 12 nm and the contiguous zone of 24 nm from the baselines.

On the contiguous zone, the coastal nation has the legal right to impose rules on taxation, finance, and health care to the border of the territory and territorial waters.

2.5- The Exclusive Economic Zone (EEZ)

Is the waters outside and adjacent to the territorial waters of coastal states which could declare rights of exclusive economic zone to the outer limit not exceeding 200 nm from the baselines. Coastal states have rights to explore, exploit, conserve and manage natural resources in the exclusive economic zone. Coastal states can exercise the right to exploit the resource management in the sea, seabed and subsoil of the sea. The detailed contents of the juridical status of the exclusive economic zone are specified in section 5 of UNCLOS 1982.

In the South China Sea exclusive economic zones of neighboring countries overlap each others.



Hình 4. Qui chế pháp lý của các vùng biển

Figure 3: Legal aspects of the sea waters³

2.6- The continental shelf

Is the seashore, seabed, subsoil of the sea, starting from the outer edge of the territorial sea to the outer edge of the geographical continental shelf of 200nm from the baseline. In case the continental shelf extends further the geographical rim of 200nm, the coastal state has the right to extend the continental shelf beyond 200nm but not exceeding 350nm from the baselines.

Coastal states have the right to investigate and exploit natural resources in the continental shelf.

³ Source : Ha Nam Ninh , Legal Referral Rules Of The Sea consistent with UNCLOS Vietnam 82 <http://www.seasfoundation.org/research-documents/historical-and-legal-arguments/vietnam-arguments/450-gii-thuu-quy-ch-phap-ly-mt-s-vung-bin-vit-nam-phu-hp-vi-unclos-82> read 22/9/2011

2.7- The sea/offshore area/high sea

is beyond the exclusive economic zones of coastal nations. The coastal countries and landlocked countries are generally entitled to the resources from the sea.

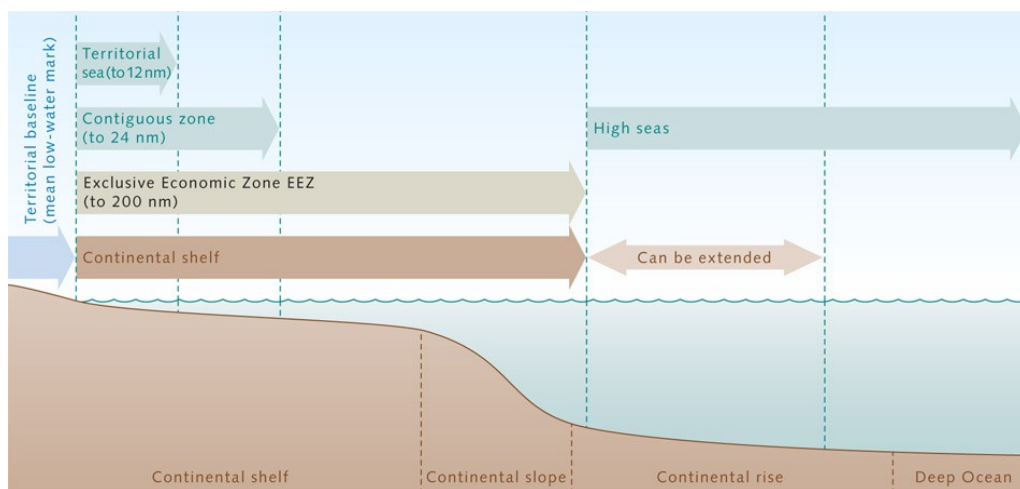


Figure 4: Illustration for the waters under UNCLOS 1982⁴

3- International approaches to bridge the gaps of sea discrepancies⁵

The international organizations as International Union for the Conservation of Nature (IUCN), World Wide Fund For Nature (WWF), International Maritime Organization

(IMO) have actively promoted the model of TBMPA (Trans-boundary Marine Protected Areas) in nearly 30 years in order to protect the transnational environment and marine biodiversity to serve sustainable development of the seas and oceans.

MPAs (Marine Protected Areas) are the trans-boundary areas where neighboring states have sovereign boundaries to be clearly demarcated. CMSP applied in the US and EU countries is another way of sea and ocean mapping for protection.

United Nations Environment Program (UNEP) has classified the number of protected currently existing trans-boundary areas, both on land and under the sea. According to UNEP, the world currently has 227 regions of this kind.

⁴ Source <http://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1094&context=award>

⁵ Du Van Toan- <http://nghiencuubiendong.vn/nghien-cuu-vietnam/2102-hin-trng-mo-hinh-hp-tac-quc-t-v-bo-tn-thien-nhien-ti-cac-vung-bin-cn-bien-va-mt-s-gi-y-ban-u-cho-vit-nam> Accessed 17 June 2014

3.1 Some TBMPA in the world

International Protected Area of Wadden Sea - including many marine preservation areas protected in different countries as Denmark, Germany, and the Netherlands. These are exemplary of conservation management model and collaboration based on international ecosystem. Since 1982, the three governments have signed an agreement to cooperate on marine conservation. To date, this area has been the world natural heritage by UNESCO, the Particularly Sensitive Sea Area (PSSA).

Central American coral reef protected areas include 80 states between Belize, Guatemala and Mexico. Pacific East Zone TBMPA includes special economic zone of Colombia, Costa Rica, Ecuador and Panama.

Turtle Island located on the border of Malaysia, Indonesia and the Philippines is also symbolical of marine conservation zones of Southeast Asia countries, which is known as the Green Turtle conservation (*Chelonia mydas*). This island is now recognized as the “Turtle Islands Heritage Protected Area” under an agreement between the Philippines and Malaysia since 1996.

3.2- Marine Peace Park

According to the IUCN definition, Marine Peace Park (MPP) is transnational protected area formally dedicated to the protection and maintenance of biological diversity, natural resources and culture to promote peace and international cooperation at sea, islands in places where there are conflicts or disputes.

MPP has the following benefits:

- Being a symbol of the ongoing cooperation between countries with peaceful purposes;
- Being the focal point for discussions between the neighboring countries, although there may be economic, social, environmental disagreement;
- Enhancing security and control over resources in sea border areas so as the legitimate owners can benefit more from them;
- Developing opportunities for eco-tourism and sustainable development of marine international venture on a wider regional scale;

- Becoming an area of rich and flexible relationships for marine preservation from the participating countries, government agencies, local and international NGOs, and the community.

Some typical MPPs

Red Sea MPP established by Israel and Jordan, Aqaba Bay to the North Aqaba between Israel and Jordan. These two countries have developed the MPP since 1994 from two MPPs of Aqaba and Eilat.

In 2005, the South Korean government has plans to start building Korean MPP with North Korea in waters west of the Korean aiming at helping ensure sustainable development and peace in the region.

Other suggested MPPs are the waters to the East of Caribbean Nations, Gaza-Israel-Jordan, Pakistan-India Indus Delta, Adriatic Sea, Cyprus, Greece-Turkey, Spratly-Paracel.

3.3- Particularly sensitive sea area (PSSA)

PSSA is an area that needs special protection by the International Maritime Organization (IMO). These are waters of high value in terms of ecology, social economy, science which are vulnerable or may be damaged by international maritime activities.

PSSA is regarded as a major tool in the sustainable development strategy of the IMO and can coordinate many international conventions on the protection of the marine environment and as a tool to protect marine areas of high value in environmental resources from navigation threats. PSSA is also the choice of many countries and regions worldwide. There have been 12 recognized official PSSA since 1990 and this proves the benefit in management of the marine environment - international shipping. 13th Region - Bonifacio (France - Italia) has been recognized in principle.

Other PSSAs:

- Wadden Sea (three countries Denmark, Netherlands, Germany) in 2002;
- Baltic Sea (eight countries Latvia, Sweden, Estonia, Lithuania, Finland, Denmark, Germany, Poland) in 2005;
- The coastal area of Western Europe (Belgium, France, Ireland, Portugal, Spain, UK) in 2004;

- Straits of Bonifacio (France - Italia-) 2010;
- Torres Strait (Australia and Papua New Guinea) in 2005

4- Planning map for maritime nations (the exclusive economic zone - EEZ) of the United States and some countries

4.1- Germany, the Netherlands, Belgium had the overall space planning for entire home waters and exclusive economic zone (EEZ) around. In 2009, the US had planned coastal and maritime spatial areas (CMSP) including its coastal areas and offshore islands (Figure 5). Intergovernmental Oceanographic Commission (IOC) in 2008 also implemented Marine Spatial Planning (MSP) - planning marine ecosystem. It can be seen that the sea space planning process is very diverse, and benefits to countries and sectors are different.

4.2- National Program for integrated coastal marine spatial planning (CMSP) of the U.S.

CMSP is a transparent planning process, respecting the unified and realistic ecosystem, based on scientific data and forecasts to the ocean, coastal areas and the Great Lakes. CMSP identifies areas most suitable for maritime activities and reduce conflicts when exploiting ocean and coastal areas, reduce environmental impacts, increase adaptive applications, conservation of ecosystem functions designed to meet social objectives, security, environment and economy of the US. Realistically, CMSP provides a public administrative process to better decisions in the use and protection of the sea, coastal areas and Great Lakes for mankind today and tomorrow.

U.S. President signed the master plan of the U.S. EEZ space - CMSP (9/12/2009) for carrying out in 2010-2015. CMSP will facilitate conducive to sustainable economic growth in the coastal communities by transparency and forecasting for economic investment in coastal, marine... for industry, transport, infrastructure and related businesses. CMSP can promote national goals such as enhancing energy security, trade and economic incentives (eg , cost savings and forecasting and faster project execution) for the commercial purposes.

CMSP provides an efficient process in order to better manage a range of applications of economic, social, cultural and scientific research as:

- Mining aquaculture seafood such as fish, shellfish and seaweed in parallel with the development of trade and transport, boats and merchant ships, tankers and haulage vessels

- Combining tourism industry, recreational fishing , sight fishing , snorkeling and scuba diving, yacht tour and visiting the fish farm, the coral park , the rig and communicate with people of the archipelago, nature conservation, fisheries parks and national marine parks to resident wildlife victims .
- Protecting the marine archaeological heritage, regulate mining activities cobblestone and sand, ice and fire marine living resources.
- Developing and oil and gas exploring - combining with high-tech country like India, the Netherlands, Japan, Russia, US to counterbalance with aggressive neighbors.
- Planning seaports, river ports, mining operations between transport stream (stream operation midfield) and adverse affects and influence.
- In the field of renewable energy, wave power, wind power, tidal power, ocean currents force, combining investment flows between countries that has grown this industry.
- Vietnamese-American may also combine learning and research topics on estuaries, the continental shelf of the United States today have sensors devices, positioning for study, aquatic rescue and military purposes, in which the dredging of the United States to serve transportation is detailed planning and rigorous review .

Other activities such as security, rescue, oil spill response exercise, disaster rescue, troubleshooting environment also need to make a plan with forecast.



Figure 5: The American waters and the marine ecosystem

White House Web site, the Interim Framework for Effective Coastal and Marine Spatial Planning Interagency Ocean Policy Taskforce

<<http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf>> read 28/06/2011.

To launch the testing for Stellwagen reservation, CMSP allows Ocean Department⁶ and the US National Oceanic & Atmospheric Administration (NOAA) , Bureau of Coast Guard and several other government agencies consider the transportation needs around the deep water ports and natural sites on the whales' extinction issue. This is aimed at reorganizing the Traffic Separated Scheme (TSS) of Boston to reduce the risk of whale deaths due to collisions with ships at Stellwagen sanctuary (Figure 6). The new map of TSS by CMSP (continuous line) reduces the risk of collision, estimating 81 % of all baleen whales and 58 % for right whales at risk of extinction. Here the ship transit frequency increased 9-22 minutes/ship (depending on speed) and collision of fish and the boats had to be removed. In addition, the new route reduces the overlap between the TSS-used boats, commercial fishing boats, and whale watching vessels, thus increasing maritime safety. CMSP integrates applications, targets increases, interaction of many industries improves in a larger and more sustainable scale.

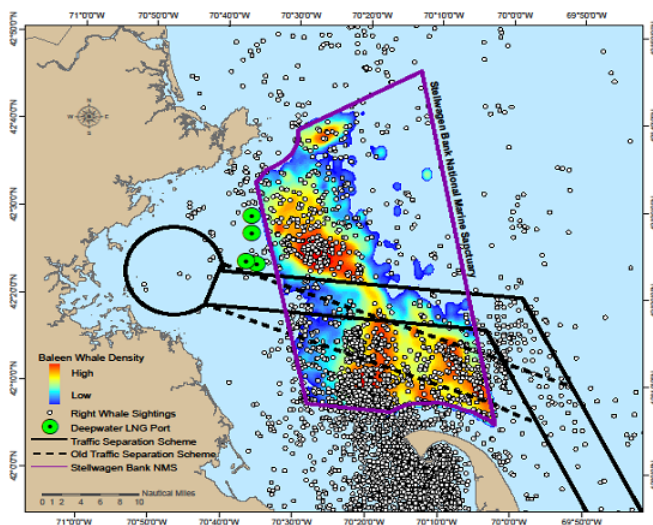


Figure 6: CMSP tool in areas Stellwagen Bank Marine Protected Areas (Diagram Courtesy of NOAA, [1])

⁶ Ocean Bureau

White House Web site, the Interim Framework for Effective Coastal and Marine Spatial Planning Interagency Ocean Policy Taskforce

<<http://www.whitehouse.gov/sites/default/files/microsites/091209-Interim-CMSP-Framework-Task-Force.pdf>> read 28/06/2011

The obvious benefit of this plan is the participation between the states and the regions along with the opportunities and potential incentives:

The CMSP management tool will identify targets and development of local and regional CMSP implementation with particular interest in specific geographic areas.

CMSP will promote, leverage, enhance and expand the local planning through integration with the region. Also CMSP also actively seek interested individuals and organization to influence the public and interest groups and reduce conflicts.

CMSP will enhance the support from the federal government to increase the CMSP database and receive the support of scientific, technical, financial advantage for CMSP further vitality.

CMSP will report to the federal government to improve resource management or try to report to higher levels when experiencing problems beyond jurisdictional boundaries.

CMSP will provide a clearer view for all federal agencies to sea, coastal areas and great lakes in a more effective, less bureaucratic and cost-saving manner.

4.3- CMSP implementation plan in the U.S. for 5 years (from first to 60th month), divided into 3 phases

4.3.1- From 1st -9th month. Strengthening the NOC⁷ and plan basis.

From 1st-2nd. Summon and Organize the Central representatives in the region

From 1st -3rd. Construction of Agreement Sample

From 2nd -4th. Organization meeting at the conference and national CMSP training and testing

From 4th -6th. Identify components and local planning

From 6th -12th. Capacity and initial step assessment for the region

4.3.2- From 9th – 24th month. Focusing on capacity building, testing specific issues or elements of the process and mobilize the public and stakeholders.

⁷ National Ocean Commission

The regional initiatives (9th -18th) and implementation plan (12th -24th)

PR for participation benefits (9th -18th)

Confirm preparation and working plans (18th -24th)

4.3.3- From 18th -60th month. While continuing phase 1 and 2 actions and steps, in phase 3, the regional planning agency will develop a plan to establish and assess the CMSP intensively in all areas.

Constructions and reports from local to central CMSP (from 18th to 60th month)

Priority for financial assistance and other support.

Recognizing the limit of new resources, each federal agency participating in the mission to develop and implement CMSP and revalue the use of marine resources, how to allocate tasks according legally. The proposed agency will adjust the priority of a deeper region than the national approval and goals of CMSP. When CMSP is developed and implemented from time to time, the NOC will consider additional resources, the process needs budget priorities described in the interim report. The various federal agencies will have different roles to support scientific basis and governance structures required to develop and implement CMSP. These areas will receive priority consideration for financial and other support for CMSP.

- National Conference and exercises.
- Support for CMSP demonstration area.
- System information data and national focal agency for CMSP with the scientific basis and necessary information.
- The critical public participation and consensus

5- Suggested Vietnam maritime area management planning

5.1- In general

Vietnam is a country with large sea area: nearly 1 million km² and three times larger than land area, so it is essential to introduce the overall coastal spatial planning to help guide economic development and manage efficiently marine natural resources and assert national sovereignty over the sea. We can attract investment and economic development scientifically and efficiently from the sea, avoiding massive but uncontrollable development.

The US CMSP can be applied entirely or partly for Vietnam's waters. Orientation maps to develop Vietnam's marine space could be the legal basis for the provinces, districts, communes, coastal villages and for neighboring countries. If approved and deployed, the individual and national identities will have the basis to carry on the process of sea usage.

Law of the sea and planning maps will take effect in the effective management of natural resources.

Vietnam history has shown that most of the attacks to Vietnam related to the sea. So in planning for sea parks and cooperative waters, we need to calculate the East Sea (SCS) vulnerable points as Vung Ang, Cam Ranh Bay, Con Dao, Nam Du and the similar areas for protection of oil, gas and territory. These areas should have prioritized plan for security and defense objectives.

5.2- The Marine Protected Areas for Vietnam

There are many ways of structuring, delimitation of marine protected areas, including conservation standards of the UNESCO world heritage activities, preserving under UNESCO biosphere space of Vietnam government (16 zones). The world community, the United Nations has initiatives to study and encourage coastal countries and Vietnam has also made its way to conform to reality and resources.

Currently, Vietnam's waters consist of one world heritage site, one RAMSAR⁸ site, six UNESCO biosphere reserves, 16 suggested MPAs.

Vietnam has been active in international activities therefore establishing TBMPA is the proper step in environmental protection and biodiversity conservation. The first reserve trans-boundary is being carried out on land Chu Mom Ray-Virachay - Dong Am Phan TPA between Vietnam, Laos and Cambodia for the protection of Truong Son Mountain Range.

In terms of policy and governmental administration on marine conservation, marine biodiversity, the marine areas of Vietnam can be divided into four areas:

⁸ On Ramsar convention http://www.ramsar.org/cda/en/ramsar-home/main/ramsar/1_4000_0 Reda 1Jul 2014

Tonkin Gulf Area

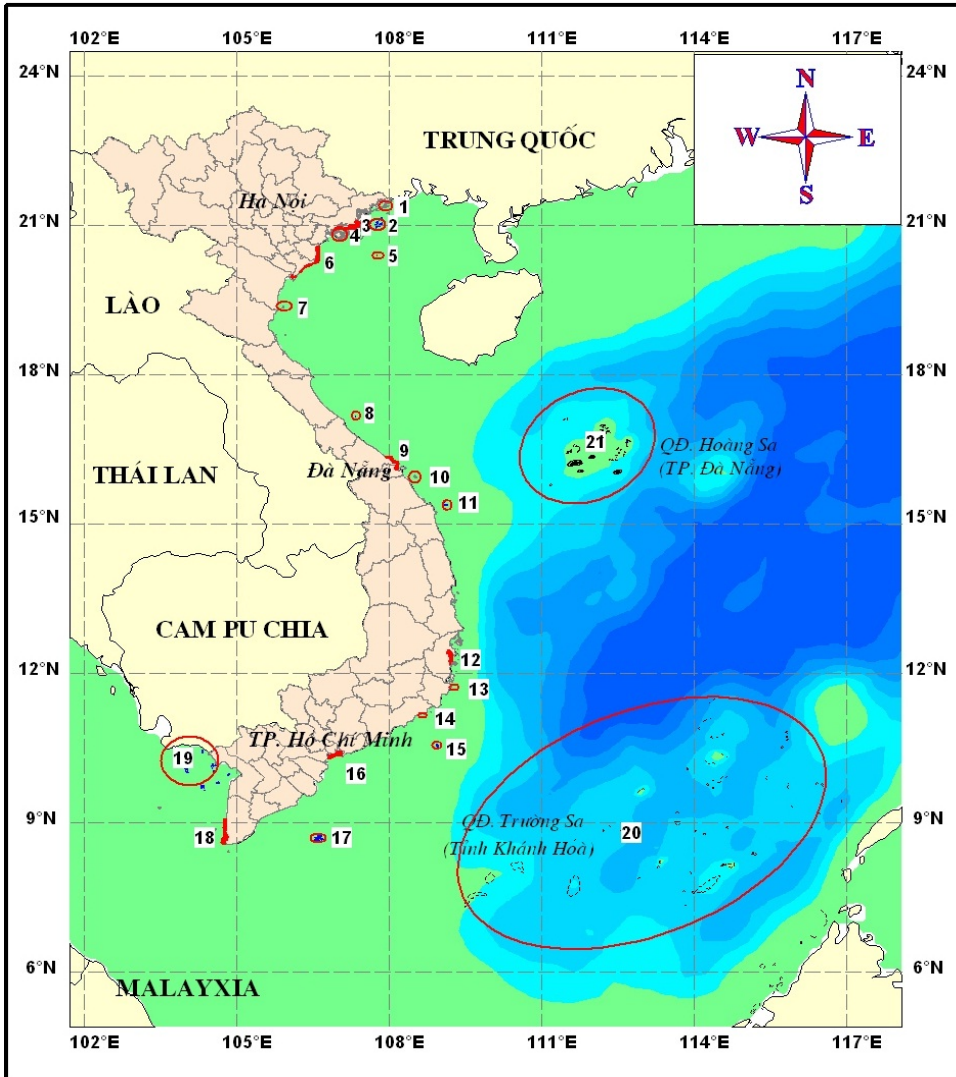
There are four national marine conservation areas already established, including: Tran Island MPA (Quang Ninh), Co To MPA (Quang Ninh), Bach Long Vy Reserve (Hai Phong), Con Co marine reserve (Quang Tri).

The Gulf of Tonkin has no border disputes with China, so we can propose some form of cooperation with China as follows:

- Developing an exemplary TBMPA or PSSA in the North of the Tonkin Gulf;
- Constructing PSSA or TBMPA along the coastal strip of Vietnam and China;
- Constructing of all Tonkin Gulf into a TBMPA or PSSA.

Paracel Area

This region has high biological diversity and is now under China control, but Vietnam may propose MPP in this area.



CHÚ GIẢI

- | | | |
|---------------------------------|---|-----------------------------------|
| 1 - Đảo Trấn, Quảng Ninh | 9 - Hải Vân - Sơn Trà, Thừa Thiên Huế - Đà Nẵng | 16 - Cồn Giò, TP. Hồ Chí Minh |
| 2 - Đảo Cô Tô, Quảng Ninh | 10 - Cù Lao Chàm, Quảng Nam | 17 - Cồn Đảo, Bà Rịa - Vũng Tàu |
| 3 - Vịnh Hạ Long, Quảng Ninh | 11 - Lý Sơn, Quảng Ngãi | 18 - Ven Biển Cà Mau |
| 4 - Cát Bà, TP. Hải Phòng | 12 - Vịnh Nha Trang, Khánh Hòa | 19 - Phú Quốc, Kiên Giang |
| 5 - Bạch Long Vĩ, TP. Hải Phòng | 13 - Núi Chúa, Bình Thuận | 20- Quần đảo Trường Sa, Đà Nẵng |
| 6 - Đồng Bằng Sông Hồng | 14 - Hòn Cau, Bình Thuận | 21 - Quần đảo Hoàng Sa, Khánh Hòa |
| 7 - Hòn Mê, Thanh Hóa | 15 - Phú Quý, Bình Thuận | |
| 8 - Cồn Cỏ, Quảng Trị | | |

Spratly Archipelago:

This area includes: (Nam Yet) *Namyit* MPA, the Spratly Archipelago (Khanh Hoa) and one suggested MPA of *Barque Canada Reef (Thuyen Chai MPA)*.

Spratly seas are occupied by many countries as China; Vietnam, Philippines Africa, Malaysia, Indonesia, Brunei and Taiwan. The ASEAN countries and China have signed the Declaration on the Conduct (DOC). However conflicts, collisions still occur frequently and it is difficult for a political solution of the sea territory. In this context, Vietnam may make a proposal to related parties for review: forming a sub-region or pan-region Spratly MPP as the first step in the nature conservation.

Thailand Gulf Area

Including Phu Quoc Reserve (Kien Giang).

The cooperation for this zone may be suggested to all or individual country in the area as Cambodia, Malaysia, Indonesia, Thailand to build a TBMPA or PSSA.

5.3- More detailed proposals

These are also some more proposals. The plan proposed research plan towards the basic 8 areas:

- The two archipelagoes of Spratly Islands (250000km²) , Paracel (30000km²) (priority for military zones and ocean parks);

- Northern Gulf of Tonkin (Bach Long Vi – Co To), Southern Gulf of Tonkin (Vung Ang to be center) (total two areas about 70000km²);

- 2 Middle Vietnam regions (from Thua Thien - Hue, Quang Ngai) with Ly Son Island to be center and the Mid Vietnam Southern region (from Binh Dinh Ba Ria) with Phu Quy to be center;

- Southeastern coastal areas (HCM - Ca Mau) with Con Dao to be center;

- The southwest coastal area (Ca Mau, Kien Giang) with Phu Quoc - Nam Du to be center.

- The area from Middle Vietnam to Southwest would be around 150,000km² The region can be divided into smaller areas, but we choose these centers for mapping and building the waters with attention to national security. Economic, environmental and scientific purposes would be the following issues.

As a maritime nation, Vietnam has been living by, on and with the sea for more than four thousand years. The orientation for Vietnam economy to achieve 55 % of GDP in 2020 from seas will depend on our determination in these days of 2014.

The key port with highly sensitive for defense, the strategic coast as Cam Ranh , Van Phong, Vung Ang should be taken into account for the protection of maritime sovereignty. Sea

lanes of communication (SLOC) and chokepoints will also be protected by our peaceful method as mapping and planning our own EEZ and waters.

6- Conclusion

Vietnam still has no plans to build TBMPA, MPP, PSSA with the neighboring countries or planning CMSP on its own. TBMPA benefits are on marine environmental protection, marine biodiversity and international cooperation for peace - friendship, especially for contiguous seas. Conservation and protection of marine resources of Vietnam in the marginal seas is still having no international interoperability. Marine environment has no clear borders as land but closely links neighboring countries waters in another way. So, to promote international cooperation, the selection of appropriate model of cooperation is very important for the overlapping, contiguous and not-yet-clarified seas in order to comply with international conventions, international agreements on marine environment and biodiversity. Following are suggestions:

Firstly, on the basis of general policy, Vietnam needs to concretize the policy to suit particularly to each region: Gulf of Tonkin, Paracel, Spratly, Gulf of Thailand to guide for protection of sovereignty and the reasonable exploitation of marine resources in each region;

Secondly, studies, experience updates on planning and implementing policies for the seas as scientific basis for diplomatic negotiations on bilateral and multilateral issues related to the Vietnam's waters;

Thirdly, the management agencies of the sea as the Ministry of Foreign Affairs, Ministry of Defense, Ministry of Public Security and the relevant ministries should establish international cooperation mechanism for science research and establishment of the TBMPA with neighboring countries. Selection and development models, appropriate international cooperation measures in protecting the sovereignty and natural resources, marine environment of the country and the region is also needed.

Considering these coastal and marine spatial plans from UN, from countries as the US, European countries, we can have our own way for preservation and development of sea waters. If Vietnam hesitates to plan its marine areas now, then Vietnamese may not know when and where to start. Economic development is also strengthening national defense power, thus is similarly the need to divide by fields in priority order as security, marine, oil and gas, mining,

recreational fishing, resort, maritime, marine conservation, marine seabed museum, wind power (0-2000 m high), other sea power (wave, tidal, geothermal heat)....

Vietnam can apply and carry on national and international means to plan, provide clear specific goals, reward organizations and individuals with initiative to complete the task.

References

1. The The White House Council on Environment Quality, 2009. Interim Framework for Effective Coastal and Marine Spatial Planning . 32 p.

2. UNESCO, 2009. Step- by- Step Approach for Marine Spatial Planning Toward Ecosystem - based Management. 98 p.

3. UN Convention on the Law of the Sea 1982 - United Nations Convention on the Law of the Sea 1982 (UNCLOS82) 4. Statement of 12 November 1982 by the Government of the Socialist Republic of Vietnam on the Territorial Sea Baseline of Vietnam Declaration VN198).

5. Ha Nam Ninh, Legal Referral Rules Of The Sea consistent with UNCLOS Vietnam 82
<http://www.seasfoundation.org/research-documents/historical-and-legal-arguments/vietnam-arguments/450-gii-thiu-quy-ch-phap-ly-mt-s-vung-bin-vit-nam-phu-hp-vi-unclos-82>

6. Doan Manh Dung, 2011, 4 the weak sea of Vietnam.
http://kinhteblen.vn/index.php?option=com_content&view=article&id=406:bn-yu-huyt-tren-bin-ong-vit-nam&catid=64:hai-quan-viet-nam-

7. Sandwith, T. and ext., *Transboundary marine protected areas for Peace and Cooperation*. IUCN, Cambridge, UK., 2001, www.iucn.org.

8. WWF, *Towards a framework for Transboundary marine protected areas*, 2006, pp. 33.

9. IMO, *PSSA guidelines*, 2007.

10. Quyết định số 742/QĐ-TTg của Chính phủ ngày 26/5/2010 về việc Phê duyệt Quy hoạch hệ thống khu bảo tồn biển Việt Nam đến năm 2020.

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Clash of Vision: How the U.S. and China Interpreting the Norm “Freedom of Navigation” – The Case of East Sea Disputes

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Abstract: The paper analyzes the norm freedom of navigation in international law and the act of States interpreting it. Freedom navigation is a well-established norm in international law in general and in the law of the sea in particular, and its importance to the regime is recognized without any objection of any States. The scope of the norm, however, usually provokes controversy. This paper indicates that, based on examining their practice encountering with the East Sea disputes, the two superpowers of the world, the U.S. and China, share few similarities on the issue. Indeed, on the one hand, the U.S. and China both claim their consistent respect to the freedom of navigation on the sea of all States in the East Sea. The latter, on the other hand, is likely to take a wider view on the scope of such right than the former since China has historically never recognized any freedom higher than their sovereignty. The paper argues that the differences in the view of those two may shape the way of smaller States making use of the norm in their practice. Furthermore, apart from reflecting the long unsettle battle of two old closed sea and open sea theories, the gap in the U.S. and China interpreting the norm is likely to prompt the development of international law of the sea in order for it to effectively govern the sea-related legal situations in modern time.

Keywords: *freedom of navigation, East sea disputes, closed sea, open sea.*

1. Introduction

The paper analyzes the norm freedom of navigation in international law and the act of States interpreting it. Freedom navigation is a well-established norm in international law in general and in the law of the sea in particular, and its importance to the regime is recognized without any objection of any States. The scope of the norm, however, usually provokes controversy. This paper indicates that, based on examining their practice encountering with the East Sea disputes, the two superpowers of the world, the U.S. and China, share few similarities

on the issue. Indeed, on the one hand, the U.S. and China both claim their consistent respect to the freedom of navigation on the sea of all States in the East Sea. The latter, on the other hand, is likely to take a wider view on the scope of such right than the former since China has historically never recognized any freedom higher than their sovereignty.

The paper argues that the differences in the view of those two may shape the way of smaller States making use of the norm in their practice. Furthermore, apart from reflecting the long unsteady battle of two old closed sea and open sea theories, the gap in the U.S. and China interpreting the norm is likely to prompt the development of international law of the sea in order for it to effectively govern the sea-related legal situations in modern time.

2. China vs. the U.S. towards the freedom of navigation principle

2.1. Freedom of Navigation

Technically speaking, the legal status of freedom of navigation is provided for all ships to enjoy on the sea areas beyond the territorial sea. Under the meaning of this principle, the navigational right of ships is solely subject to the jurisdiction of flag state and limited regulations of coastal state's marine zones namely contiguous zone and exclusive economic zone (EEZ), and in the high sea, there are even fewer limitations on this right.

- **Contiguous zone:** according to Art. 33 of the 1982 Sea Convention, foreign vessels are put under the control (prevention and punishment) of coastal state only when they violate any rules related to custom, fiscal, immigration or sanitary of the concerning state in its territory or territorial sea. This exception of the navigational rights of vessels in contiguous zone is conceptualized on the basis of hot pursuit principle. It provides that if a foreign ship were found committing infringement of local laws in the territorial sea of the coastal state, this ship could be pursued and arrested on the high seas¹. This principle grants the coastal states enforcement jurisdiction beyond their 12-mile limit, which is, on the other hand, constrained from comparatively strict conditions. Indeed, coastal states can only exercise their enforcement measures when they can provide good reason for a violation of four subjects listed in art.33, and the violation must be committed in their territory or territorial sea.

¹ R. R. Churchill and A.V. Lowe, *The law of the Sea*, Manchester University Press (1999), p. 133.

- **EEZ:** under the light of Art.58 foreign ships shall enjoy the freedom they are provided in Art.87 referred to the navigational rights in the high seas. When exercising their right, foreign ships need to take into account other ships' rights and duties ("due regard" principle), and are only put under the governing of the Convention. Coastal states' jurisdiction is limited on activities relating to pollution, scientific research and economic exploitation and exploration of the zone, and their artificial islands and installations must respect recognized sea-lane essential to international navigation (Art.56).

- **High seas:** the peak of freedom of navigation principle is set out on the high seas where there is only one limitation of their navigational right. It is the "due regard" for the interests of other States in their exercise of the freedom (Art.87).

What is set out in the Convention is that there is no intension of distinguishing the rules applicable on civil ships and those applicable on military vessels. By using the words "ships" for all the provisions mentioned above, the language of the Convention makes it clear that the laws shall be applied for all ships in a whole. Therefore, at some certain extent, it could be also understood that the Convention was not made in order to directly deal with the security issues of states on the contiguous zones and EEZ. More importantly, the Convention also implied that foreign ships may operate military exercises on the high seas and the EEZ of other states and that those activities should be not interfered by coastal states as long as they comply with the principle of "due regard". However, the practice of states in interpreting and applying those provisions of the Convention can be called a clash of vision when it comes to China and the U.S.

2.2 China's perspectives

[Enforcing domestic laws] China is trying to enforce domestic laws to protect its sea zones on the contiguous zone and the EEZ from any harm caused by foreign activities.

- Art. 13 of the 1992 Law of the People's Republic of China Concerning the Territorial Sea and the Contiguous Zone (1992 China Law hereafter) added the element of "security" into the conditions for China's exercising its sovereignty rights in the contiguous zones.

- Art.11 of the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf (1998 China Law hereafter) puts the freedom of navigation under the limitation of "international law and laws and regulations of the People's Republic of China". Throughout the 1998, it seems obvious that China

stressed on the compliance of foreign vessels with its domestic regulations.

[China's practice] Taking the 2009 Impeccable case into account, it is easily to say that China has never judged the military activities such as collecting military surveys and reconnaissance's in the EEZ of other states in the light of freedom of navigation. Indeed, after finding that the Impeccable vessel of the U.S. were exercising activities relating to intelligence collection on the EEZ of China, Chinese government almost immediately sent their navy ships to halt such operation. Their justification for the action has two folds.

- The first argument was that the navigational right provided in Art.58 of the 1982 Sea Convention was no longer seen as the same as the freedom of navigation in the high sea regime. The notion of national security of coastal state should be seriously taken into consideration when employing the “due regard” rule in the EEZ of coastal states. Therefore, military activities in other states' EEZ could not be deemed as legally accepted.

- On the other hand, China believed that with the significant development of technologies, the differences between scientific research and military activities such as collecting military surveys and reconnaissance's were unable to be distinguished². Hence, those naval exercises of the U.S. could fell into the scope of scientific activities that were prohibited in the EEZ regime of the Convention.

To put it in a nutshell, in the mindset of China, freedom of navigation has never been absolute. And by revoking the Lotus principle which was “whatever is not prohibited in international law is permitted”, China is enforcing its laws and exercising its practice on the sea with the attempt to re-conceptualize the norm “freedom of navigation” in the way that best suits its interest.

2.3 The U.S.'s perspectives

Although it has not been a party to the 1982 Sea Convention yet, the U.S. shall enjoy the legal effect of the norm sine it is considered as customary international law. In terms of interpreting the norm, the U.S. takes the seemingly opposite view in comparison with that of China. According to the U.S., the navigational rights of ships in the EEZ amount to those in the high sea. Military vessels should be treated as equal as civil ships, which mean that there is no

obligation of providing prior notice and obtaining approval of coastal states before entering their EEZ³.

Furthermore, the U.S. stresses on the issue that there is a clear line between military activities and scientific research; therefore, those exercises carried out by the U.S. in EEZ of China in 2009 (the Impeccable case) could not be deemed as violating the customary rules in the EEZ of the 1982 Convention. Besides, according to the U.S., the act of unilaterally enlarging the scope of provisions in a multilateral treaty should be treated as unlawfully accepted⁴. Therefore, art.13 of the 1992 China Law and art.11 of the 1998 China Law could have no legal affect on American ships.

It should be taken into account that the focal point of US policy during its history is protecting freedom of American people. Freedom of navigation undoubtedly plays a vital point in such policy. For the U.S., the right to send ships across the ocean with limited exceptions in a coastal state' marine zones is of key importance which the U.S. has been standing for throughout its existence.⁵ Against the attempt of China to recreate new interpretation of the norm, the U.S. is trying its best to protect the original meaning of the norm freedom of navigation. It even considers the possibility of ratification the 1982 Sea Convention.

2.4 Summary

The clash of vision between China and the U.S. can be summarized into one aspect, which is security. Indeed, the significance in China's interpreting and applying the principle of freedom of navigation is its stress on national security with the obsession of voluntarily before the development and advancement of technology. On the other hand, what the concept of security means to the U.S. is the freedom of sending its ships, no matter what kinds of ships they are, across the ocean to carry out merchant activities as well as military exercises.

3. China in the attempt of re-conceptualizing the norm freedom of navigation

As mentioned in the previous part of the paper, China is attempting to change the interpretation of the norm freedom of navigation by adding the element of security. As a matter of international law, there are two possible ways for China to do so. The first one is to develop a

⁵ The announcement of U.S. Supreme Court in 1947.

new custom concerning the navigational activities of vessels on the sea with additional limit, or alternatively to invoke the principle of *rebus sic stantibus*.

3.1 Customary international law

It is generally accepted that in order to change a rule of customary international law or, more ambitiously, to form a new custom which may shape a new interpretation of the old one the combination of the two factors of *state practice* and *opinio juris sive necessitatis* (opinion as to law or necessity⁶, hereafter *opinio juris*) is strictly required. At first, taking the element of *state practice* into account, one should know that the requirement for a settled practice contributing a new custom does not rely on the fact that every single state in the world carry out the same action, but the widespread acceptance and the consistency of such practice are the key.

As for the practice on limitations of freedom of navigation, China does not single-handedly attempt to put more limit to the navigational rights of vessels on the sea. The table below shows the number of states that share the same view with China on the subject of broadening the control of coastal states over the sea on the basis of security. Although the number of states listed in the table does not make up half of the state parties of the Law of the Sea Convention, the fact that there have been a seemingly large and potentially increasing portion of states which have been currently restricting the navigational rights and possibly considering such action may helpfully contribute to the establishment of a new custom governing navigational activities of vessel on the sea.

In addition, through the table it is pretty clear that most countries in the South China Sea appear to agree with China on the subject of security over the sea, and that most developing countries also share the same view. Therefore, if such phenomenon is growing strong, it can be said that China is one-step ahead the U.S. in a run for controlling the sea, or at least, the South China Sea.

In terms of the element of *opinio juris*, the Court in the North Sea Continental Shelf case indicated that: “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”.⁷ In order to achieve this requirement, China is actively employing several methods. Initially, one could see that China is strongly enforcing its national laws concerning the navigational issues. The 1992 China Law and 1998 China Law mentioned above are two prime examples. However, domestic laws can

⁶ Hugh Thirlway, “The Sources of International Law”, Malcolm D. Evans, International Law, Oxford university Press, 3rd ed., 2010, p. 102.

⁷ North Sea Continental Shelf, Judgment, ICJ Report 1969, p. 3 para. 77.

hardly be seen as evidences of the so-called *opinio juris*. Therefore, drawing up more multinational treaties governing such issue could be seen as another option. The ratification of the 2002 Declaration on the Conduct of Parties in the South China Sea could be seen as the first moves of China. Besides, China might take advantage of their role in the United Nations to urge the Organization to adopt navigation-related Resolutions. Nonetheless, the U.S. and their representatives at the Security Council do not seem to let such scenario happen.

In short, when it comes to the attempt of China in bending the usual interpretation of the norm freedom of navigation, it is insensible to say that China is winning the U.S. over this battle. However, in the long run, China might successfully extent their jurisdiction over the sea, or at least over the South China Sea since the practice of a number of states, most of which are from such region, is seemingly supporting the Chinese way of interpretation the norm navigational freedom. Furthermore, it could be argued that while launching their policies, any activities of China, one of the two most powerful countries in the world, may shape the way other smaller states making use of the norm.

3.2 Rebus sic stantibus

The principle of *rebus sic stantibus* is not a new concept in international law; in fact, the doctrine, which allows parties of an international treaty to halt or to limit their implementation of a provision in the treaty owing to the fact that there are unforeseen and extraordinary circumstances affecting their performances, has been a controversial topic arousing seemingly unsettled battle among scholars for years. And, to some extent, it could be seen that the arguments of China fall into the scope of such principle. Indeed, one of the arguments over China's extending jurisdiction over the sea, which amounts to limiting the recognition of navigational freedom of foreign ships in the sea provided in the Law of the Sea treaty, is on the ground that new circumstances emerging which are able to alter the old school of thought about freedom. China believes that due to the rapid and somehow uncontrollable development and evolution of technologies national security is facing more deadly potential threats which are needed to be prevented before actually happening. Besides, in the eye of China the line between scientific research and military activities such as such as collecting military surveys and reconnaissance's is gradually vanishing. Behaviors of China towards the Impeccable incidence in 2009 with the U.S. at the South China Sea are the prime example of this argument.

However, it is necessary to revisit article 62 of the 1969 Vienna Convention on the Law of Treaties. It provides that a state party of an international treaty can only invoking the *Rebus*

sic stantibus principle when (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; or (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. Hardly can China reach the consensus of all the parties to the Convention to meet the first requirement described in article 62. Besides, it is also without doubt that China may fail to demonstrate that current circumstances which China believes to be new and potentially shifting the performances of parties to the treaty since there have been no significant proofs of such belief.

On the importance of the principle Oliver J. Lissitzyn in her article “Treaties and Changes Circumstances (*Rebus sic stantibus*)” argued that: “.... the primary function of interpretation [of an international treaty] – [is] that of deciding whether the application of an agreement to a particular situation is or is not in accordance with the shared intentions, expectations and objectives of the parties. Therefore a treaty should not be applied in circumstances which are so different from those for which the parties sought to provide that its application would be contrary to the parties' shared expectations and would defeat their apparent objectives”⁸. Standing on this ground, one can deem that the possibility of China invoking the doctrine is still open since it has been consistently stressing on national security and the vulnerability before new kinds of threat. On the one hand, such policy of China may damage the stability of international legal order as there has not been a shared view among countries on the issue. On the other hand, it sparks a promising opportunity for international law to revisit the old principle and to internally develop its system.

4. Conclusion

The clash of vision on the principle of navigational freedom between China and the U.S. can be explained by different views on the so-called national security. Indeed, while China is trying to limit the scope of the freedom of navigation of foreign vessels, protecting the rights of freely sailing across the sea of its ships is the highest consideration of the U.S. And, when for China security means the extending control over its sea zones, the U.S. believes its security lays on the enjoyment of sending ships, civil as well as military, all over the world. This situation leads the two powers have differences in interpreting international legal norm, in this case, the norm freedom of navigation.

⁸ Oliver J. Lissitzyn, “Treaties and Changes Circumstances (*Rebus sic stantibus*)”, *The American Journal of International Law*, Vol. 61, No. 4 (Oct., 1967), p. 869.

In addition, it can be seen that changing the old school of thought over the norm freedom of navigation that the U.S. is trying to keep is the goal of China. In order to achieve such goal on the legal ground, China may employ two methods. The first one is to develop new customary international law relating to navigational rights of ships on the sea. Alternatively, invoking the *rebus sic stantibus* principle is another choice of China. It could be argued that while carrying out such policy via those two methods of law creating China may shift the way of other smaller countries making use of international law and at the same time encourage this legal system to develop to effectively cope with new phenomena in the new era.

Table 1: State Practice on Limitations to Navigation⁹

State	Type of Rights Asserted
Albania	Warships require prior special authorization
Algeria	Authorization must be obtained for warships 15 days prior to their passage; exception: force majeure
Antigua and Barbuda	Warships require prior authorization
Bangladesh	Warships require prior authorization; CZ 18 nm Security interests
Barbados	Warships require prior authorization
Brazil	Prohibition of the boarding, searching and of the exclusive economic zone and enact and capturing of vessels in the exclusive economic zone; military exercises and manoeuvres may be conducted in the exclusive economic zone only with the consent of Brazil
Bulgaria	24 nm("Control rights")

⁹ Derived principally from a number of tables contained in Germany, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*; Stuart Kaye, "Freedom of Navigation in a post 9/11 World: Security and Creeping Jurisdiction".

Cambodia	Control of all foreign activities on the continental shelf, irrespective of their purpose; CZ 24nm Security interests
Cape Verde	Warships require prior authorization; Prohibition of “non-innocent use” of the exclusive economic zone, including weapons exercises
China	Requires prior notice for transports of waste in TS and EEZ; warships require prior authorization; CZ 24nm Security interests
Congo	All ships require prior authorization
Costa Rica	Fishing vessels must announce their passage through the exclusive economic zone beforehand
Croatia	Warships must announce their passage; the number of warships is limited
Denmark	Warships and governmental ships are required to notify the Danish authorities prior to their passage through territorial waters if that involves passage through the Great Belt, the Samsø Belt or the Øre Sound; prior authorization is required for more than 3 warships passing through at the same time
Djibouti	Prior notice required of any passage of nuclear-powered ships and ships carrying nuclear or other radioactive material
Ecuador	"Special area to be avoided"
Egypt	Warships have to announce their passage in advance; ships carrying nuclear material or other hazardous substances require prior authorization; CZ 24cm Security interests
El Salvador	Expressed concern at UNCLOS III in respect of military activities in the EEZ

Estonia	Warships and research vessels must announce their passage 48 hours in advance; authorization must be applied for nuclear-powered ships 30 days; prior to their passage
Finland	Warships and governmental ships have to announce their passage in advance
Gambia	Asserts the right to prohibit navigation in certain areas of its continental shelf
Greece	Claims only a 6-nm territorial sea but 10 nm of airspace for air traffic control purposes
Grenada	Warships require prior authorization
Guinea	Taking photographs and transporting toxic or hazardous material are considered a criminal offence
Guyana	Warships have to announce their passage in advance
Haiti	Passage prohibited to ships carrying waste or materials with an inherent health or environmental hazard; Prohibition of the passage of all vessels carrying waste or materials that are environmentally harmful or detrimental to health; furthermore claims the right to exercise the control required in the exclusive economic zone in order to ensure navigational safety and prevent violations of financial, customs, health and environmental protection regulations; CZ 24nm Security interests
India	Warships have to announce their passage in advance; Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf; CZ 24 nm Security interests

Indonesia	Warships and all vessels other than merchant ships must announce their passage in advance; 100 nm Ships are not allowed to stop, anchor or cruise “without legitimate cause”.
Iran	Warships, submarines, nuclear-powered ships as well as ships carrying nuclear or other hazardous materials require authorization; Prohibition of “military activities and practices” in the exclusive economic zone and on the continental shelf; CZ 24nm Security interests
Latvia	Reserves the right to regulate the passage of warships
Libya	Innocent passage to be announced in advance and allowed during daylight hours only; four exclusion zones
Lithuania	Warships require prior authorization if this is required by the flag state
Malaysia	Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf
Maldives	Warships require prior authorization; With regard to the EEZ, acknowledge only the right of innocent passage; make entry of fishing and research vessels into the exclusive economic zone conditional upon prior consent
Malta	Asserts the claim for warships to obtain prior authorization
Mauritania	Reserves the right to restrict navigation and aviation in or above the exclusive economic zone if this is necessary for reasons of national security
Mauritius	Warships must announce their passage; Apparently makes the passage of warships and submarines through the EEZ conditional upon prior approval

Myanmar	Warships require prior authorization; Claims the right to restrict the freedom of navigation and overflight in its exclusive economic zone; CZ 24cm Security interests
Namibia	Claims sovereign rights with regard to financial, customs, immigration and health regulations in the exclusive economic zone as well
Nicaragua	25 nm Security interests 15 days advance notification for warships and military aircraft, seven days for civilian traffic
North Korea	62 nm Military zone 50 nm seaward of the territorial sea. All ships and aircraft require prior approval
Oman	Warships, nuclear-powered ships, submarines and ships carrying hazardous loads require prior authorization
Pakistan	Warships require prior authorization; supertankers, nuclear-powered ships and ships carrying nuclear materials are required to announce their passage in advance; Claims authority to regulate transit through parts of the exclusive economic zone and enact and enforce all regulations required for controlling activities in the exclusive economic zone; CZ 24cm Security interests
Peru	Prior consent to military exercises and manoeuvres in the exclusive economic zone and on the continental shelf
Philippines	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Poland	Reserves the right to regulate the passage of warships
Portugal	With regard to the exclusive economic zone, acknowledges only the right of innocent passage

Romania	Reserves the right to regulate the passage of warships
São Tomé and Príncipe	Reserves the right to regulate the passage of warships
Saudi Arabia	Reserves the right to regulate the passage of nuclear-powered ships; CZ 18 nm Security interests and navigation
Senegal	Expressed concern at UNCLOS III in respect of military activities in the EEZ
Seychelles	Warships are required to announce their passage in advance
Slovenia	Reserves the right to regulate the passage of warships
Somalia	Warships require prior authorization
South Korea	Warships and government ships have to announce their passage three days in advance
Sri Lanka	Warships require prior authorization; CZ 24cm Security interests
St. Vincent and Grenadines	Warships require prior authorization
Sudan	Warships require prior authorization; the right of innocent passage may be suspended for security reasons; CZ 18 nm Security interests
Syria	Warships require prior authorization; 41 nm Security interests
United Arab Emirates	Warships require prior authorization; nuclear-powered ships and ships with nuclear or hazardous loads must announce their passage in advance; CZ 24cm Security interests
Uruguay	Asserts the right to prohibit military exercises in the EEZ
Venezuela	15 nm National and security interests

Vietnam	Warships require authorization to be applied for at least 30 days prior to passage; passage restricted to 3 warships at a time; CZ 24 nm Security interests Submarines are required to navigate on the surface and to show their flag; aircraft are not allowed to land on board ships or be launched from them; on-board weapons have to be set in “non-operational” mode prior to the entry into the zone.
Yemen	Warships require prior authorization; nuclear-powered ships or ships carrying nuclear materials must announce their passage in advance; CZ 24cm Security interests
Yugoslavia	Warships must announce their passage 24 hours in advance

Institutions and Methods for Resolving Maritime Territorial Disputes under International Law

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It's a fact that international disputes are unavoidable in international practice. The numbers of disputes increase in proportion with the development of international relations. By definition, according to the Permanent Court of International Justice under the League of Nations (now the International Court of Justice), "*a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two entities*"¹. International disputes arise as a result of complicated relations in many areas, among nations and other stakeholders of international law.

Based on their subject matters, international disputes can be categorized as: territorial disputes; disputes over membership status at international organizations; juridical disputes among states in specific cases; disputes over diplomatic protection among states; and disputes over rights and obligations in international treaties.

1. Definition of territory and international disputes over territory

National territory is an integral part of any country. At the same time, it is a criterion to determine whether a country is subjected to international law or not. National territory is tied to economic, political, social, defence and security conditions of each country. Therefore, national territory provides a natural environment and physical facility for the survival and development of a country in the international community. At the same time, a country's territory is directly related to other countries, in particularly its neighbouring and regional countries.

A country cannot survive without its territory. Territory is established in the space where a country performs its sovereignty rights. It is a principle in the international customs that: "In the event of complete loss of territory, a country will not exist in reality. Therefore, territory is not only important to a country itself but it is an inevitable factor of international relations.

¹ PCIJ, Seri A, page 11 http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.

National territory must be determined in accordance with international law so that each country can freely perform its sovereignty rights within its territory while requesting other countries to respect the sovereignty of others.

Among the subject-matters of disputes, political or legal disputes related to national territory or security often impose significant threats to peace and international security if they persist and cannot be settled through peaceful measures. History has shown that territorial disputes themselves are direct and indirect causes of major military conflicts. The disputed Alsace - Lorraine region between France and Germany was the cause of tension in bilateral relations and partly led to the two World Wars in 1914 and 1939². The disputed region of Danzig (now Gdansk, Poland) between Poland and Germany was one of the causes of the Second World War in 1939³. The war between Britain and Argentina in 1982 was related to the dispute over the sovereign of Falkland Islands. The war between Israel and the Arab countries in 1948, 1956, 1967, 1973⁴, Iran - Iraq war from 1980 to 1988 were related to the disputed area in Khuzestan and borders at the estuary of Sat al - Arab river⁵. The 1990 - 1991 Gulf War was mainly caused by the territorial dispute between Iraq and Kuwait which deliberately led to an attack Kuwait by Iraq⁶. These wars caused significant casualties and physical damage over its duration and left dreadful consequences.

In the current trend of globalization, there are close economic – political – social relationship between nations. It will be a failure to settle territorial disputes through armed conflicts, which is contrary to the desire and will of the majority of people, not only in countries involved in the conflict, but also worldwide.

2. Peaceful resolutions of territorial disputes

As an international dispute can potentially lead to armed conflict and war, the settlement of international dispute has an important implication for the maintenance of world peace and security and putting an end to conflicts and disagreements between related parties. At the same time, dispute settlement also motivates countries to comply and implement international law

² Joseph A. Biesinger, Germany: a reference guide from the Renaissance to the present, Infobase Publishing, 2006, trang 79-80

³ A. J. P. Taylor, “*The Origins of the Second World War*”. DALUM HJALLESE DEBATKLUB. <http://www.dandebate.dk/eng-taylor6.htm>.

⁴ *A History of Middle East Region*, Nguyễn Thị Thu et al, Education Published, Hanoi, 2009, page 330-334

⁵ Nguyễn Thị Thu et al, cited, page 343-344

⁶ Nguyễn Thị Thu et al, cited, page 345-346

more thoroughly. These disputes must be settled through peaceful measures in accordance with international law, based on international conventions or customs which have been recognized by the claimants for resolving dispute according to Paragraph 1 Article 38 of the International Court of Justice's Statute.

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international customs, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law⁷.

Peaceful settlement of international disputes is one of the fundamental principles of modern international law. This is in accordance with the prohibition of the use of force in international relations. This principle has been recognized since the late 19th century and early 20th century in the Hague Convention in 1899 and 1907, then in the Briand-Kellogg Pact on 27th August 1928. It was officially recognized as the fundamental principles of international law for the first time in Paragraph 3, Article 2 of the UN Charter, which stated "*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*"⁸, and reaffirmed in the Declaration of the UN General Assembly (Resolution 2625) on 24th October 1970: "*Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States...Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.*"⁹

Besides the recognition of the principle of peaceful settlement of disputes, the UN Charter has also developed a system of peaceful measures for resolving international disputes in Article 33: "*The parties to any dispute, the continuance of which is likely to endanger the*

⁷ <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>

⁸ <http://www.un.org/en/documents/charter/>

⁹ <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>

maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."¹⁰ Based on Article 33 of the Charter, peaceful measures for solving international disputes can be divided into two categories:

Group 1, measures of diplomatic nature including *negotiation, enquiry, mediation, conciliation, resort to regional agencies or arrangements.*

Group 2, *judicial settlement* measures, through the International Court of Justice and International Arbitration.

2.1 Diplomatic measures for resolving disputes

The diplomatic measures to resolve international disputes have existed and always played an important roles since the early days. These measures often result in the adoption of resolutions, recommendations of international organizations or the signing of commitments and conventions between the parties to the disputes.

2.1.1 Negotiations

Among dispute settlement measures, negotiations are considered the most easy, popular and effective measure. Its existence was directly based on the opinions and stances of dialogue parties without the involvement of a third party. The purpose, components, participation levels and means of negotiation will be agreed upon by the negotiating countries following the fundamental principles of international law.

Negotiations have many advantages over other dispute resolution measures. Firstly, negotiations are flexible and proactive, without the limitations of time and location. Secondly, it restricts direct interventions from a third party (even the international community), without complicating the dispute. Thirdly, it is cost and time effective for the disputants. However, negotiations may not always succeed, depending on the level of willingness, flexibility and sensitivity of negotiators. Hostility and political disagreement will further complicate the negotiation process, and to greater extent, lead to a failure to reach any agreement¹¹.

¹⁰ <http://www.un.org/en/documents/charter/>

¹¹ Malcolm Nathan Shaw, *International law*, Cambridge University Publishing, 2003, page 721

In some cases, negotiation is the obligation of the parties to the disputes as provided in bilateral and multilateral conventions. In addition, an international tribunal can also directly request the compliance of negotiating parties or an agreement to be reached between involving parties. In the North Sea Continental Shelf case, the International Court of Justice has ruled:

“The Parties were under an obligation to enter into negotiations with a view to arriving at an agreement and they were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it.”¹²

Good examples of successful territorial dispute settlement through negotiation include: The 1953 Gadsden peace talks to settle a territorial dispute between the U.S. and Mexico, the negotiation over disputed Sakhalin Island between Russia and Japan which resulted in the Saint Petersburg Agreement in 1875, the peace talks from 1963 to 1966 between Malaysian Prime Minister Tunku Abdul Rahman, President Sukarno of Indonesia and President Macapagal of the Philippines which successfully settled territorial disputes in Borneo¹³, the Delimiting Agreement on Cooperation in the Barents Sea in 2010 which resolved a dispute over the Barents Sea between Norway and the Russian Federation and ended tensions that hinder oil and gas exploration and fisheries of both countries since the 1970s, periodic talks on the Gulf of Tonkin in 1999 and 2000 which resulted in the Agreement on Maritime Delimitation, Exclusive Economic Zone and Continental Shelf in the Gulf of Tonkin on 25th December 2000 between the Socialist Republic of Vietnam and the People Republic of China resolving a dispute over the Gulf of Tonkin, a historical problem in the diplomatic relations between Vietnam and China.

2.1.2 Mediation by an intermediary

Mediation is a diplomatic dispute resolution measure involving a third party with the approval of the disputing parties, as regulated in the Hague Convention in 1899 and 1907. It is the responsibility of the intermediary to encourage and motivate disputing countries to settle their disputes by peaceful means, through meetings and official negotiation. The intermediary may be one or several countries, one or a number of reputable individuals, or the agency of an international organization.

¹² Neil Craik, *The International Law of Environmental Impact Assessment*, Cambridge University Publishing, 2010, page 70.

¹³ Neal D. Gidvani, *“The Peaceful Resolution of Kashmir: A United Nations Led Effort for Successful International Mediation and a Permanent Resolution to the India-Pakistan Conflict”*, page 732-733

Along with the development of international law, mediation becomes increasingly popular, especially from the 1990s. The number of disputes settled through mediation increased by 469% compared with the previous period and even more than the entire 1945-1989 period¹⁴. In the practice of settling territorial disputes, many cases have successfully been resolved through mediation. For example, in the dispute between Algeria and Morocco in 1963 - 1964, the neighboring countries Mali and Ethiopia stood out as mediator and supervisor of the cease-fire; the mediating role of the United States in the reconciliation process for territorial disputes in the Middle East from 1973 to present; the European Union (EU) has successfully mediating the territorial issues between Slovenia and Croatia in 2010, two African nations Eritrea and Djibouti agreed to let Qatar being the mediator for their disputes over national territory and border near Ras Doumeira in 2010¹⁵.

2.2 Arbitration through international jurisdiction

Settlement of international disputes through international jurisdiction or legal resolution is the use of an international jurisdictional body on the basis of agreement or recognition of the disputing parties through judicial method and proceedings. Based on the establishment, organization, operation, dispute resolution method, the validity of the judgment and enforcement mechanisms, arbitration through international judicial body can be divided into international court of justice and international arbitration.

In terms of history, international arbitration is the very first form of international jurisdiction. Prior to the 20th century, international arbitration took the form of *ad hoc* arbitration (i.e. tailoring arbitration according to circumstances). Whereas the first permanent judicial body in the cause of history and development of jurisdiction is the Permanent Court of International Justice, which was established and operated under the League of Nations since 1920.

2.2.1 International arbitration

The settlement of disputes through international arbitration is an resolution method in which disputing parties agreed to authorize one or a number of individuals (arbitrator) for resolving the dispute. Such agreement shall be stated in a particular agreement or in the special provisions of bilateral treaties. The agreement recognizing the settlement of dispute through

¹⁴J. Michael Greig, Paul F. Diehl, *International Mediation*, Cambridge University Publishing, 2012, page 36.

¹⁵J. Michael Greig, Paul F. Diehl, cited, page 37.

arbitration shall be made prior to or after the occurrence of the dispute. This agreement shall define the subject matters of dispute and the binding legal enforcement of the arbitration's judgment. The modern form of arbitration was first presented in the 1794 Jay Treaty (Treaty of Amity, Commerce, and Navigation) between Great Britain and the United States¹⁶. Three Commissions were established under this treaty to resolve remaining issues between the two countries after the American Independence War.

The 1907 Hague Convention defined international arbitration as a method of settling disputes between countries through the judges chosen by the country. Article 38 of the convention states: "*In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.*"¹⁷

Settling dispute through arbitration is one of the peaceful measures that are highly feasible and effective. However, the success of this method will depend on the will of concerned parties in each specific case.

International Arbitration takes the two forms: *ad-hoc* arbitration and institutional arbitration. *Ad-hoc* arbitration is temporary and tailored for each specific case. Court proceedings will be agreed between the disputing parties. In the event of failing to reach an agreement, related parties shall follow the proceedings provided for in the 1899 and 1907 Hague Conventions. The arbitration's judgment shall be the final ruling. However, it can be reconsidered at the occurrence of a new event or condition that affects the content or invalidates the judgment in some special cases.

A major advantage of resolving disputes through international arbitration over the International Court of Justice include flexibility in the selection of arbitrators and a flexible and easy procedure. In addition, international arbitration offers a secret settlement mechanism, without affecting the reputation and honour of the disputing parties.

¹⁶ Shabtai Rosenne, *The World Court, What it is and how it works*, Martinus Nijhoff Publishing, 1995, page 4

¹⁷ <http://cil.nus.edu.sg/rp/il/pdf/1907%20The%20Hague%20Convention%20for%20the%20Pacific%20Settlement%20of%20International%20Disputes-pdf.pdf>

In territorial dispute settlement through international arbitration, it is worth mentioning the role of the Permanent Court of Arbitration (PCA) in Hague. Despite its being named the Permanent Court, only its supreme body - the Administrative Council - remains permanent. From 1907 to 1945, disputes resolved by the Court include the territorial dispute between the Netherlands and Portugal on the island of Timor in 1914, and the sovereignty dispute between the Netherlands and the United States over the Island of Palmas in 1928. From 1946 to present, the Court has successfully settled 24 disputes and is now dealing with 12 cases, including the territorial dispute over the Hanish Islands between Eritrea and Yemen in 1998 and 1999, the sovereignty dispute over the islands surrounding the Strait of Malacca between Malaysia and Singapore in 2003, and the maritime border dispute between Barbados and Trinidad and Tobago in 2006.

2.2.2 International Court of Justice (ICJ)

Sovereignty dispute is essentially a legal dispute. Therefore it is important to bring this matter to the international court. This method of peaceful settlement of international disputes is stipulated under Article 33 of the UN Charter.

In international law, dispute resolution through a Court measures is subjected to high level of validity, applied in sequential order and followed an effective judicial proceeding. Dispute settlement through a Court requires related parties to agree to bring the disputes to international court, recognize the mandatory power of the court and consent to the court's judgment even if such judgment is not in favourable to them.

The International Court of Justice under the United Nations (International Court of Justice) was established in 1946 and operated in accordance with the UN Charter and the International Court of Justice's Statutes (ratified in 1946). It inherited the role of the Permanent Court of International Justice. This is the main body of the UN responsible for peaceful settlement of international disputes. The International Court of Justice also provides legal advices to the General Assembly, the Security Council in all legal matters and to the specialized agencies of the United Nations in matters relating to their operations if allowed by the General Assembly under Article 96 of the UN Charter.

In principle, all UN members are automatically subjected to the statutes of the International Court of Justice. Non-member countries can also be a party under the court if it was to make official statement agreeing to recognize the ICJ's Statute, and respect the Court's judgement in general and in specific case. Only states are eligible to be parties before the Court.

The jurisdiction of the court for dispute settlement is established in two ways. Firstly, parties concerned accept its jurisdiction in each specific case. The disputing countries will sign an agreement, called the compromissory clauses, requesting the Court to resolve the dispute. In this agreement, the countries specify the parties to the dispute, the questions to be addressed, the Court's jurisdiction, the scope of the applicable law and diplomatic channels. Since the 1960s, countries often use the compromissory clauses to submit disputes relating to the delimitation of the continental shelf and border to the Court, for example *the North Sea Continental Shelf case* in 1969, *the Libya/Tunisia Continental Shelf* in 1982, *the Libya/Malta Continental Shelf* in 1985 and *territorial dispute between Libya and Chad* in 1994.

Secondly, the Court's jurisdiction over the provisions of international conventions shall be established in advance. Until now, there have been more than 400 agreements containing clauses by which member states accept in advance the Court's jurisdiction. Thirdly, the parties concerned unilaterally declare to accept the jurisdiction of the Court. If both parties to the dispute submit the unilateral declarations and these declarations have the same enforcement effect, then the Court will be given jurisdiction over the settlement of such dispute.

Judgments delivered by the Court are final and binding upon the parties concerned. In principle, the decisions of the Court are only binding upon the parties to a dispute. However, if there is interpretation of a multilateral treaty in which a third party is a member of, the third party must comply with the Court's decision. Judgments are without appeal. If either of the parties challenges the scope or meaning of the Court's decision, it has the option to request an interpretation. The court has higher enforcement power than other dispute settlement mechanisms because if one party to the dispute does not comply with the Court's decision, the other party may request an intervention from the UN Security Council¹⁸.

Since its establishment, about one third of the cases submitted to the International Court of Justice is related to territorial and border disputes¹⁹. Famous cases include: *Minquires and Ecrehos* between France and the United Kingdom in 1953, *Sovereignty over Certain Frontier Land* between Belgium and the Netherlands in 1959, *Temple of Preah Vihear* between Cambodia and Thailand in 1962, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* between Canada and the United States of America in 1981, *Frontier Dispute* between

¹⁸ Paragraph 2, Article 94, UN Charter.

¹⁹ Steven R. Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, St. Martin's Publishing, 1996, page 814.

Burkina and Faso-Mali from 1983 to 1986, *Territorial Dispute* between Libyan Arab Jamahiriya and Chad from 1990 to 1994, *Border Dispute* between Cameroon and Nigeria in 1994, *Kasikili/Sedudu Island* between Botswana and Namibia in 1996, *Sovereignty over Pulau Ligitan and Pulau Sipadan* between Indonesia and Malaysia in 1998, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* between Malaysia and Singapore in 2003. These cases help develop theories on territorial acquisition, the principle of effective occupation, the *uti possidetis* principle as well as the theories of the law of timing, the occurrence of dispute and the value of using maps as an evidence.

2.2.3 International Tribunal for the Law of the Sea (ITLOS)

According to Article 287 of the 1982 UN Convention on the Law of the Sea (UNCLOS), all maritime disputes can be brought to the International Tribunal for the Law of the Sea, a permanent and independent judicial body which was established and operated under Annex VI of the 1982 UNCLOS.

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with article 287 of the Convention, and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. The decision of the Tribunal is final and shall be complied with by all the parties to the dispute.

Section XV and Annex VI and VIII of the Convention stipulate: “*States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means...*”²⁰.

Any dispute arising between the State Parties on the interpretation or application of the 1982 UNCLOS is subjected to the procedures provided for in Part XV.

According to Article 287 of the 1982 UNCLOS: “*When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:*

(a) *the International Tribunal for the Law of the Sea established in accordance with Annex VI;*

(b) *the International Court of Justice;*

²⁰ Article 279, UNCLOS.

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.”

If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree²¹. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII. Even in cases where a state party has not announced its consent procedure stipulated in paragraph 1 of Article 287, it shall still be deemed to have accepted arbitration in accordance with Annex VII (paragraph 3 Article 287). The rationale behind this provision of the Convention is the advantages of settling disputes through arbitration, which include the binding judgment of the arbitrator and the involvement of parties to the dispute in the arbitration selection and the proceedings. In short, dispute settlement according to Part XV of the Convention has a tendency towards institutionalizing the binding obligation to settle dispute through court. This is clearly illustrated in the dispute settlement procedures stated in Part XV, which comprises of two stage:

- The first stage includes non-binding procedure such as diplomatic negotiations and conciliations;

- The next stage includes a mandatory procedure for a thorough resolution which is failed to settle in the first stage.

Since its establishment (on 1st August 1996) until now, 13 cases have been handled by the ITLOS. There is one case in the Southeast Asia relating to the legality over the polderarea in Johor Strait between Singapore and Malaysia²². The maritime delimitation case between Bangladesh and Myanmar in 2012 was the first proceeding handled by the ITLOS on this matter.

2.3 Resolving disputes through the UN Security Council

According to Article 24 of the UN Charter, the Security Council is given primary responsibility for preserving peace and international security. Accordingly, the Security Council can apply these measures to the peaceful settlement of disputes, conflict and, when necessary, can use measures, including coercion and force, to eliminate the threats, sabotage peace, or act

²¹ Paragraph 4, Article 287, UNCLOS.

²² <http://www.itlos.org/index.php?id=104>

of aggression. The provisions of the Charter relating to the Security Council in the Chapter V, VI, VII, VIII, and XII²³.

The United Nations Security Council (UNSC) is one of the six principal organs of the United Nations and is charged with the maintenance of international peace and security. According to Article 39 of the UN Charter, The Security Council is the only UN organ who shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. In performing this function, the Security Council is acting on behalf of all members of the UN. In fact, the functions in which the Security Council be given serve three goals: to maintain, restore and build peace.

While other UN organs can only make recommendations to the governments of the UN member states, the decisions and resolutions adopted by the Security Council according to chapter VII Charter are binding in nature and must be respected and complied by all UN members.

Under the Charter, the Security Council may conduct an investigation of any dispute or situation which may lead to international conflict or threaten peace and international security, and it can make recommendation on the measures and actions to resolve those conflicts. The conflicts and situations, which potentially threaten peace and international security, can be brought up by the UN member states, the General Assembly or the UN Secretary General before the Security Council. Non-member country may bring up the dispute, in which is a party to the dispute, before the UNSC for consideration and settlement, given that it must be consent to comply with peaceful dispute settlement procedures in accordance with the UN Charter.

Each member of the Security Council holds one vote on important issues of international peace and security. The decision concerning the procedure will be adopted with at least 9 out of 15 affirmative votes from permanent or non-permanent members. The substantive decisions on the matters shall only be adopted with at least nine votes, including the concurring votes of all permanent members according to the UN Charter. In other words, the decisions of the Security Council relating to the maintenance of international peace and security must be concurred by its permanent members. If one out of five permanent members vote against, the decision will not be adopted regardless of other 9 affirmative votes. This is called the principle of unanimity or

²³ Article 21, Annex VI, UNCLOS.

veto by the permanent members countries. In applying this principle, abstention and absence from the vote by a permanent member is not regarded as a veto. Any country, regardless of being permanent or non-permanent member, are not allowed to vote on the decision to resolve a dispute in which that country is a party.

A permanent UNSC member has the power to block the adoption of a non-procedural resolution by a veto even if it has received the required votes from other permanent and non-permanent members. In other words, this is the principle of concurring between the five permanent members. During the course of sitting as permanent members, all five countries have already applied its veto power of which is mostly used by the U.S. and the former Soviet Union. In fact, the adoption of a substantive resolution (relating to the procedures) may not necessarily require all five votes from the five permanent members. If a permanent member does not support or express support for a resolution but also does not want to block the adoption of the resolution, it can abstain or stay absent from the vote. Such action will not be considered as a vote and the resolution will still be adopted.

3. Conclusions

Dispute between countries over national borders and territory have long existed and always been difficult to settle. In the past, countries to the dispute often opted to use force to settle their disputes. This threatened the stability of international peace and security. Since the UN establishment in 1945, international law on resolving territorial and border disputes become increasingly useful. Documents on international law of the UN has promoted dispute settlement through peaceful measures and strictly prohibited the use of force. Depending on the nature of each dispute, the parties to the dispute can choose the procedures and institutions for a peaceful settlement of dispute.

Current disputes relating to maritime issues between the countries are very diverse and complex. They involve issues relating to maritime boundary delimitation, the application and interpretation of the Law of the Sea Convention, or territorial sovereignty at sea. There are disputes which have been prolonged for centuries and not been resolved. The international institutions for resolving these disputes have made changes and improvements. However, there remain limitations which require further development to settle these disputes by peaceful means, contributing to the peace, stability and development in the world.

UNCLOS in the Spotlight of International Territorial Disputes in the East Sea¹: Gaps and Ways out

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It has been 20 years since the implementation of the United Nations Convention on the Law of the Sea (hereinafter - UNCLOS). Elaboration of this treaty was a significant step to the settlement of numerous international territorial disputes concerning the law of the sea around the world. However, some disputes are still in progress. In the authors' opinions, some provisions and definitions of UNCLOS have serious gaps that lead to various interpretations and misunderstandings by countries. Due to provisional gaps, all parties of the East Sea Disputes (Brunei, China, Malaysia, the Philippines, and Vietnam) have their own opinions on the UNCLOS interpretations and are confident that they follow International law. We consider that certain provisions of UNCLOS should be revised in order to resolve actual disputes and prevent further debates.

The first issue of importance is the current distinction between an island and a rock. This issue is significant since according to UNCLOS Article 121, 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 this Convention applicable to other land territory. However, Rocks that cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. This applies to Russia, which has many islands in the Arctic that probably are not so sustainable for habitation or economic life such as small rocks and atolls in the Pacific Ocean. Also, it should be noted that modern technologies could provide possibilities for creation of appropriate conditions for habitation and economic activity everywhere.

In the practice of sea disputes, some countries use the term "island" in a very broad sense. For instance, Japan, in case of "Okinotori-shima", and China uses the term "qundao" (archipelagoes or a group of islands in Chinese) to name all features. This definition even includes some islands permanently under water, such as Macclesfield Bank situated in the East

¹ On Russian maps the term "South China Sea" is used.

Sea in the four archipelagos. The Spratly Islands in Chinese are called Nansha Archipelago. The definition of an “island” in the UNCLOS leaves room for further debate and discussion.

Specifically, it leads to the situation that all of claimants in the East Sea, except Brunei, attempting to establish their sovereignty claims by occupying certain islands and reefs. Claimants construct airstrips, research stations, platforms, tourist attractions, and military facilities on them to show that they have a real island that produces an exclusive economic zone and continental shelf. For instance, the largest islands are occupied by Vietnam and the Philippines. Vietnam occupies 21 features, the Philippines - 9, China – 7, and Malaysia - 5. All of those countries claim that they have rights to delimitate an exclusive economic zone and continental shelf around a small piece of land that did not originally sustain human habitation.

For nearly 30 years after UNCLOS was negotiated, International law provided little guidance on how to interpret this clause. However, in 2009, the United Nations International Court of Justice examined the case of sea delimitation between Ukraine and Romania. The most significant part of this dispute was the determination of the legal nature of Snake Island, a rocky offshore island in the Black Sea, which belongs to Ukraine. It is slightly larger than 0.2 square kilometers and is more than 40 meters above sea level at its highest point. Snake Island has a lighthouse, but little fresh water or vegetation. A small number of military and scientific personnel are stationed there (much like the Spratly Islands in the East Sea), it requires regular resupply of food, water and other necessities from the mainland in order to sustain personnel on Snake Island. The UN International Court of Justice ruled that Snake Island did not generate an exclusive economic zone or a continental shelf and, therefore, did not significantly alter the maritime boundary between the two countries.

Despite that ruling, some countries try to generate an exclusive economic zone and continental shelf by using small rocks. Since decisions of the UN International Court of Justice do not create rules and charge obligations, only to the parties of a particular dispute. In addition, there is no obligation to submit any dispute to the UN International Court of Justice and most of politically strong countries choose different ways.

The second problem is the strait baseline conception that permits to delineate big sea areas far from the coast.

In accordance with Article 7 of UNCLOS in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the

baseline from which the breadth of the territorial sea is measured. However, how many nautical miles is “immediate vicinity”?

We have two famous examples of using strait baselines: the Norwegian Fjords and the Canadian Northwest Passage where tremendous territory is claimed as internal water because it lays within strait baselines.

It should be noted that the straight baseline method allows a country with offshore islands and/or very rough coastlines to reckon its territorial seas from straight lines drawn from a point on the coast to the islands, or from island to island. After connecting the points, the water behind the lines is recognized as internal water, while waters away from the line and towards open waters are considered territorial seas. Grounds for this concept are created by the Fisheries Case (United Kingdom vs. Norway) of 1951, it is important because it accepted the method of using straight baselines for delimitation.

Vietnam used that ruling in its 1982 Statement on the Territorial Sea Baseline, to established straight baselines from which its territorial sea was to be measured. However, Vietnam’s system of straight baselines was strongly protested by other countries on the basis that Vietnam did not meet the criteria set forth by the Article 7 of UNCLOS.

China’s mainland baselines are mostly expressed in terms of its coastal geography. However, in several offshore locations, China’s baselines enclose more than 2,500 square nautical miles of ocean space, primarily in the East China Sea, from full international use. In the East Sea, China has also drawn straight baselines around the Paracel Islands.

Following this logic obviously, that some terms of straight baseline provisions allow states to interpret them in a different way. Such a state of affairs creates an area for numerous disputes not only in the East (South China) Sea. For example, articles of UNCLOS that concern international straits also produce confrontation. Countries delimitate big maritime areas because the modern law of the sea allows it.

In conclusion, it should be noted that UNCLOS distinctly helps to settle many disputes in the world, possibly even put a stop to some wars. However, everything should develop, even such useful convention as UNCLOS is not the Bible and not a dogma and it is time to revise some provisions and terms of UNCLOS, especially those that produce international conflicts.

The Case of Philippines v. China before the Arbitral Tribunal Constituted under Annex VII to UNCLOS: A Chinese Perspective

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Abstract: The Philippines v. China case appeared to come into a new stage when it was started to resolve the issue of whether the tribunal has jurisdiction over the case. Whether the case will finally be accepted and heard by the tribunal is still far from certain. Philippines' claims come down to disputes concerning maritime delimitations involving the concurrent consideration of unsettled sovereignty disputes over insular land territory—issues that are not covered by UNCLOS. Since the Chinese Government has so far not made a clear interpretation of the nine-dash line, the logic behind the Philippines' accusation that the nine-dash line does not conform to UNCLOS is questionable. China has reiterated that it has sovereignty over the South China Sea islands and their adjacent waters, but never claimed sovereignty over all waters within the nine-dash line. It is worth noting that the low-tide elevations or submerged features the Philippines mentioned are all located within the EEZs of larger islands. Thus, the Philippine accusation that China claims too many waters is groundless. Furthermore, the Philippines has failed to fulfill the obligation to exchange views with China on the arbitration items submitted by the Philippines, that either go against facts or international law, or involve disputes that China has excluded from arbitration procedures. The arbitral tribunal should conclude that it has no jurisdiction over the case.

I. The Philippines' legal challenge over South China Sea disputes

Last year, the Philippines instituted arbitral proceedings^② against China over maritime

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^② The Philippines v. China arbitration was commenced on 22 January 2013 when the Philippines served China with a Notification and Statement of Claim “with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea”. On 19 February 2013, China presented the Philippines with a diplomatic note in which it described “the Position of China on the South China Sea issues,” and rejected and returned the Philippines' Notification. The five-member Arbitral

disputes in the South China Sea (SCS). According to the Notification and Statement of Claim “with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea”, the Philippines asserts that China’s nine-dash line claim is contrary to the United Nations Convention on the Law of the Sea (UNCLOS or “the Convention”), some low tide elevations or submerged features that China claims sovereignty are not subject to occupation, and China claims too many waters around some “rocks” not entitled to EEZ and continental shelf under Article 121 (3) of UNCLOS. The Philippines has requested the Arbitral Tribunal to issue an Award: “Declares that China’s rights in regard to maritime areas in the South China Sea, like the rights of the Philippines, are those that are established by UNCLOS, and consist of its rights to a Territorial Sea and Contiguous Zone under Part II of UNCLOS, to an EEZ under Part V, and to a Continental Shelf under Part VI; Declares that China’s maritime claims in the SCS based on its so-called nine-dash line are contrary to UNCLOS and invalid; Requires China to bring its domestic legislation into conformity with its obligations under UNCLOS; and Requires that China desist from activities that violate the rights of the Philippines in its maritime domain in the West Philippine Sea.”^①

The Arbitral Tribunal constituted under Annex VII to UNCLOS, has issued its first Procedural Order, establishing the initial timetable for the arbitration and adopting Rules of Procedure on 27 August 2013, after the first meeting of the Members of the Arbitral Tribunal, held at the Peace Palace in The Hague on 11 July 2013. The Arbitral Tribunal decided that the Permanent Court of Arbitration (PCA) shall act as the registry in the proceedings. The case appeared to have entered a new phase when Manila submitted a 4000-page memorial (Up to now, the memorial hasn’t been released to the public, we can only conjecture on the precise content of the memorial based on last year’s Notification and Statement.) filing to the arbitral tribunal on 30 March 2014, addressing matters relating to the jurisdiction of the Arbitral Tribunal, the admissibility of the Philippines’ claim, as well as the merits of the dispute in accordance with the Tribunal’s first Procedural Order^②. The Members of the Arbitral Tribunal held the second meeting at the Peace Palace in The Hague on 14 and 15 May 2014, and has issued its second Procedural Order on 2 June 2014,^③ establishing the next steps in the timetable

Tribunal is chaired by Judge Thomas A. Mensah of Ghana. The other Members are Judge Jean-Pierre Cot of France, Judge Stanislaw Pawlak of Poland, Professor Alfred Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany. See ITLOS/Press 197 - 24.06.2013, http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_197_E.pdf.

^① Statement by Secretary of Foreign Affairs Albert del Rosario on the UNCLOS Arbitral Proceedings against China to Achieve a Peaceful and Durable Solution to the Dispute in the WPS, http://www.philippineconsulatela.org/Bajo_de_Masinloc/22%20Jan%202013%20-%20State%20by%20SF%20A.pdf.

^② First Press Release (English), dated 27 August 2013, http://www.pca-cpa.org/showpage.asp?pag_id=1529.

^③ PCA News: The Republic of the Philippines v. The People’s Republic of China, http://www.pca-cpa.org/shownews.asp?ac=view&nws_id=423&pag_id=1261.

for the arbitration.^① In Procedural Order No. 2, the Arbitral Tribunal fixes 15 December 2014 as the date for China to submit its Counter-Memorial responding to the Philippines' Memorial.^②

In truth, it is merely the starting points for resolving the issue of whether the tribunal has jurisdiction over the arbitration case. In accordance with Article 25 of the Rules of Procedure adopted by the arbitral tribunal, if China does not appear before the tribunal, the tribunal shall invite written arguments from the Philippines on, or pose questions regarding, specific issues which it considers have not been canvassed or have been inadequately canvassed in the pleadings submitted by the Philippines. The Philippines shall make a supplemental written submission within three months, which shall be communicated to China for comments. The latter's comments will then be submitted within three months of the communication.^③ Therefore, whether the case will finally be accepted and heard by the tribunal is still far from certain.

Under Article 298 of UNCLOS,^④ China declared that it does not accept compulsory

^① The Arbitral Tribunal has been mindful of its obligation under the Convention to determine its own procedure while "assuring to each party a full opportunity to be heard and to present its case." Before adopting Procedural Order No. 2, the Arbitral Tribunal provided to each Party the opportunity to comment on scheduling and a draft of Procedural Order No. 2. On 29 May 2014, the Philippines submitted comments. On 21 May 2014, the Permanent Court of Arbitration (PCA) received a Note Verbale from China in which it reiterated its position that "it does not accept the arbitration initiated by the Philippines" and that the Note Verbale "shall not be regarded as China's acceptance of or participation in the proceedings."

^② Second Press Release (English), dated 3 June 2014, http://www.pca-cpa.org/showpage.asp?pag_id=1529.

^③ Rules of Procedure, Article 25, http://www.pca-cpa.org/showpage.asp?pag_id=1529.

^④ United Nations Convention on the Law of the Sea (UNCLOS), Article 298, provides:

"1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree; (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

procedures relating to sea boundary delimitations in 2006.^① But the Philippines insisted that the arbitral tribunal have jurisdiction over the claims the country has asserted in the belief that its claims do not fall within the excepted category of disputes. According to Article 288(4) of UNCLOS: “In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.”^②In these circumstances, pursuant to Article 9 of Annex VII to UNCLOS,^③ the arbitral tribunal must demonstrate not only that it has jurisdiction over the disputes but also that the Philippines' claims are well founded in fact and law before making its award.

Furthermore, the Philippines has failed to fulfill the obligation to exchange views with China on the disputes. Article 283 of UNCLOS^④ says that when a dispute arises between state parties concerning the interpretation or application of the convention, the parties shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. And in accordance with Article 286 of the Convention,^⑤ if the Philippines failed to fulfill this obligation, it has no right to subject the disputes to compulsory procedures. In fact,

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph 1(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.”

See http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

^① Declaration made after ratification (25 August 2006),

http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China after ratification.

^② UNCLOS, Article 288(4).

^③ UNCLOS, ANNEX VII, Article 9, provides: “If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”

^④ UNCLOS, Article 283, *Obligation to exchange views*, provides:

“1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.”

^⑤ UNCLOS, Article 286, *Application of procedures under this section*, provides: “Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”

the Philippines knows the importance of this obligation, and often regards diplomatic consultations on sovereignty disputes involving Huang Yan (Scarborough) and Meiji (Mischief) Reef as evidence that it has fulfilled the obligation. As previously mentioned, arbitration under the Convention should not address any dispute concerning sovereignty over land territory. The Philippines also states explicitly in its notification and statement that it does not seek in this arbitration a determination of which party enjoys sovereignty over the islands claimed by both of them.^① It therefore has no reason whatsoever to use diplomatic consultations on sovereignty disputes as evidence of fulfilling the obligation to exchange views.

II. Premeditated Misinterpretation of the Nine-dash Line

Though Philippines' arbitral proceedings against China are carefully packaged, they come down to disputes concerning maritime delimitations involving the concurrent consideration of unsettled sovereignty disputes over insular land territory—issues that are not covered by UNCLOS. The Philippines doubted the legitimacy of the nine-dash line claimed by China in the South China Sea, and asserted South China Sea maritime disputes should be judged by UNCLOS. But the fact is, under the principle of “non-retroactivity of treaties” enshrined in the Vienna Convention on the Law of Treaties adopted in 1969,^② the UNCLOS, which came into force in 1994, cannot deny China's “U-shape line” published almost half a century ago.

In 1947, the Chinese government internally circulated an atlas drawing an eleven-dash line to indicate the geographical scope of its authority in the South China Sea, right down to the Zengmu Ansha (James Shoal), at about the 4° north latitude. In February 1948, the Geography Department in the Ministry of Internal Affairs of the Republic of China published “the Location Map of the South China Sea Islands”, in which an eleven-dash line was drawn around the Dongsha (Pratas) Islands, the Xisha (Paracel) Islands, the Zhongsha Islands (Macclesfield Bank and Scarborough Shoal), and the Nansha (Spratly) Islands in the South China,^③ and officially announced to the international community the Chinese government's sovereignty of the South China Sea islands.

^① Notification and Statement of Claim on West Philippine Sea, p. 3, <http://plj.upd.edu.ph/wp-content/uploads/2013/01/Notification-and-statement-of-claim-on-West-Philippine-Sea.pdf>.

^② VIENNA CONVENTION ON THE LAW OF TREATIES (Adopted in Vienna, Austria on 23 May 1969), Article 28 Non-Retroactivity of Treaties, p. 13, <http://cil.nus.edu.sg/rp/il/pdf/1969%20Vienna%20Convention%20on%20the%20Law%20of%20Treaties-pdf.pdf>.

^③ 韩振华:《我国南海诸岛史料汇编》, 东方出版社, 1988年, 第363页。

There are multiple interpretations of “U-shaped line” (or “nine-dash line”) on the South China Sea within China's academic circles, including “archipelagoes attribution line” or “islands and reefs attribution line”^①, “historical rights line”^② and “historic waters line”^③ and so on. The author believes that “archipelagoes attribution line” is found more legally, and has already been approved by a lot of international scholars. Since the Chinese Government has so far not made a clear interpretation of the nine-dash line, the logic behind the Philippines' accusation that the line does not conform to UNCLOS is questionable. The Philippine side may ask China to give an official explanation before making its comments. However, Manila chose to distort China's claim, saying China has claimed the sovereignty of the whole South China Sea and made that the precondition for negotiations.^④

China has reiterated it has sovereignty over the South China Sea islands and their adjacent waters, but never claimed sovereignty over all waters within the nine-dash line. For instance, in a letter to UN Secretary General Ban Ki-moon in May 2009, the Chinese Government stated that “China has indisputable sovereignty over the islands in the South China Sea and their adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.” Anyone who is familiar with UNCLOS and international law should know that “sovereignty” and “sovereign rights” are two different concepts, claiming sovereign right doesn't necessarily mean having sovereignty. From a legal perspective, while having sovereignty over its internal waters and territorial waters, a country can enjoy sovereign rights and jurisdiction over its Exclusive Economic Zone (EEZ) and continental shelf. Therefore, “adjacent waters” in the letter should be interpreted as territorial waters, whereas “relevant waters as well as the seabed and subsoil thereof” refer to China's EEZ and continental shelf.

The Philippines also recognized that international scholars basically agree on the “legitimacy” of “islands and reefs attribution line”. Only interpreting the nine-dash line as “islands and reefs attribution line”, the Philippines would be unable to make its violation of UNCLOS. Therefore, the Philippines' refutation on nine-dash line seemed not be based on the interpretation of “islands and reefs attribution line”, but rather focused on the “historic rights line”, accusing that China claims the “sovereignty” or “sovereign rights” over the waters beyond territorial sea of islands and reefs within the nine-dash line. Meanwhile, the Philippines also lodged implicit accusations against the “island and reefs attribution line”, holding a “zero

^① It is a line encompassing all islands and reefs of the 4 archipelagoes in the South China Sea are attribution to China.

^② It is a line depicting the waters within the line over which China is entitled to a number of historic rights in fishing and other marine activities.

^③ It is the line indicating the waters within the line is “historic waters” of China.

^④ Raul Hernandez, Response of the DFA Spokesman to the Recent Statement of the Chinese Ministry of Foreign Affairs on the West Philippine Sea Issue, July 15, 2013.

effect” view on the effect of disputed islands and reefs in the delimitation of EEZs and continental shelves. Therefore, The Philippines accused China of excessive maritime claims on Huang Yan (Scarborough), Chigua (Johnson South), Yongshu (Fiery Cross) reef and Meiji (Mischief), Ximen (Mckennan), Nanxun (Gaven), Zhubi (Subi) reef within nine-dash line.

International law scholars still remain divided on the effect of the disputed islands in maritime delimitation. However, there are many scholars, including Daniel Dzurek, Victor Prescott, Haller Trost, Lee Cordner etc., believe that some islands in the South China Sea are qualified for EEZ and continental shelf. It is worth noting that the low-tide elevations or submerged features the Philippines mentioned are all located within the EEZs of larger islands. Thus, the Philippine accusation that China claims too many waters is groundless. In a recent article published in RSIS Commentaries titled *The South China Sea Disputes: Formula for a Paradigm Shift?*, Robert Beckman and Clive Schofield wrote that China could limit its EEZ claim to just the 12 largest islands in Nansha Archipelago. They all have vegetation and in some cases roads and structures have been built on them. Therefore, they are “islands” entitled in principle to EEZ and continental shelf rights of their own under the UNCLOS. The two authors pointed out that while it may appear that using only the larger disputed islands to generate its EEZ claim would entail a “loss” of potential maritime areas to China, the impact would actually be minimal because the islands are grouped in close proximity to each other, allowing a broad sweep of EEZ claims. They argued that claiming only the larger islands will not limit China's maritime reach significantly, but would bring the country's claim more in line with international law.^①

Vietnamese scholar Dr. Tran Truong Thuy, made a more rigorous study of this issue. He argued that some islands^② are entitled in theory to EEZ with maximum effect in maritime delimitation, and in accordance with the “equidistance principle”, but “the boundary as the median line is much smaller than nine-dash line” that there are some “residual” parts of waters within nine-dash line located outside the China's EEZ.^③ On Map 2 in Tran Truong Thuy's article, on the assumption of Chinese sovereignty five islands of Spratly Islands, he has drawn an “equidistance line” delimitating the maritime boundary between China and Philippines. We

^① Robert Beckman and Clive Schofield, “The South China Sea Disputes: Formula for a Paradigm Shift?” *RSIS Commentaries*, March 5, 2014, <http://www.rsis.edu.sg/publications/Perspective/RSIS0352014.pdf>.

^② He also argued that: “Assuming that China can prove its sovereignty over Paracel and Spratly islands, it still cannot claim such a large area of exclusive economic zone and continental shelf as most of land features of these two groups are too small to sustain human habitation or economic life of their own, and therefore they cannot generate exclusive economic zone and the continental shelf. Even in the case if some of these features can be considered as “islands” under Article 121 (3) of the 1982 UNCLOS, the impacts of these features/islands on maritime delimitations are insignificant when opposing to the coast of the mainland.”

^③ Tran Truong Thuy, “China's U-shaped Line in the South China Sea: Possible Interpretations, Asserting Activities and Reactions from Outside,” *The Practices of the UNCLOS and the Resolution of South China Sea Disputes*, Taipei, 3-4 September 2012, pp. 9-10, <http://nghiencuubiendong.vn/en/publications/vietnamese-publications/784-chinas-u-shaped-line-in-the-south-china-sea-possible-interpretations-asserting-activities-and-reactions-from-outside-by-tran-truong-thuy>.

can see that the adjacent waters of the controversial rocks, reefs and “submerged features”, such as Chigua (Johnson South), Huayang (Cuarteron), Yongshu (Fiery Cross), Meiji (Mischief), Ximen (Mckennan), Nanxun (Gaven), Zhubi (Subi) reef, are all located within the “equidistance line” which delimitates the Chinese EEZ conforming to UNCLOS.

In the final analysis, the Philippine accusation isn’t substantiated by fact. Undoubtedly, the Philippine side has well known about the fact. But, in order to safeguard their own interests, the Philippine side would like to insists on the approximate “zero effect” of the disputed islands. So the Statement of Philippines has premeditatedly evaded the fact that China has never completely defined the nine-dash line, and tried to misinterpret the nine-dash line to make a “hypothetical” target to refute.

III. The Arbitration under “Regime of Islands”

According to Article 121 “Regime of islands” of the Convention^① (dispute concerning the interpretation or application of Article 121 can’t been excluded from compulsory procedures by virtue of China’s declaration under Article 298), the Philippine side accuses China of claiming too many waters near some rocks and low-tide elevations. The Philippines argued: “Submerged features in the South China Sea that are not above sea level at high tide, and are not located in a coastal State’s territorial sea, are part of the seabed and cannot be acquired by a State, or subjected to its sovereignty, unless they form part of that State’s Continental Shelf under Part VI of the Convention...Mischief Reef and Mckennan Reef are submerged features that form part of the Continental Shelf of the Philippines under Part VI of the Convention, and that China’s occupation of and construction activities on them violate the sovereign rights of the Philippines...Gaven Reef and Subi Reef are submerged features in the South China Sea that are not above sea level at high tide, are not islands under the Convention, and are not located on China’s Continental Shelf, and that China’s occupation of and construction activities on these features are unlawful...Scarborough Shoal, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tide, except that each has small protrusions that remain above water at high tide, which are ‘rocks’ under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 M; and that China has unlawfully claimed maritime entitlements beyond 12 M from these features...”^②

^① UNCLOS, Article 121, *Regime of islands*, provides: “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 this Convention applicable to other land territory. 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

^② Notification and Statement of Claim on West Philippine Sea, p. 13, 17-18,

The Philippine side seems to be full of confidence in this regard. However, the key point is that China has made clear claim to sovereignty over the Scarborough Shoal and the above mentioned reefs of Spratly archipelago, but has not made comments on the effect of these disputed rocks and reefs in maritime delimitation. China has also not disclosed relevant baselines, nor expressed different opinions on effects of the rocks and reefs from the Philippines. The author cannot, therefore, see the logic of the accusation made by the Philippines.

Article 121 has left wide scope for interpretation, thus severely weakened the authority and influence of this Article of the Convention. Perhaps, the Philippines may be worried about that China will “freely” define “rocks” as “islands” which can generate EEZs, following the example of Japanese claim to the continental shelf of Okinotori Reef which is only a “rock”. Unlike Japan, which tried to extend continental shelf by making use of the Okintori, China’s claim on EEZs in Spratly waters is not generated from the above mentioned reefs of Spratly archipelago, but the islands which can “sustain human habitation or economic life of their own”, such as Taiping (Itu Aba) Island and etc.

As previously mentioned, the Philippines also argued that China's sovereignty claim over some low-tide elevations or submerged features such as Meiji Reef, Ximen Reef, Nanxun Reef and Zhubi Reef violates the UNCLOS, which says submerged features not above sea level at high tide are part of seabed and cannot be subject to the sovereignty of a state. However, China released its nine-dash line long before the UNCLOS entered into force. The international law community at that time distinguished seabed and subsoil from waters in the high seas. They essentially deemed that the seabed and subsoil can be occupied. For instance, the eighth edition of Oppenheim's International Law published in 1955 said that states' exploitation of seabed resources through the activities of their people had become an international practice.^①

In the 1940s and 1950s, especially after Washington issued the Truman Proclamations in 1945, there were many cases of countries claiming rights over seabed and subsoil in the high seas. Truman Proclamation 2667 said the U.S. Government “regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”^② Truman Proclamation 2668 vowed to establish conservation zones in those areas to protect fishery resources.^③ Therefore, it is unfair to question China’s “historic title” over the

<http://plj.upd.edu.ph/wp-content/uploads/2013/01/Notification-and-statement-of-claim-on-West-Philippine-Sea.pdf>

^① Oppenheim, International Law, 8th edn., ed. Lauterpacht, 1955, Vol. 1, Part 2, § 287-2, 3.

^② Harry S. Truman: "Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," September 28, 1945. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=12332>.

^③ Harry S. Truman: "Proclamation 2668 - Policy of the United States with Respect to Coastal Fisheries in

submerged features within the nine-dash line that have been officially identified by China. This “historic title” should be respected and accepted according to the principle of “Intertemporal Law”. Besides, disputes concerning historic title evidently fall in the excepted category of disputes which has been declared by China in 2006 under Article 298 of UNCLOS.

IV. China’s Domestic Legislation Hasn’t Contravened UNCLOS

The Philippines’ accusation that China’s domestic legislation has contravened UNCLOS seems to target at “Law on the EEZ and Continental Shelf” and “Hainan Coastal Border Security Regulations”. As a matter of fact, the refutation raised by the Philippine is full of contradiction and contain deliberate misreading and distortion concerning related law and regulations.

Under the condition that China hasn’t publish the official interpretation of “historical rights” in Article 14 of “Law on EEZ and Continental shelf”, we can’t comprehend the logic of the Philippines’ accusation that China’s domestic legislation has contravened UNCLOS.

The Philippines also distorts “Hainan Coastal Border Security Regulations” based on his dubious logic. The Philippines alleges that the Regulation requires “foreign vessels to obtain China’s permission before entering the waters within the nine-dash line”.^① In fact, the Regulations don’t apply to the entire waters within the nine-dash line. For instance, on December 31th, 2012, when answering journalists’ questions concerning the modification of the Regulations, the spokesman of the Standing Committee of People’s Congress of Hainan Province said, compared with the Regulations formulated in 1999, the scope of applicability of this modified Regulations’ remains the same.^② Furthermore, some Chinese and international media analyzed that the Regulations apply only to the waters within 12 nautical miles from the coast of Hainan Province, not including the waters outside Hainan’s EEZ as other countries worried.^③

The Philippines’ Statement has other more serious contradictions. While claiming the EEZ on the so-called West Philippine Sea, the Philippines accuses China of claiming sovereignty over all waters within the nine-dash line. On closer examination, even if we assumed that China claims “historic title” of “historic rights” on all waters with the nine-dash

Certain Areas of the High Seas,” September 28, 1945. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=58816>.

^① Notification and Statement of Claim on West Philippine Sea, p. 6, <http://plj.upd.edu.ph/wp-content/uploads/2013/01/Notification-and-statement-of-claim-on-West-Philippine-Sea.pdf>.

^② “海南省沿海边防治安管理条例施行”，<http://www.chinanews.com/gn/2013/01-01/4452309.shtml>.

^③ “外媒：中越南海法律声索针锋相对 局势不乐观”，<http://mil.huanqiu.com/observation/2013-01/3439899.html>.

line, the Philippines cannot yet accuse the nine-dash line while claiming the EEZ of West Philippine Sea where exist disputed waters and EEZ overlap. The reason is that this accusation will lead to the issue of maritime delimitation concerning “historic title” that fall in China’s excepted category of disputes under Article 298 of UNCLOS, and the arbitral tribunal has no jurisdiction over issues of this kind.

V. Concluding Remarks

In conclusion, the Philippines' push for international arbitration against China over maritime disputes in the South China Sea is suspected of abusing the procedures of UNCLOS. It also seeks to damage China's image by deliberately distorting the country's stance. Since the arbitration items the Philippines submitted either go against facts or international law, or involve disputes that China has excluded from arbitration procedures, the arbitral tribunal should conclude that it has no jurisdiction over the case.

Taking China to Court and its Politico-Economic Impacts

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1. South East Asian Sea – the setting

The 19th of January of this year 2014 is the date marking 40 years in which the People's Republic of China has used its military force to invade the entire Paracel Islands of Vietnam. For the last 40 years, a part of Vietnamese territory has been occupied illegally.

China not only occupies the islands, but also imposes sovereign rights over the waters around Paracel Islands. Since 2014, implementing the «Measures of carrying out the Fisheries Law of Hainan Province», Chinese agencies of law enforcement at sea have continually seized, chased away, and acted inhumanly against Vietnamese fishermen right in Vietnam's age-old fishing grounds around Paracel archipelago.

China's above-mentioned acts and «measures» have been performed for many years aiming to force Vietnamese fishermen to give up Paracel fishing grounds. According to information released by the president of the fisheries' union of a district in Quảng Ngãi Province, in 2012 alone, as many as 300 local fishermen were arrested by Chinese forces. Since 2013, China has shifted from arresting to chasing, shooting, ramming and sinking Vietnamese fishing vessels, destroying fishing tools and equipment of Vietnamese fishermen.

And most recently, China's positioning of the HD 981 oil rig in Paracel waters and in the very exclusive economic zone of Vietnam revealed even more clearly China's ambition. According to Articles 57 and 76 of UNCLOS 1982, the position where China stationed its HD981 oil rig is completely located in Vietnam's exclusive economic zone and continental shelf.

To protect the HD981 oil rig, the Chinese government has deployed a large number of protective vessels, up to 136 at some point of time, including 04 military vessels, 42 marine police ships, service vessels, cargo ships, and iron-hull fishing ships. A number of these Chinese ships have deliberately rammed into and attacked the ships of Vietnamese functional forces with high-capacity water cannons, damaging Vietnamese law enforcement vessels operating in these waters.

According to UNCLOS 1982, China's use of water cannons to attack Vietnamese law enforcement vessels and of patrol planes, and more dangerously, China's weapons readiness state can be construed as an act of using force and a threat of using force against Vietnam's competent law enforcement forces at sea. China can thus be said to have violated the principles of peaceful settlement of disputes and the principles of non-use or threat of force.

All these acts have gone against the principles of the International Convention on adjusting nations' behavior in connection with disputed territories, against related stipulations stated in UNCLOS 1982, DOC Declaration of 2002 by ASEAN nations and China, and against the Agreement between and Vietnam and China on the principles guiding the settlement of sea-related issues.

In face of increasing tension between Vietnam and China over the South East Asian Sea, Vietnam's leaders – as revealed by latest information – are considering legal measures, i.e. to initiate a lawsuit against China.

Relating to this lawsuit against China, many articles have presented such issues as the performance and legal consequences of the lawsuit¹. Specifically, it is imperative for Vietnam to promptly proceed against China's positioning of the Haiyang 981 oil rig in line with the compulsory dispute settlement procedure of UNCLOS 1982. A court established in conformity with this procedure would be able to conclude that China's stationing of its oil rig in Vietnam's EEZ is illegal.

This may be one of the following courts of jurisdiction: the International Tribunal for the Law of the Sea in Hamburg, Germany; the International Court of Justice in The Hague, Netherlands; or any court established in accordance with UNCLOS procedure as in the measure taken by the Philippines.

¹ Domestic and international opinions on Vietnam's necessary challenge against China to bring Hoàng Sa dispute before an international arbitral tribunal
http://www.bbc.co.uk/vietnamese/forum/2014/01/140124_duongdanhdy_unrealistic_solutions.shtml
http://www.bbc.co.uk/vietnamese/forum/2012/03/120331_danhuy_hoangsa.shtml
http://www.bbc.co.uk/vietnamese/forum/2014/03/140314_vietnam_role_scs_conflict.shtml
http://www.bbc.co.uk/vietnamese/vietnam/2014/01/140112_vn_china_sea_disputes_solution.shtml
http://www.bbc.co.uk/vietnamese/vietnam/2014/01/140110_vn_paracels_legal_action.shtml
<https://www.facebook.com/notes/trung-tinh-le/vi%E1%BB%87t-nam-c%E1%BA%A7n-%C4%91%C6%B0a-tranh-ch%E1%BA%A5p-ho%C3%A0ng-sa-ra-tr%E1%BB%8Dng-t%C3%A0i-qu%E1%BB%91c-t%E1%BA%BF/10152335955925269>
<http://www.thanhvien.com.vn/pages/20140116/quyen-ke-thua-cua-nha-nuoc-va-chu-quyen-hoang-sa-truong-sa.aspx>

At the same time, Vietnam should officially request China to bring the dispute over Parcel archipelago before the International Court of Justice. It has been proven that the settlement of Parcel dispute through bilateral negotiations was ineffective, as China claimed that Parcel was not a disputed area. The longer this situation is, the more Vietnam will suffer from disadvantages.

An important question we need to address is: what are the politico-economic impacts of such a lawsuit?

This article starts with an analysis of the weak points of the Vietnamese government's approach to persistent negotiations, on which basis to work out the proper legal measure, i.e. initiation of a lawsuit as a proactive diplomatic move. The article will then continue with presenting the value of a lawsuit in preventing war – an undesirable ending awaited by no one.

This article will also analyze the effect of such a lawsuit, which on the one hand will impact all aspects of Vietnam's politics, and on the other, is likely to generate economic reprisals in both short and long terms that Vietnam needs to prepare countermoves.

2. Persistent negotiations?

Relevant information also shows Vietnam has been very hopeful that a settlement could be reached through negotiations. Between early May, 2014 when the crisis arose and early June, 2014, there were nearly 30 efforts made by the Vietnamese side in search of negotiations from experts' and leaders' levels, which all failed.

Pursuing persistent negotiations with the Chinese side to settle problems related to the South East Asian Sea has long been Vietnamese leaders' guiding motto. Yet, reality shows that this approach is totally unsuccessful, partially contributing to the Haiyang 981 oil rig incident. This approach did not help curb China's ambition, if not to say further encouraged this neighbor's greedy sole occupation of the South East Asian Sea.

In face of the current situation in which China has been using its oil rig, airplanes and warships to encroach on Vietnam's EEZ, the approach to persistent negotiations proves to be all the more irrational. In the interrelationship between Vietnam and China alone, this has put Vietnam to a lower position in which Vietnam is likely to make more concessions so as to mitigate China's behavior. In manifestations to the world community, persistence in seeking negotiations with an aggressing country would also introduce a very vague message to other

nations on Vietnam's immediate response as well as selection of a long-term strategy towards China. This would be an unprofitable solution to gain international support.

On their part, China has for decades made every effort and devised plans to violate sovereignty and the right to sovereignty all over the South East Asian Sea. And this ambition has shown up all the more clearly in recent years, with such perverse actions as cutting off the cables of Vietnam's vessel Binh Minh 2, officially introducing the "nine-dotted line" in its declaration opposing the Joint Statement between Vietnam and Malaysia, printing the "nine-dotted line" on Chinese passports, etc. Therefore, the hope that negotiations will force China to give up its long-cherished ambition is merely a delusion that should be promptly abandoned.

The best outcome from negotiations during Chinese aggression against Vietnam would only be some mild mitigation of its encroachment. For instance, China would be likely to station its oil rig at the same place and promise to enter into more active negotiations on COC. Even in case it may withdraw the Haiyang 981 rig, China would still be likely to declare that it has executed sovereignty in Vietnam's EEZ that it has claimed as its own.

However, in order to "gain" this mitigation in encroachment through negotiations, Vietnam will be likely to trade off its economic and political concessions, namely to accept greater aggression and dependence in more aspects. A specific instance of this is that China may force Vietnam to agree on China's joint exploitation in Vietnam's EEZs such as Tu Chinh and Nam Côn Sơn.

Carrying out persistent negotiations will therefore be a regrettable solution, which is synonymous to capitulation and which may be later described with understatement and hailed as a "joint victory" or "lofty friendship" of the two nations.

3. Initiating a lawsuit as a diplomatic move and a preventive weapon in international affairs

There exist two major schools in addressing foreign relations².

Liberalism is the school of international relations theory giving prominence to common values of mankind such as peace, equality, and confidence in a world inclined to the good in which all nations wish to prosper and seek happiness for themselves and others.

² <http://community.tuanvietnam.net/2009-10-06-chu-quyen-viet-nam-va-luat-phap-quoc-te-2/>

Conversely, realism is the school which highlights the concept that each country has to manage to protect itself. Or, even more extremist is *realpolitik* which casts a dubious look at such values as peace and equality and gives prominence to a nation's might in its struggle for subsistence.

With the current status of a minor country, Vietnam is to make full advantage of the values set forth in liberalism, chiefly represented by international laws such as UNCLOS 1982, the UN Charter, or international arbitration agencies such as the International Court of Justice and the International Tribunal for the Law of the Sea. This is especially significant when Vietnam has China as a neighbor – one long known to have negated the said values.

It is therefore not a situational or final choice for Vietnam to resort to legal measures. On the contrary, this is a must, an indispensable and indisputable choice, when injustice is likely to take place (and not when injustice has occurred as *fait accompli*). This is a kind of preventive weapon and a “dissuasion weapon” (*arme de dissuasion*) made use by the weaker side in preventing tensions from being escalated to a regrettable war.

The non-use, or even declaration of likely non-use of legal measures right from the start, resembles tying one's own hands in face of an opponent. This is certainly an unwise approach, especially when this opponent is much mightier and has a history of using force. Such an opponent can be said to have exposed weaknesses which Vietnam could deter with strong legal measures.

And this approach was even more unsuitable when it was clearly manifested in such a stance as « persistence in peaceful negotiations » and especially in China's motto of “16 Golden Words” and spirit of “Four Goods”.

The above motto does not belong to any school of international relations and certainly is not one of liberalism. For it is not based on equality, but instead on concessions, not on peace and freedom, but rather on intimidation and arrangement.

These slogans can be rationally said to be merely diplomatic euphemisms or diversions. However, when the national foreign affairs and political policies use euphemisms to refer to the devil, what do those who can help think? Are diversionary tactics which are likely to bring the image closer to surrender feasible? Who choose to sacrifice their financial and political resources to help the relinquished? They may tend to keep their own defenses by taking up realism instead.

Specifically, Vietnam is to promptly initiate a lawsuit against China's positioning the Haiyang 981 oil rig at an arbitral tribunal established in line with the compulsory dispute settlement procedure of UNCLOS 1982.

At the same time, Vietnam should officially request China to bring the dispute over Paracel before the International Court of Justice. This is a form of peaceful struggle regulated in Article 33.1 of the UN Charter.

Moreover, Vietnam needs to abolish immediately and permanently all the above abnormal and use an ordinary and rational measure to handle international relations, i.e. to initiate a lawsuit against China at the very first signs of injustice.

4. Taking China to court and/or War

4.1 Persistent negotiations may hold potential risks of war

In reality, China has been attacking Vietnam at sea. Ramming with ships and firing water cannons at Vietnamese fisheries surveillance vessels are all destructive and deadly methods. And all these aggressive activities have been well supported by airplanes and warships.

A contradictory fact which turns out to be true is that the persistence in seeking negotiations may spark potential risks of war. First of all, no matter what might take place during negotiations, the Vietnamese government would have to maintain the protest at sea with fisheries surveillance vessels. Prolonged standoffs and tensions would be gradually heated and may be triggered into armed conflicts at sea. Secondly, when realizing that Vietnam has no other choice to abide by persistent negotiations, China would not hesitate to carry out localized attacks so as to create pressure and fright. As a response, Vietnam then would have to choose either to swallow the bitter pill, in other words, surrender or to carry out counterattacks, which would lead to war.

4.2 A war would not help solve the dispute

A war, however it may end, would be unlikely to help thoroughly settle the dispute. For it would be almost impossible to subdue anyone by force, let alone a whole people.

In contemporary history, several wars have taken place between Vietnam and China (1974, 1979, and 1988), with contradictions piling up. Regardless of the outcome of these wars, Vietnam has never reached more agreements with China. Conversely, whether they won or lost

any of these wars, the Chinese were never pleased or kind to Vietnam. The outcome of any war could only render the stronger side more brutal and more ambitious, and the weaker side would be displeased and discontented, in spite of all the euphemisms that the representing nation may use to describe the relation.

On the other hand, a struggle by legal means before an arbitral tribunal would be a much better measure for both countries to settle all conflicts and contradictions. Each of the nations then would enjoy proper fairness and would be free to use their own tools, namely reasoning, legal and historical evidences. The judgment of such a court shall be rational, clear-cut, public, and shall enjoy international recognition.

Here, we wish to highlight the failure of a war as a means of settling contradictions between the Vietnamese government and the Chinese government. And the crimes and sufferings related to any war are beyond discussions in this article.

4.2 A war would erase history

No wars can help solve contradictions. In contemporary history, several wars have taken place between Vietnam and China (1974, 1979, and 1988), with contradictions piling up, though disguised by euphemisms.

For all the sufferings and losses it causes, a war would not bring about any truly positive lesson of experience to the warring countries when it ends. For many reasons, the nations participating in a war will have to distort related history, whether they win or lose. In each of such countries, after a war leaders would continue to be hailed with heroic or pathetic images.

Not until at least some decades after a war would the people become disillusioned and then put aside the wartime thematic arguments to abide by and look at the incidents in a truly imperturbable attitude. Therefore, it is faintly hoped that no war would break out.

While persistent negotiations or surrender are a historical smear, wars are a long-term concealment of history and truth under a cover made up the number of war years.

4.3 Lawsuit as a means of war prevention

Except in case of defense, a war is what every nation should avoid. In fact, an effective and intelligent method of defense would be to prepare for war on the one hand and to keep war at the farthest distance on the other.

Initiating a lawsuit against China is a way of keeping war at the farthest distance. Why has China been always upset any time Vietnam mentions the capability of making use of legal measures? It is certain that China is not afraid of a broken friendship between the two countries. But when the dispute is brought before an arbitral tribunal, in the light of justice and world opinion, China will no longer be longer able to intimidate Vietnamese fisheries surveillance forces with force or to use a war threat as in a situation with only two disputing countries and with Vietnam persisting in seeking negotiations.

It is imperative that Vietnam promptly uses legal measures, as this is the only and sole way to thoroughly solve the disputes. China is to pay proper attention to this.

China may not accept the settlement of disputes through legal measures as this is likely to deprive China of its advantages as a powerful country. Yet, to whatever extent it might be aggressive, China will have to understand that wars are synonymous to sufferings and losses. As mentioned above, a war will never help solve any disputes with Vietnam, China's neighbor to the south. And China must have realized that the price to pay for a war would be much higher when it knows that Vietnam is not fearful of any struggles, both legal and armed.

On the other hand, even if there is a war, legal measures will also be necessary and need to be carried out by Vietnam. For in case of war, whatever the outcome might be, the contradictions would remain and become more serious. In addition, Vietnam's giving prominence to legal and peaceful measures is bound to gain support from world opinion during wartime. And to the very end of the struggle, Vietnam's victory in terms of international public laws shall be a fatal blow against the Chinese warmongers.

5. A number of political impacts from initiating a lawsuit against China

A lawsuit against China will provide Vietnam with a possibility of solving problems related to the Haiyang 981 oil rig and disputes related to the sovereignty over Hoàng Sa archipelago in the most equitable and effective manner.

A lawsuit against China would place the Vietnamese in a new response to the Chinese. The duration of the lawsuit would redefine the relationship between the two countries, and the motto of "16 Golden Words" and "Four Goods" would have no further chance to exist, and everything would take place in peace. By choosing a more defined stance compared to China, Vietnam would then enjoy greater support from the free world. Vietnam would then have the

opportunity to free itself from China's politico-economic influence, which cannot be obtained through persistent negotiations or the outbreak of a war.

Before an arbitral tribunal, both China and Vietnam would have to present their most accurate historical and legal evidences. And when historical incidents are referred to in a rational and clear-cut manner, for the sake of national sovereignty and other vital issues of the whole nation which requires the understanding of many people, they would help the Vietnamese know more about history, understand one another better and enjoy easier reconciliation.

More important, a lawsuit against the Chinese government would help the Vietnam partially free themselves from traditional confinements and get access to universal values of mankind such as "equality", "peace" and "rationality". And when struggling for justice benefiting the nation, the Vietnamese would understand more about the issue and request justice for themselves. All this would make up the genuine might of Vietnam.

In this spirit, initiating a lawsuit against China would be Vietnam's most appropriate choice compared to persistent negotiations which are so close to surrender and contain in themselves potential risks of war. A lawsuit against China therefore should not be a final choice but an urgent task to be performed in the soonest possible time.

6. China's possible immediate and short-term economic reprisals in response to a lawsuit

Immediately after Vietnam initiates a lawsuit against China, this country may take immediate and short-term reprisals such as stopping some imports from Vietnam for some period of time.

A typical example of this kind of reaction is the reprisals taken by China within two months against the Philippines as tensions arose between these two countries around the Scarborough Shoal waters³.

At the peak of tensions, namely by mid-May 2012 and 1 month after the arising tension, China declared the suspension of imports of 1,200 containers of fruits from the Philippines then waiting at various ports. At the same time, China also prevented its citizens from taking

³ Renato Cruz de Castro, 2012. China's Realpolitik Approach in the South China Sea Dispute: The Case of the 2012 Scarborough Shoal Stand-Off. *International Conference on the Sovereignty of Hoang Sa and Truong Sa at Pham Van Dong University, Vietnam, 2012.*

outbound tours to the Philippines. These moves have presented a number of difficulties to Filipino farmers and the Philippines administration.

However, it was interesting that during this whole tension, the support from Filipino citizens and political parties to the Filipino President soared up. The whole Philippines seemed to have united into a unique bloc backing up President Aquino. Subsequent to this incident, the Philippines proceeded against China at an arbitral tribunal established in accordance with UNCLOS.

Such reprisals as mentioned above are what the Vietnamese government as well as the Vietnamese must be prepared for. The long history of living close to this northern neighbor may have familiarized the Vietnamese with and enabled them to adopt corresponding responses to such similar reprisals or behavior from China as buying buffalo hooves⁴, buying golden applesnails, selling goods at low prices and of poor quality, halting goods at border gates ...

Such normal characteristics which are limitations of Vietnam's industrial and agricultural production such as small-scale, scattering or fluctuating happen to be partially positive features during the «wartime»; for instance, this production would develop high adaptability and flexibility in many difficult situations. And like the Philippines, once facing challenges against their sovereignty, the Vietnamese people would often become adamant and readily accept sacrifices. The problem is that the government must have clear-cut and transparent reactions, thus creating trust among its people.

7. Long-term macro-economic reprisals related to trade balance, cooperation and investment

During the possibly lengthened lawsuit, China may exert adverse impacts on trade transactions and force the commerce, cooperation and investment between the two countries to come to a standstill. In a short term, this would certainly affect the Vietnamese people's living. However, in the medium term and longer term, these reprisals once prolonged would become precious springboards for Vietnam to thoroughly solve problematic issues and weaknesses in Vietnam's economic ties with China.

Firstly, Vietnam currently has a trade deficit against China, with import values about 2 - 3 times export values, and this gap shows no signs of narrowing down. Any commercial

⁴ <http://giaoduc.net.vn/Kinh-te/Thi-truong/10-ngon-don-hiem-ac-cua-thuong-lai-TQ-khien-dan-Viet-Nam-dieu-dung-post7321.gd>

reprisals taken by China in any form would only enable Vietnam to cut down its imports from China, and this would eventually create a better trade balance between the two countries.

Secondly, the goods items that Vietnam imports from China are mainly agroproducts, and the remaining 40% is basic, resource-intensive and low-tech commodities. Trade tensions with China would force Vietnam to turn back to Vietnamese agricultural and basic products.

In addition, Vietnam has to import such commodities as iron, steel, machinery and equipment from China partly because Chinese EPC contractors or FDI projects from China do not comply with the norms of using Vietnamese products and contractors. Vietnam could fully improve and minimize importation of these products from China if FDI projects and EPC assessment are strictly managed.

Thirdly, as Chinese investments into Vietnam are modest, accounting for a small FDI proportion compared to such other countries as Japan, Singapore and South Korea, with a lawsuit against China, the reduction of Chinese investments (if any) would not impose any pressure against Vietnam's economy.

Despite its modest amount of foreign currency brought into Vietnam, China happens to benefit much more in comparison to other countries⁵. FDI projects from China often send large numbers of Chinese workers to Vietnam, who have set up Chinese villages or streets right in the Vietnamese territory⁶. All the more, Chinese companies often bring along old and outdated working machinery and equipment to Vietnam. Economic «tensions» with China, if any, would urge Vietnam to thoroughly solve these problems, which turns out to be a positive move.

China is an important trade partner of Vietnam, but it is certainly not the only trade partner, and would not be likely to be a good, stable and equitable partner who would comply with the values of equality and environment protection, at least in the present context of developments. China's economic reprisals in face of Vietnam's lawsuit would show that China is equivocal between economic and political affairs, and this would be an opportunity for Vietnam to seek more equitable partners, promising a better trade balance such as the United States and the EU, thus minimizing Vietnam's economic dependence on China.

⁵ <http://baodatviet.vn/kinh-te/doanh-nghiep/fdi-trung-quoc-lo-lach-luat-chen-ep-doanh-nghiep-viet-3032584/>

⁶ <http://www.rfa.org/vietnamese/reportfromvn/cn-suffused-in-quang-tri-03032014081043.html>

8. China's possible economic reprisals in the long term

Unlike the 2-month tension between the Philippines and China, Vietnam's lawsuit against China may last a longer time, ranging from several months to even several years.

If that is such a case, it is worth considering China's reactions after the Philippines proceeded against China at the International Arbitral Tribunal for the Law of the Sea. It is interesting and noteworthy that since the Philippines lodged its complaint in January 2013, no clear-cut economic reprisals from China have been recorded. This is totally different from the tension lasting two months around Scarborough Shoal.

China's reaction subsequent to Vietnam's approval of the Law on Vietnamese Sea dated June 21, 2012 is just another example. According to Carl Thayer⁷, China had learned of Vietnam's drafting the Law on Vietnamese Sea and had many times intervened by proposing Vietnam to suspend this task. However, subsequent to Vietnam's approval of the Law on Vietnamese Sea, almost no clear-cut economic reprisals from China have been recorded.

These above-mentioned examples show that it is not easy for China to take economic reprisals or that China is not readying itself in so doing. For the economic and commercial ties among countries, and between countries and economic organizations have become tighter and closer day after day, and require stability, rationality, and consistency in conduct. As China is currently the country with the world leading trade turnover, any and all of its moves will be monitored and criticized if they are «unreasonable» and prolonged. This is why China would often choose the approach of creating implicit political pressure, keeping every incident and affair in a vague scope, and handling affairs internally, while continuing to perform aggressive moves: occupying islands, chasing away fishermen, and deploying its oil rig into the continental shelf of Vietnam.

More than ever, Vietnam understands the plot and needs to bring the issue into the daylight and before international justice by officially proceeding against China in the two above-mentioned methods to protect Vietnam's sovereignty and national security.

⁷ Carlyle A. Thayer, 2012. The Philippines' Claim to the UNCLOS Arbitral Tribunal: Implications for Viet Nam. *International Conference on the Sovereignty of Hoang Sa and Truong Sa at Pham Van Dong University, Vietnam, 2012.*

9. Conclusion

To initiate a lawsuit against China would be a civilized action, manifesting the respect of international public laws and peace. This would be a normal thing and a righteous attitude between neighboring countries with minimal mutual respect.

The analyses contained in this article show that Vietnam needs to promptly abandon the approach of persistent negotiations with China and to make use of legal measures instead. A lawsuit against China would be both an active form of foreign relations and an effective solution of war prevention.

Besides, a lawsuit against China would bring about positive political impacts on Vietnam. This would require the Vietnamese government to adopt a new kind of response to China and the motto of “16 Golden Words” and the spirit of “4 Goods” will have no more grounds for existence. More important, the lawsuit would enable the Vietnamese to partially free themselves from their own confinements and get access to universal values of mankind.

Vietnam’s experience in dealing with this northern neighboring country shows that by performing this positive move, Vietnam is to prepare itself for economic reprisals from China.

Immediate and short-term reprisals may cause difficulties to the Vietnamese people and production, for which Vietnam will also need to prepare.

However, in medium and longer terms, protracted reprisals would be a valued medicine for Vietnam to thoroughly treat the problems and weaknesses in Vietnam’s economic relations with China. Firstly, there would be a better trade balance between the two countries and Vietnam would be oriented to turning back to its own agricultural and basic products. Secondly, Vietnam would have to proactively address problems related FDI projects from China or from Chinese EPC contracts; such problems include the uncontrolled influx of Chinese workers into Vietnam, poor quality construction works, and the lack of respect for Vietnam’s domesticization criteria. Thirdly, these difficulties would serve as a driving force and opportunity for Vietnam to carry out restructuring and reform production and consumption, as well as seek more promising trade partners, or even gain a more equitable trade relationship with China.

By thoroughly understanding potential reprisals from China, Vietnam needs to foresee possible developments and prepare its own economic strength to cope with these reprisals and minimize adverse impacts. However, these reprisals should not become obstacles that could prevent Vietnam from making proper decisions for national interests and sovereignty.

Institutional Paradigms to Prevent Inadvertent Armed Conflicts in the East Sea

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Abstract: The recent tension over the East Sea involving multiple parties in Southeast Asia has raised concerns for the potential outbreak of an ‘inadvertent war’. The ‘inadvertent war’ does not only envisage an ‘accidental war’ which can be triggered due to misinformation or misinterpretation of information, technical error or unauthorised military action. It also encompasses situations where states could be drawn into an armed confrontation without intending or desiring to initiate a war as a result of the domestic pressure, political circumstances or even legal considerations forcing them into a collision course. It is feared that such an ‘inadvertent war’ could spiral out of a minor incident which, whether it was initiated deliberately or by miscalculation, would be very difficult to contain or de-escalate. The United Nations collective security mechanism is not designed to address an ‘inadvertent war’ and is not expected to play any meaningful role, given that one of the major parties to the conflict, the People’s Republic of China (PRC), is a veto-holding permanent member on the UN Security Council. On that basis, this paper reviews three institutional paradigms – Antarctic regime, joint development, and the Locarno regime – that can be considered suitable in managing conflicts in the East Sea. It critically examines what legal obligations those different institutional paradigms would specifically impose and whether those legal obligations are conducive to the effective management of conflicts, not to their settlement.

1. Introduction

The recent tension over the East Sea (also referred to as the South China Sea) involving multiple parties in Southeast Asia has raised concerns for the potential outbreak of an ‘inadvertent war’. To prevent an ‘inadvertent war’ in the East Sea, the ‘management’ of the disputes, not their ‘settlement’, is of key strategic interest to all. The former Secretary-General

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of the Association of Southeast Asian Nations (ASEAN), Rudolfo Severino calls to ‘stop dreaming of a grand solution to South China Sea disputes’ because ‘dreaming about it only distracts us from doing what can and should be done to manage the disputes and keep the harm they do to a diminishing minimum’.¹ The adoption of the Declaration on the Conduct of the Parties in the South China Sea (DOC) in 2002,² and the on-going negotiation for the conclusion of a legally binding Code of Conduct in this area, illustrates the significance regional states attach to the management of disputes.

With the focus on the ‘management’ of East Sea disputes, this paper reviews and examines three institutional paradigms that are considered potentially suitable in managing conflicts in the East Sea: (1) the Antarctic regime model for institutionalising a moratorium; (2) the joint development model for institutionalising regional cooperation to achieve common interests; and (3) the Locarno regime model for institutionalising the regional balance of power. It critically examines what legal obligations each of those different institutional paradigms would specifically impose and whether those legal obligations are conducive to the effective management of conflicts in lieu of their settlement.

2. The state of conflict

The territorial and maritime disputes in East Sea are long-standing flashpoints with the potential to threaten peace, security, and economic prosperity in the region. Competing territorial claims over the islands and other maritime features in the East Sea, together with overlapping maritime claims, have been sources of tension for decades. These disputes involving Brunei, Malaysia, Vietnam, the People’s Republic of China (PRC), the Republic of China (Taiwan) and the Philippines have led to numerous incidents and even armed confrontations between claimants. As the claimants attempt to exploit energy resources in disputed areas, potential exists for maritime incidents to recur, with the associated risks of escalation into a major outbreak of warfare.³ As most recently the US Secretary of Defense, Chuck Hagel, highlighted at the 2014 Shangri-La Dialogue:

¹ Rudolfo C Severino ‘Preventing Conflict in the South China Sea’ in Pavin Chachavalpongpun (ed), *Entering Unchartered Waters? ASEAN and the South China Sea*, (Institute of Southeast Asian Studies, 2014) 5, 13.

² Available at: <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> (last accessed 31 May 2014).

³ Clive Schofield et al, ‘From Disputed Waters to Seas of Opportunity: Overcoming Barriers to Maritime Cooperation in East and Southeast Asia’, National Bureau of Asian Research Special Report No 30 (2011)

in recent months, China has undertaken destabilizing, unilateral actions asserting its claims in the South China Sea. It has restricted access to Scarborough Reef, put pressure on the long-standing Philippine presence at the Second Thomas Shoal, begun land reclamation activities at multiple locations, and moved an oil rig into disputed waters near the Paracel Islands.⁴

While the disputes may be intractable, it is important that the region is managed proactively in order to prevent escalation of conflict.

The PRC's recent 'destabilizing, unilateral actions' in the East Sea can be considered as 'opportunistic attacks' – one of the common causes of warfare – whereby an attacker believes that would improve its prospects for achieving its political goals.⁵ The rapid shift in the relative balance of power, as has been witnessed in the Asia-Pacific with the rise of the PRC, creates precarious geo-political conditions that allow rising military powers to seek for change to the status quo.⁶ Opportunistic attacks, however, involve a danger of triggering an 'accidental' war due to misinformation or misinterpretation of information, technical error or unauthorised military action.⁷ Van Evera has indeed made the finding in his study of causes of war that many modern wars were 'wars of illusions, waged by states drawn to war by misperceptions of international power realities'.⁸

Even without any error, states could still be drawn into an 'inadvertent war' without the expectation or desire to initiate a war.⁹ An 'inadvertent war' encompasses situations where states could be drawn into an armed confrontation as a result of the domestic pressure, political

3; Ralf Emmers, 'The Changing Power Distribution in the South China Sea: Implications for Conflict Management and Avoidance' (2010) 62(2) *Political Science* 118, 128-130.

⁴ Chuck Hagel, 'The United States' Contribution to Regional Stability', addressed at the 2014 Shangri-La Dialogue, Singapore, 31 May 2014, the transcript available at: <https://www.iiss.org/en/events/shangri-la-dialogue/archive/2014-c20c/plenary-1-d1ba/chuck-hagel-a9cb> (last accessed 1 June 2014).

⁵ Stephen van Evera, *Causes of War: Power and the Roots of Conflict* (Ithaca/London: Cornell University Press, 1999) 39.

⁶ See, eg, Randall L Schweller and William C Wohlforth, 'Power Test: Evaluating Realism in Response to the End of the Cold War' (2000) 9(3) *Security Studies* 60, 75-78; Kenneth N Waltz, 'Structural Realism After the Cold War' (2000) 25 *International Security* 5, 36-37.

⁷ See, eg, James D Fearon, 'Rationalist Explanations for War' (1995) 49(3) *International Organization* 379, 390-400; Jeffrey M Elliot and Robert Reginald, *The Arms Control, Disarmament, and Military Security Dictionary* (1989) 3-4; John Phelps et al, 'Studies on Accidental War', Institute for Defence Analyses, Economic and Political Studies Division, Research Paper, May 1963, 5.

⁸ van Evera, above n 5, 255.

⁹ van Evera, above n 5, 43 fn27 ('Inadvertent war includes accidental war and also wars that emerge from a range of other causes, e.g., from over-commitment arising from underestimates of others' resolve, or from deliberate military moves that have unforeseen military effects or trigger unexpected military responses').

circumstances or even legal considerations forcing them into a collision course. Indeed, it is feared that this broader category of ‘inadvertent war’ that could spiral out of a minor incident which, whether initiated deliberately or by miscalculation, would be very difficult to contain or de-escalate.¹⁰ Competing territorial and maritime claims, destructive and unsustainable resource competition, confrontation between rival fishing fleets and the resulting friction involving coastal states’ enforcement authorities, particularly when they perceive themselves to be merely patrolling what is rightfully their maritime space,¹¹ have added destabilising factors to the currently prevailing precarious geo-political condition in the East Sea.

Under this precarious geo-political condition, the existing institutional mechanisms for the maintenance of international peace and security, centred upon the United Nations collective security system, confront challenges, as it is not designed to manage disputes to prevent an ‘inadvertent war’. The United Nations is also not expected to play any meaningful role in the East Sea disputes, given that one of the major parties to the disputes, the PRC, is a veto-holding permanent member on the United Nations Security Council. However, this does not necessarily mean that there is no legal framework for East Sea disputes. Articles 74(3) and 83(3) of the *United Nations Convention on the Law of the Sea* (LOSC), to which all the disputing states with the exception of the Republic of China (Taiwan) are party, requires states to make every effort ‘to enter into provisional arrangements of a practical nature’ and ‘not to jeopardize or hamper the reaching of a final [maritime delimitation] agreement’.¹² This entails an obligation upon states parties to LOSC to consult with each other if they intend to carry out unilateral activities in any disputed area and to continue to negotiate even after such unilateral activities have taken place without resorting to a threat or use of force.¹³ Similar obligations also arise from Article 123 of LOSC, which requires states bordering a semi-enclosed sea to ‘cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention’.¹⁴ All the regional disputing states in the East Sea are bound by these obligations. What is absent

¹⁰ For detailed policy analysis, see, eg, International Crisis Group, ‘Dangerous Waters: China-Japan Relations on the Rocks’, Asia Report No. 245, 8 April 2013, 45-49.

¹¹ Schofield et al, above n 3, 7.

¹² *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), arts 74(3) (in relation to the Exclusive Economic Zone) and 83(3) (in relation to Continental Shelf).

¹³ *Guyana v Suriname*, Award of the Arbitral Tribunal, 17 September 2007, paras 471-482 and 484 (finding that Suriname’s threat of force in a dispute area jeopardised the reaching of a final delimitation agreement).

¹⁴ See, Nien-Tsu Alfred Hu, ‘Semi-Enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea’ (2010) 41 *Ocean Development & International Law* 281, 299-307.

is an institutional mechanism through which the implementation of those obligations can be practically ensured.

Institutionalising moratorium – the Antarctica regime model

The Antarctica regime is one option which some scholars have proposed as an institutional model to manage disputes in the East Sea. Calibrated as one of the most successful international law regimes in overcoming various sources of potential conflicts over more than half a century, the Antarctica regime centres on the Antarctic Treaty, its Protocols and decisions made by consensus during Antarctic Treaty Consultative Meetings (ATCMs).¹⁵ At the core of the regime is Article IV of the Treaty,¹⁶ which freezes any existing claims of territorial sovereignty on Antarctica and provides that cooperation under the Treaty is without prejudice to those claims.

This successful model for dispute containment has attracted the attention of some scholars as an institutional model to manage disputes in the East Sea. Beckman, for example, has proposed an Antarctic regime-like arrangement whereby ‘the states could set aside the existing claims to sovereignty over the islands, set out principles for cooperation and use of the East Sea, and agree that such cooperation is without prejudice to sovereignty claims’.¹⁷ Similarly, Lu considers a freeze on sovereignty claims and demilitarisation to be relevant to East Sea disputes.¹⁸ McManus and others even go further by proposing the establishment of a Marine Peace Park to manage the area’s natural resources and alleviate regional tensions via a freeze on territorial claims.¹⁹

The rationale for this proposal can be found in certain similarities that are alleged to exist between Antarctica and the East Sea – for example, remoteness, rich mineral resources and fragile ecosystem. However, critical differences in geopolitical environment between the

¹⁵ See generally, Donald R Rothwell, *The Polar Regions and the Development of International Law* (Cambridge University Press, 1996); Francesco Francioni, ‘A Decade of Development in Antarctic International Law’ in Francesco Francioni and Tui Scoyazzi (eds), *International Law for Antarctica* (Kluwer Law International, 1996) ch 1; Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, 1992).

¹⁶ *The Antarctic Treaty*, 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

¹⁷ Robert C Beckman, ‘Legal Regimes for Cooperation in the South China Sea’ in Sam Bateman and Ralf Emmers (eds), *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime* (Routledge, 2009) 222, 229.

¹⁸ Ning Lu, *Flashpoint Spratlys!* (Dolphin Trade Press, 1995) 145.

¹⁹ John McManus, Kwang Tsao Shao and Szu Yin Lin, ‘Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan’ (2010) 41 *Ocean Development & International Law* 270. See also, Beckman, above n 17, 233-234.

two militate against any prospect of a moratorium arrangement as a viable solution to East Sea disputes. As Joyner observed, a key to the success of the Antarctic regime is the ‘low salience’ of issues which has produced political inertia that permits a regime to grow and acquire strength and resilience.²⁰ Peterson suggests another factor which is that the moratorium was seen as preferable to alternative possibilities: non-claimants preferred it to endorsement of claims; claimants and probably many of the others preferred it to acceptance of the common heritage notion.²¹ By contrast, regional states involved in East Sea disputes see far greater strategic values, not least because the area lies astride main shipping lanes and significant mineral and petroleum resources. Also, at least one country – the PRC – is hoping to attain the most favourable solution to address its energy security concerns with its rapidly rising political, economic and military power.²² A moratorium arrangement modelled upon the Antarctica regime might have been a viable option in the East Sea 50 years ago, but is no longer capable of accommodating the political and economic interests of the parties involved that are at stake.

Even if such a moratorium regime were to be accepted by regional parties, freezing territorial claims to territory may not address the underlying security issues. With a moratorium in place, it is expected that claims to territorial sovereignty will fade. However, as Hemmings observes in relation to the Antarctica regime, ‘whilst for the first twenty years after the adoption of the Antarctic Treaty the issue of sovereignty appeared to reduce in profile, with the arrival of technical capacity to realise various resources, and an economic rationale for doing so, it gained new life’.²³ Given the strategic significance of the sea lanes and resources within the area, the extent to which a moratorium may contribute to the management of maritime incidents is questionable.

Institutionalising regional cooperation – the joint development model

In their book, *Sharing the Resources of the South China Sea*, Valencia, van Dyke and Ludwig have suggested the establishment of a robust resource management authority in the East

²⁰ Christopher C Joyner ‘Review Article: The Evolving Antarctic Legal Regime’ (1989) 83(3) *American Journal of International Law* 605, 617.

²¹ M J Peterson, *Managing the Frozen South: The Creation and Evolution of the Antarctic Treaty System* (University of California Press, 1988) 220-221.

²² 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* (Routledge, 2009) 155, 160-162; cf M Taylor Fravel, ‘China’s Strategy in the South China Sea’ (2011) 33(3) *Contemporary Southeast Asia* 292, 314-315.

²³ Alan D Hemmings, ‘Beyond Claims: Towards a Non-Territorial Antarctic Security Prism for Australia and New Zealand’ (2008) *New Zealand Yearbook of International Law* 77, 91.

Sea, modelled upon the regulatory regime envisaged under the *Convention on the Regulation of Antarctic Mineral Resource Activities* (CRAMRA).²⁴ This idea is an extension of the moratorium model, but more focuses on institutionalising cooperation to achieve common interests such as exploitation of mineral resources. Even though CRAMRA never came into force, they consider that it may still serve as a useful model for East Sea disputes as it had all the components necessary for development of the area's mineral resources without (1) acknowledgement of any territorial claims, (2) exclusion of non-claimant parties from the decision-making process, or (3) significant environmental degradation.²⁵

Indeed, many institutional proposals made in academic literature in relation to East Sea disputes are focused upon the idea of joint development as a provisional arrangement that does not resolve territorial claims but provide a means for moving forward in the absence of such a resolution.²⁶ Joint development is also considered to bring mutual benefits to all the parties concerned and to be conducive to promoting economic development and creating stability in the region.²⁷ These proposals tend to refer to bilateral joint development agreements within the Asia-Pacific²⁸ as success models that can be applied to the East Sea.²⁹ However, the multilateral

²⁴ Signed 2 June 1988, Doc AMR/SCM/88/78 (1988), reprinted in 27 ILM 859.

²⁵ Mark J. Valencia, Jon M. van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (Martinus Nijhoff Publishers, 1997) 177-178.

²⁶ See, eg, Wu Shicun and Nong Hong (eds), *Recent Developments in the South China Sea Dispute: The Prospect of a Joint Development Regime* (Routledge, 2014); Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea – Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013); Zou Keyuan, 'Joint Development in the South China Sea: A New Approach' (2006) 21 *International Journal of Marine and Coastal Law* 83, 89-95.

²⁷ See, Nazery Khalid, 'South China Sea: Platform for Prosperity or Arena for Altercation?' (2010) 2(1) *KMI International Journal of Maritime Affairs and Fisheries* 1, 15; Christopher C Joyner, 'The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-Politics in the South China Sea' (1998) 13 *International Journal of Marine and Coastal Law* 193, 216.

²⁸ See, *Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand*, 21 February 1979, available at: <http://cil.nus.edu.sg/rp/il/pdf/1979%20MOU%20between%20Malaysia%20and%20Thailand-pdf.pdf> (last accessed 8 June 2014); *Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, 30 May 1990, available at: <http://cil.nus.edu.sg/rp/il/pdf/1990%20Agreement%20between%20Malaysia%20and%20Thailand%20on%20the%20MTJA-pdf.pdf> (last accessed 8 June 2014); *Treaty between Australia and the Republic of Indonesia Zone of Co-operation in an Area between the Indonesia Province of East Timor and Northern Australia*, 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991) (hereinafter *Timor Gap Treaty*); *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003) (hereinafter *Timor Sea Treaty*).

²⁹ See, eg, Leszek Buszynski, 'Rising Tensions in the South China Sea: Prospects for a Resolution of the Issue' (2010) 6(2) *Security Challenges* 85, 96-97; Zou, above n 26, 93-97; Lian A Mito, 'The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands' (1998) 13 *American University International Law Review* 762.

nature of the dispute in the East Sea presents challenges to the institutional design of such legal arrangements. The establishment of a joint development zone by a bilateral agreement will inevitably have adverse and detrimental consequences for resolving competing territorial and maritime claims and interests with other third party claimants.³⁰

As there is no uniformity in the institutional design of joint development arrangements,³¹ it is possible to find a joint development arrangement that is tailored to accommodate the unique circumstances surrounding the East Sea. Given the distrust that exists among disputing parties, any attempt to develop a joint development regime will lean towards an elaborate and comprehensive model involving the establishment of a joint authority with delegated power to manage resource extraction activities on behalf of the states concerned.³² Such comprehensive arrangements would require agreement in relation to exploration and production rights, civil and criminal jurisdiction, disposition of resources, environmental and safety standards, foreign investment limits and a formula to apportion the revenue from joint development.³³ While it may be possible for two claimants to agree to all of these matters,³⁴ such an agreement becomes exceedingly complicated when other parties are involved, as is the case in the East Sea disputes.³⁵

There are further practical and political challenges to the formation of a multilateral joint development regime in the East Sea. First of all, the specific legal claims of the PRC government still remain shrouded in ambiguity,³⁶ which make it difficult to identify the

³⁰ For discussion, see, Peter Cameron and Richard Nowinski, 'Joint Development Agreements: Legal Structure and Key Issues' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea – Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) 152, 158-161.

³¹ See, Thomas A Mensah, 'Joint Development Zones as an Alternative Dispute Settlement Approach in Maritime Boundary Delimitation' in Ranier Lagoni and Daniel Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff Publishers, 2006) 143, 146.

³² See, Gavin MacLaren and Rebecca James, 'Negotiating Joint Development Agreements' in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea – Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) 139, 145.

³³ Craig Snyder, 'The Implications of Hydrocarbon Development on the South China Sea' (1996/97) 52 *International Journal* 142, 153-154. See also, Hazel Fox et al (eds) *Joint Development of Offshore Oil and Gas A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law, 1989).

³⁴ For example, the 1979 and 1990 Joint Development MOU between Malaysia and Thailand: for details, see, David Ong 'The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?' (1999) 14(2) *International Journal of Marine and Coastal Law* 207.

³⁵ Nong Hong, *UNCLOS and Ocean Dispute Settlement: Law and Politics in the South China Sea* (Routledge 2012) 187; Buszynski, above n 29, 97.

³⁶ Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' (2013) 107 *American Journal of International Law* 124, 131; Zou Keyuan, 'China's U-Shaped Line in the South China Sea Revisited' (2012) 43 *Ocean Development and International Law* 18.

overlapping claims area for the purpose of identifying joint development zones.³⁷ Second, PRC prefers bilateral negotiations over multinational management of resources in the East Sea to use its dominant power in steering the course of dispute settlement in its favour.³⁸ Third, PRC's proposals on joint development have been viewed with scepticism – designed to legitimise its claims and to gain a larger share of the resources from the continental shelf of neighbouring countries, rather than as support for a truly multinational regime in the East Sea.³⁹

Alternatively, an agency could play a much looser coordinating role between separate joint development schemes managed by the particular claimants to the different areas.⁴⁰ Smith, for example, proposes that various 'joint zones' be established for each area of overlapping claims by drawing hypothetical equidistant lines between the disputed islands and surrounding littoral states.⁴¹ Mito similarly suggests establishing twelve separate joint development zones modelled upon the Timor Gap Treaty arrangement, with each zone employing organisational and decision-making structures.⁴² A weakly institutionalised body with an oversight function for coordination of separate joint development zones may well be more politically attractive than entering into a formal agreement as it allows maximum flexibility.⁴³ Yet, as Valencia, van Dyke and Ludwig observe, those weak forms of institution will contribute much less to confidence building through cooperation due to insufficient authority to address related problems such as transboundary fisheries and environmental management in the entire area.⁴⁴

Cf Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107 *American Journal of International Law* 98.

³⁷ Hong, above n 35, 186; MacLaren and James, above n 32, 149.

³⁸ Schofield et al, above n 3, 22; Zou, above n 36, 29.

³⁹ Nguyen Hong Thao and Ramses Amer 'A New Legal Arrangement for the South China Sea?' (2009) 40(4) *Ocean Development and International Law* 333, 342; Valencia, van Dyke and Ludwig, above n 25, 186.

⁴⁰ For example, the 1992 Joint Development MOU between Malaysia and Vietnam: for details, see, Nguyen Hong Thao, 'Joint Development in the Gulf of Thailand' (1999) *IBRU Boundary and Security Bulletin* 79.

⁴¹ Robert Smith, 'Joint (Development) Zones: A Review of Past Practice and Thoughts in the Future' in Mochtar Kusuma-Atmadja, Thomas A Mensah and Bernard H Oxman (eds), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* (Hawaii: Law of the Sea Institute, 1997) 645, 661.

⁴² Mito, above n 29, 762. Note, however, a more recent dispute between Australia and Timor Leste that arises from the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea, which deals with the Greater Sunrise Field that is located in large part outside the joint development zones defined under the 2002 Timor Sea Treaty (and earlier by the Timor Gap Treaty).

⁴³ See, eg, David L Vanderzwaag and Cynthia Lamson, 'Ocean Development and Management in the Arctic: Issues in American and Canadian Relations' (1986) 39(4) *Artic* 327, 334.

⁴⁴ Valencia, van Dyke and Ludwig, above n 25, 208.

These pitfalls with different institutional models of joint development cast doubt on the underlying rationale for the predominant focus on resource exploitation within the existing literature on peaceful management of East Sea disputes. Those who propose these ideas consider that the joint development of resources in the East Sea may act as an effective means to manage the disputes in the light of the fact that persistent perception of the area as a ‘major potential source of energy sources’ have often been suggested as a ‘key driver’ of the disputes.⁴⁵ Zou indeed suggests that joint development ‘is a most feasible mechanism by which to shelve the dispute so as to pave the way for co-operation pending settlement of the territorial and/or maritime disputes over a certain sea area due to the overlapping claims.’⁴⁶ Likewise, Buszynski argues that ‘[o]ne 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’.⁴⁷ However, the functional limitations commonly observed with all the different joint development models means that any agreement on the joint development of resources in the area may not produce the anticipated effect of ‘shelving’ the dispute,⁴⁸ with disputes over fishing rights, navigation of navy vessels and environmental degradation remaining unaddressed as potential causes of inadvertent military confrontation.

Institutionalising the balance of power – the Locarno model

The third institutional framework which could be used to moderate the conflict and to prevent an inadvertent war in the East Sea is based on the Locarno regime, which emerged as an institutionalised way of creating stable and permanent conditions on the frontiers between Germany, France and Belgium.⁴⁹ The idea behind this regime was to transform a traditional anti-Germany alliance regime into a collective security framework for the protection and guaranteeing of all borders, including Germany’s, to meet the dictates of the League of Nations,

⁴⁵ Clive Schofield, ‘What’s at Stake in the South China Sea? Geographical and Geopolitical Considerations’ in Robert Beckman et al (eds), *Beyond Territorial Disputes in the South China Sea – Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar, 2013) 11, 36.

⁴⁶ Zou, above n 26, 90.

⁴⁷ Buszynski, above n 29, 101.

⁴⁸ For a detailed analysis of various drawbacks, see, Clive Schofield, ‘No Panacea? Challenges in the Application of Provisional Arrangements of a Practical Nature’ in Myron H Nordquist and John Norton Moore (eds), *Maritime Border Diplomacy* (Martinus Nijhoff, 2012) 151, 159-168.

⁴⁹ *Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy*, 16 October 1925, 54 LNTS 303 (entered into force 14 December 1926). For a thorough historical review of the development of this regime, see, Jon Jacobson, *Locarno Diplomacy: Germany and the West 1925-1929* (Princeton: Princeton University Press, 1972).

which forbade traditional alliances to prevent the WWI-type inadvertent war.⁵⁰ The regime ended in failure as World War II erupted due to the pact leaving the German eastern borders outside this arrangement and therefore effectively signalling that it was open for revision. Nevertheless, the genesis of the regime as the institutional mechanism to manage border disputes and to prevent inadvertent wars may still provide helpful insights in institutionalising the balance of power in the East Sea.

The genesis of the Locarno regime consisted of two central provisions of the 1925 Locarno Treaty: Article 2 of the Treaty set out a mutual undertaking that the state parties ‘will in no case attack or invade each other or resort to war against each other’; and Article 4 required state parties, in case of a flagrant violation of Article 2 of the Treaty, to immediately ‘come to the help of the Party against whom such a violation or breach has been directed’. These two provisions mirror Articles 10 and 16 of the *Covenant of the League of Nations* as the basic framework for collective security,⁵¹ but the critical difference existed with the assurance provided by two powerful external guarantors – Great Britain and Italy – as a way of avoiding clashes between two alliances. A risk of escalation of border disputes into a major war by securing commitment of two external major powers in the region was considered to have a sufficient deterrent effect against any military action along borders. In the East Sea, the United States currently acts as an indirect deterrence, however, it is not sufficiently committed to engage in a move to prevent minor maritime incidents or small scale military skirmishes.⁵² Consequently, the basic idea of the Locarno regime may find a useful application by formally securing commitment of the US and perhaps Russia as direct deterrence against any hostile action.

For this idea to work effectively, important lessons from the failure of Locarno must be applied. First, prohibited conduct must be clearly set out and agreed upon at the operational level. In 2002, ASEAN member states and PRC signed the Declaration on the Conduct of the Parties in the South China Sea (DOC), and currently negotiations are in progress towards the

⁵⁰ Julian Lindley-French, ‘In the Shade of Locarno? Why European Defence Is Failing’ (2002) 78 *International Affairs* 789, 790; George A Grün, ‘Locarno: Idea and Reality’ (1955) 31 *International Affairs* 477, 479.

⁵¹ *Treaty of Peace*, opened for signature 28 June 1919, 225 CTS 188, (entered into force 10 January 1920), Part I.

⁵² Rosemary Foot, ‘Modes of Regional Conflict Management: Comparing Security Cooperation in the Korean Peninsula, China-Taiwan, and the South China Sea’ in Amitav Acharya and Evelyn Goh (eds), *Reassign Security Cooperation in the Asia-Pacific Competition, Congruence, and Transformation* (MIT Press, 2007) 93, 104.

adoption of a legally binding Code of Conduct.⁵³ While the DOC refers to the Parties' commitment to 'exercise self-restraint in the conduct of activities that would complicate or escalate disputes',⁵⁴ it does not clearly set out which conduct is in fact considered to constitute an activity that would complicate or escalate disputes. Although scholars and policy-makers appear to consider that the adoption of a legally binding Code of Conduct will somehow improve the situation,⁵⁵ it is dubious whether any concrete set of practical guidelines can be produced through political and diplomatic processes. In this respect, the Code for Unplanned Encounters at Sea (CUES), adopted at the 14th Western Pacific Naval Symposium held in Tsingtao in April 2014, could be of greater significance. CUES offers safety procedures, a basic communications plan and manoeuvring instructions when naval ships and aircrafts encounter each other unexpectedly, which are expected to provide a much needed de-escalation mechanism.⁵⁶ The successful adoption of CUES amidst rising tensions in the Asia-Pacific signifies a greater chance for the adoption of a wider range of standard operating procedures at sea to avoid misunderstanding as to what might be considered as a hostile act or a hostile intent in manoeuvring vessels in the area.

Second, the conditions under which, and the manner in which immediate assistance is to be provided must be clearly agreed upon in advance. Grün critically reflected upon the failure of Locarno pointing out the lack of detailed advanced planning for mobilisation of personnel and allocation of resources as well as coordination of strategy and tactics as the reason why the regime remained an unrealistic endeavour.⁵⁷ Yet, any advanced planning for mobilisation and coordination of regional naval forces in case of a maritime incident would involve full and frank disclosures of military and technical capabilities, which may not be readily forthcoming from regional great powers. Also, a UN-modelled collective body to make decisions as to when and how assistance is to be rendered is neither a viable nor effective option when the interests of major powers are set for a collision course. A politically neutral and practically viable option might be a multinational naval peacekeeping force which comprises naval forces from regional states that do not have direct involvement in the territorial and maritime disputes in the East Sea

⁵³ Joint Communiqué 46th ASEAN Foreign Ministers' Meeting, Bandar Seri Begawan, Brunei Darussalam, 29-30 June 2013, para 91.

⁵⁴ DOC, above n 2, para 5.

⁵⁵ See, eg, Severino, above n 1, 14; Thao and Amer, above n 39, 339-340.

⁵⁶ See, eg, Shannon Tiezzi, 'Small But Positive Signs at Western Pacific Naval Symposium', *The Diplomat*, 24 April 2014, available via: <http://thediplomat.com> (last accessed 1 May 2014); Zhou Bo, 'Avoiding Incidents at Sea', *China US Focus*, 26 April 2014, available at: <http://www.chinausfocus.com/peace-security/avoiding-incidents-at-sea> (last accessed 28 April 2014).

⁵⁷ Grün, above n 50, 485.

including, for example, Australia, India, Indonesia, Japan New Zealand, the Republic of Korea and Singapore.⁵⁸ Even though it does not provide assurance of external great powers as envisaged in the Locarno regime per se, such a joint peacekeeping force can have a degree of deterrent effect and capability to prevent or deal with minor maritime incidents, for example, through naval patrol at around potential flashpoints or maritime incident investigation.

Third, the external great power, the United States, must play a more neutral role as Great Britain did through the initiative of the then British Foreign Secretary Austen Chamberlain in establishing the Locarno regime in 1925. A Locarno regime-like arrangement can be built upon the existing regional security framework, in particular, the ASEAN Regional Forum (ARF), which is designated as ‘the primary forum in enhancing political and security cooperation in the Asia Pacific Region’.⁵⁹ Indeed, Garofano observes that its ‘goals and procedures resemble those of an institution that aims to create a security community’.⁶⁰ It can provide a forum and mechanism through which external actors that do not have direct interest in territorial and maritime claims in the East Sea could engage in the management of conflicts in the disputed area. However, the development of the Locarno-like assistance mechanism – consisting of standard operating procedures at sea and deployment of a multinational naval peacekeeping force as discussed above – will mean that all the states including the US are expected to provide consent to, abide by, the same standards and to be subject to maritime incident investigations and observation in the same manner. As a result, the established position of the US that while it does not take sides on any competing sovereignty claims, it opposes any effort to restrict overflight or freedom of navigation,⁶¹ may need to be compromised.

Conclusion

By critically examining the specific legal obligations different institutional paradigms would impose, this paper has identified certain limits to a moratorium regime like the Antarctic regime and variously proposed joint development models as an institutional mechanism for the

⁵⁸ The involvement of regional rivals such as Japan and India may damage political neutrality: Zhao Hong, ‘The South China Sea Dispute and China-ASEAN Relations’ (2013) 44 *Asian Affairs* 27, 36-38. However, excluding them from this endeavour means significantly reduced naval capability.

⁵⁹ Declaration of Bali Concord II, 7 October 2003, para 6, available at: <http://www.asean.org/news/item/declaration-of-asean-concord-ii-bali-concord-ii> (last accessed 8 June 2014).

⁶⁰ John Garofano, ‘Power, Institutions, and the ASEAN Regional Forum: A Security Community for Asia?’ (2002) 42 *Asian Survey* 502, 503.

⁶¹ See, eg, Hagel, above n 3.

management of conflict to prevent an inadvertent war. This paper has then examined a conflict management institution modelled upon the 1925 Locarno regime and has set forth certain requirements for its development in the East Sea. In reflecting upon the failure of the Locarno regime for Europe's security strategy, Lindley-French has observed that 'the institutions will have to be put in their proper place – as tools for the promotion of security and not ends in themselves'.⁶² This lesson suggests that building a Locarno regime-like arrangement should not become an end itself by, for example, pursuing legally binding commitments from all the parties involved, but should rather flexibly be approached, including informal undertakings at the operational level, as a means to achieve effective management of conflict in the East Sea.

⁶² Lindley-French, above n 50, 811.

Mitigating Fishing Conflicts in the Disputed East Sea

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Abstract: The coastal waters of the disputed East Sea (called the South China Sea by most non-Vietnamese) are extraordinarily productive and biologically diverse. They supply one-tenth of the global fish catch and many people in Southeast Asia rely on fish for a fifth of their animal protein intake. The rising demand for fish from the growing, increasingly well-off population in the region is creating more pressure on the fishery resources along the coastlines of the East Sea.

This prompts fishermen to go further from their shores in search of fish and causes many incidents of fisherman being arrested by or fired on by maritime police from the different claimant countries along the East Sea. Each year China institutes a several-month fishing ban in the sea north of the 12th parallel, and in recent years, it has increased its number of maritime surveillance vessels to supervise fishing in the disputed waters. More fishermen from Vietnam and other countries have been detained, resulting in more confrontations at sea and risking the possibility of military accidents in the future.

So far, disputing governments have paid relatively little attention to negotiating fisheries cooperation agreements in the East Sea. Still, two examples have been introduced over the past decade that could be expanded to reduce the chances for a conflict resulting from a fishing dispute. The first is the fisheries agreement between Vietnam and China in 1994 to spell out fisheries management in the Gulf of Tonkin. The second is the Southeast Asia Fisheries Development Council established among several Southeast Asian countries to monitor and report fish exploitation. The scope and coverage of both the limited Vietnam-China agreement and the Southeast Asia fisheries council could be expanded and their role bolstered to reduce the danger that a fishing dispute could provoke military conflict between the disputing parties in the East Sea.

Importance of the East Sea's Aquatic Resources

Much of the focus on the East Sea centers on its importance as one of the planet's busiest shipping lanes which serve as the lifeblood of East Asia's economy. Others stress the

sea's still undiscovered significant oil and gas reserves. But the sea is also important for its rich fisheries resources.

The waters of the East Sea are extremely biologically diverse and productive. The countries of Southeast Asia, some of which do not border on the East Sea, produced a quarter of global fish products in 2009, or about 21 million tons.¹ China is the world's largest producer, harvesting nearly 13 million tons in 2009 out of a total of almost 80 million tons.² (To be sure, some of this production comes from rivers and ponds outside of the East Sea itself).

Southeast Asians depend heavily on fish as an important source of both protein and income. The East Sea supplies up to one-tenth of the global fish supply and roughly 70 percent of the fish produced in Southeast Asia comes from the long coastlines, vast continental shelves, and potential exclusive economic zones (EEZs) of states in the region, particularly from the East Sea and the western central Pacific Ocean.³

Fisheries in Southeast Asia contribute up one-tenth of gross domestic product (GDP) in Southeast Asia. Seafood accounts for just over 50 percent of Vietnam's agricultural exports, significantly higher than the regional average of 38 percent.⁴

The increasing demand for seafood products from the rapidly growing middle class in the countries bordering the East Sea is creating mounting pressure on the already significantly depleted resources of the sea. Some researchers estimate that overfishing in Southeast Asia broadly has depleted coastal fish stocks by 5 to 30 percent of their unexploited levels.⁵

Depleted supplies are pushing fishermen from countries bordering the East Sea to go further offshore in search of seafood. Fishermen from Vietnam and the Philippines operate in the northern reaches of the sea around the Paracel Islands, while fisherman from China go to the southern part near Vietnam and the Philippines.

¹ Robert S. Pomeroy, "Marine Fisheries in Crisis: Improving Fisheries Management in Southeast Asia," in R. Hathaway and M. Mills (eds.), *Managing New Security Challenges in Asia* (Washington, DC: Woodrow Wilson Center Press, 2013). Another source for fish catch figures in the East Sea for China, Vietnam, Thailand, the Philippines, Malaysia, and Indonesia is <http://www.fao.org/docrep/017/i3185e/i3185e00.pdf>. Much of the material in this section is taken from Murray Hiebert and Gregory Poling, "The South China Sea," a chapter prepared for the World Wildlife Fund which will be published later this year.

² Tabitha Grace Mallory, "China's distant water fishing industry: Evolving policies and implications," *Marine Policy* 38 (March 2013): 99.

³ Pomeroy, "Marine Fisheries in Crisis."

⁴ *Ibid.*

⁵ Len R. Garces, Michael D. Pido, and Robert S. Pomeroy, "Fisheries in Southeast Asia: Challenges and Opportunities," in *Transnational Trends: Middle Eastern and Asian Views* (Washington, DC: The Henry L. Stimson Center, 2008) http://www.stimson.org/images/uploads/research-pdfs/Stimson_ch9.pdf, 175.

China Interdicts Vietnamese Fishermen in Vicinity of Paracels

As fishermen go further from home they run into disputes with the authorities of neighboring countries and many of them get arrested. In some cases, naval vessels ram fishing boats from nearby countries and sometimes maritime policing officials fire on and damage fishing boats from neighboring countries.

For example, on January 2, 2014, several Chinese vessels chased and rammed two Vietnamese fishing boats in the vicinity of the Paracels. The Chinese side caught up with one of the boats and its officers climbed on board and allegedly harassed the fishermen, confiscated five tons of fish, and damaged some of their equipment.⁶

A similar incident happened off the coast of Quang Ngai on January 7, 2014, when a Vietnamese fishing boat with seven fishermen was chased and boarded by Chinese officials, who reportedly damaged equipment on board. On March 1, another boat from Quang Ngai with 12 fishermen was stopped by a Chinese fishery patrol vessel and officials confiscated some of the Vietnamese equipment.

The Vietnamese Foreign Ministry on March 17, 2014, handed a diplomatic note to officials in the Chinese Embassy in Hanoi requesting that China investigate the incidents of January 7 and March 1 in which its enforcement officials allegedly chased and damaged Vietnamese boats in Vietnam's "traditional fishing grounds" around the Paracel archipelago. Vietnam asked China to compensate the Vietnamese fishermen and avoid similar incidents in the future.⁷

Similar incidents were reported by the Vietnamese media last year. On March 20, 2013, a Vietnamese fishing boat was reportedly chased and hit by a flare from a Chinese maritime surveillance vessel, resulting in the Vietnamese boat's cabin being burned in the attack.⁸ Vietnamese officials said this attack marked an increased use of force by the Chinese side, which normally has not used weapons when confronting foreign fishing boats. Chinese Foreign

⁶ Lao Dong, January 7, 2014 <http://laodong.com.vn/hoat-dong/keu-goi-giup-ngu-dan-bam-bien-bao-ve-chu-quyen-to-quoc-172001.blđ>

⁷ Vietnam, "China asked to probe damages to Vietnamese vessels," March 20, 2014. <http://en.vietnamplus.vn/Home/China-asked-to-probe-damages-to-Vietnamese-vessels/20143/47746.vnplus>

⁸ Participants in a 2013 conference on the Paracel and Spratly islands organized by Pham Van Dong University were taken to meet the captain of the damaged boat on April 29, 2013.

Ministry spokesman Hong Lei disputed the claim of damage and said “relevant Chinese parties” took “proper and reasonable actions” against what he described as illegal fishing activity.⁹

Other incidents between Vietnamese fishermen and Chinese surveillance officials reportedly took place on May 20,¹⁰ and July 6, 2013.¹¹

China’s Annual Fishing Ban

Since 1999, Beijing has implemented a 10-week fishing ban north of the 12th parallel in the East Sea from about mid-May to early August. During this period, China bans domestic and foreign boats from fishing in this region for the alleged purpose of allowing maritime resources to replenish.¹² Fishermen caught violating this prohibition often have their equipment confiscated.

Vietnam’s Foreign Ministry rejects China’s unilateral move to ban fishing in the East Sea, arguing that it violates Vietnam’s sovereignty over the Paracels and its jurisdiction over its EEZ and continental shelf as defined under the UN Convention on the Law of the Sea.¹³ Manila also does not recognize Beijing’s fishing ban because parts of the area affected includes the Philippines EEZ. The Philippines has declared its right to introduce its own fishing ban in such areas as Scarborough Shoal, which since 2012 has been controlled by China.¹⁴

China has beefed up its ability to supervise fishing in waters it disputes with neighbors, including in the East Sea. Beijing plans to increase its maritime surveillance fleet to 16 aircraft and 350 vessels by the end of 2015.¹⁵

⁹ Jeremy Page, “Hanoi Says Chinese Shot at Boat,” *The Wall Street Journal*, March 26, 2013. <http://online.wsj.com/news/articles/SB10001424127887324789504578383820145232386>

¹⁰ Tuoi Tre News, “Chinese ship attacks Vietnamese fishing boat,” May 25, 2013. <http://tuoitrenews.vn/society/9973/chinese-ship-attacks-vietnamese-fishing-boat-off-hoang-sa>

¹¹ Tuoi Tre News, “VN fishermen accuse Chinese ship of attacking them,” July 10, 2013. <http://tuoitrenews.vn/society/11512/vn-fishermen-accuse-chinese-ship-of-attacking-them>

¹² “China starts annual South China Sea fishing ban,” *Xinhua*, May 16, 2013, http://news.xinhuanet.com/english/china/2013-05/16/c_132386383.htm.

¹³ Vietnam Dismisses China Fishing Ban in East Sea,” *Thanh Nien News*, May 16, 2013, <http://www.thanhniennews.com/index/pages/20130516-vietnam-opposes-china-fishing-ban-on-east-sea.aspx>.

¹⁴ *Ibid.*

¹⁵ Leszek Buszynski, “The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry,” *Washington Quarterly* 35, no. 2 (Spring 2012): <http://csis.org/files/publication/twq12springbuszynski.pdf>, 144.

Hainan Province's New Registration Requirements

Effective January 1, 2014, China's Hainan province put into force new regulations mandating that all foreign fishing vessels get permission from the Chinese government before entering "maritime areas" within the jurisdiction claimed by the province, effectively most of the East Sea. These regulations were approved by Hainan's legislature on November 29, 2013, in an effort to harmonize the province's maritime enforcement activities with the central government's fisheries law, which was originally passed in 1986 and amended in 2000 and 2004.¹⁶

Articles 35 and 37 of these regulations require that foreign fishing boats entering the jurisdiction waters of Hainan province must get approval from officials of China's State Council. Those who refuse to seek approval or obstruct enforcement official will be "punished." Chinese media have reported that these penalties could include seizure of their catches and their fishing equipment, and fines up to 500,000 renminbi (about \$83,000).¹⁷

Both Hanoi and Manila have rejected these regulations. A Vietnamese Foreign Ministry spokesman said the laws are "illegal and invalid" and "violate Vietnam's sovereignty" and called on China to "stop these wrongful acts and make practical contributions to the maintenance of peace and stability in the region."¹⁸

In January 2014, Philippines Defense Secretary Voltaire Gazmin said the Philippines would ignore Hainan province's new fishing regulations and would provide escorts for Filipino fishermen in the West Philippines Sea (the name used by Manila for areas of the East Sea the Philippines claims) "if necessary."¹⁹

Since these registration requirements went into to effect January 1, 2014, neither Chinese officials nor the Chinese media appear to have provided progress reports on how many foreign vessels, if any, have applied for permission to fish in China's claimed territory. Vietnamese and Philippine media have reported the interdiction of their fishermen by Chinese authorities, but

¹⁶ Craig Murray and Kimberly Hsu, "China's New Fishing Regulations Seek to Justify and Consolidate Control in the South China Sea," U.S.-China Economic and Security Review Commission Staff Report, January 27, 2014. http://origin.www.uscc.gov/sites/default/files/Research/USCC%20Staff%20Report_China%27s%20New%20Fishing%20Regulations%20Seek%20to%20Justify%20and%20Consolidate%20Control%20in%20the%20South%20China%20Sea_01%2027%2014.pdf

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Carl Thayer, "Tensions Set to Rise in the South China Sea," The Diplomat, February 19, 2004. <http://thediplomat.com/2014/02/tensions-set-to-rise-in-the-south-china-sea/>

they have not tied these detentions to the requirement for them to obtain permission to fish from Hainan province.

Hainan's Communist Party secretary said on March 6, 2014, that Chinese patrols operating out of Sansha city on Woody Island are intercepting Vietnamese fishermen in the Paracels on at least a weekly rate. "There's something like this happening if not every day then at least once a week, and the majority are dealt with by negotiating and persuasion," the official said.²⁰

Recommendations for Addressing Fishing Disputes

Anecdotally, it appears that more fishermen from Vietnam and neighboring countries have been detained by Chinese authorities in recent years, resulting in more incidents, ship ramming, and destruction or confiscation of fishing and navigation equipment in the East Sea. To date, little effort appears to have been expended to seek a reduction of the numbers of incidents and/or some type of fisheries cooperation agreement in the East Sea. This free-for-all approach to fishing in disputed regions of the sea results in incidents and tension that could lead to accidents and more serious confrontation in the future as the pressures on fishing stocks increase.

There are a couple of models that might be explored for achieving at least minimal regulations and rules to govern fishing in disputed areas of the East Sea:

The first is the Hanoi-Beijing maritime boundary agreement and fisheries cooperation agreement in the waters off Vietnam's northeastern coast and China's southwestern coast which was hammered out in 2000 with the goal of maintaining good relations between the two countries in Gulf of Tonkin and conserving and rationally using its maritime resources. Both agreements went into effect in 2004. The fisheries agreement creates a Common Fishery Zone, which is effectively a buffer zone for small fishing boats in some 30,000 square kilometers that includes much of the most productive fishing areas in the gulf.

This 2004 agreement could potentially be considered as a model for managing fishing activities in other disputed areas of the East Sea, perhaps beginning around the islands in the Paracel archipelago.²¹ As a possible precedent, the United Kingdom and Argentina were

²⁰ Reuters, "China apprehending boats weekly in disputed South China Sea," March 6, 2014. <http://www.reuters.com/article/2014/03/06/us-china-parliament-seas-idUSBREA2512I20140306>

²¹ Zou Keyuan, "The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin," *Ocean Development and International Law* 36 (2005): 14-15.

prepared to cooperate in marine activities around the disputed Falkland Islands in the Atlantic Ocean “without prejudice” to respective sovereignty claims.²²

A second option for increasing regional fisheries cooperation might be to ramp up support for and the activities of the Southeast Asia Fisheries Development Council to monitor and report fish exploitation.²³ The 11 members of this grouping (including all members of the Association of Southeast Asian Nations plus Japan) could increase cooperation on management, conservation, and sustainable fisheries among regional states.

It might be easier to start with just the Southeast Asia claimants to the East Sea (particularly Malaysia, the Philippines, and Vietnam) initially due to China’s hard-line on issues like the unilateral fishing ban, but even an agreement among the smaller grouping could be a useful start. The council is currently underfunded and operating on a limited mission to monitor and report fish exploitation. The group allows participation by outside countries, but so far only Japan has joined. Perhaps the United States could consider participating as well and eventually it might be possible for the Southeast Asian countries to convince China to join not to address the sovereignty disputes but to protect the sea’s diverse fish resources from overexploitation.

Ian Townsend-Gault of the University of British Columbia argues that the best way to protect the environmental, ecological, and living resources of the East Sea would be through “the concept of the large marine ecosystem.” This means focusing on “ecosystem-based management” instead of on the arbitrary divisions about which state has jurisdiction of a certain marine area. This approach allows cooperation without resolving differences over maritime borders.²⁴

The scope and coverage of both the limited Vietnam-China agreement and the Southeast Asia fisheries council could be expanded and their role bolstered to reduce the danger that a fishing dispute could provoke military conflict between the disputing parties in the East Sea. Cooperation in fisheries could be a relatively low-risk effort that would no doubt be easier to

²² Ian Townsend-Gault, “Managing South China Sea Disputes: The Legal Basis for Cooperation,” RSIS Commentaries, June 3, 2014.
<https://pod51044.outlook.com/owa/#viewmodel=ReadMessageItem&ItemID=AAMkAGNkOTczMmViLTm3OWEtNDFiYi04ZDM0LTA4ODM1NTdlY2I4OABGAAAAAACoOwcQWLK8RbV3WS%2BaM7YhBwD0yPm1kD1BR4Lvq34xn7JkAAAAolu2AABtXInFmetQQ4CdZxxTONr%2FAAEGRV8LAAA%3D&wid=66&ispopout=1>

²³ <http://www.seafdec.org/>

²⁴ Townsend-Gault, “Managing South China Sea Disputes: The Legal Basis for Cooperation.”

achieve than joint oil and gas development in disputed areas. Fisheries cooperation could serve as a confidence building measure that might lead to other forms of cooperation the future.

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.Achievements and Challenges in Dispute Settlement and Management in the South China Sea¹

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Abstract: The paper assesses the progress made in dispute settlement and management in the South China Sea. The remaining challenges are also analysed in the paper. The progress made is outlined through an overview of settled and managed disputes in the South China Sea and adjacent areas, i.e. the Gulf of Thailand and the Gulf of Tonkin. This is followed by an analysis of the settlement and management approaches. The challenge of the un-settled disputes is analysed and assessed by highlighting both the nature of the disputes and efforts made to manage them. The paper concludes by a broader assessment of progress made and remaining challenges in the South China Sea from the perspectives of dispute settlement and management.

Purpose and structure

The main purpose of the paper is to assess the progress made in dispute settlement and management in the South China Sea. The remaining challenges are also analysed in the paper. The progress made is outlined through an overview of settled and managed disputes in the South China Sea and adjacent areas, i.e. the Gulf of Thailand and the Gulf of Tonkin. This is followed by an analysis of the settlement and management approaches.

The challenge of the un-settled disputes is analysed and assessed by highlighting both the nature of the disputes and efforts made to manage them. The paper is concluded by a broader assessment of progress made and remaining challenges in the South China Sea from the perspectives of dispute settlement and management.

The paper is structured as follows. First, the term dispute settlement is discussed through global, regional and national dimensions with reference to the South China Sea region. Second, the settled disputes are identified and analysed. Third, the remaining un-settled dispute situations are identified and approaches to management are outlined. Fourth, a broader analysis is carried out in the concluding section.

Peaceful Settlement of Disputes – Global, Regional and National Dimensions

Dispute settlement is a fundamental principle in the international system and it is evidently displayed in relevant provisions of the Charter of the United Nations and of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), respectively.²

The Charter is explicit in its commitment to the peaceful settlement of disputes in Article 2(3) and Chapter VI, in addition the prohibition of the threat or use of force in Article 2(4) is of relevance.³

Article 2(3) reads as follows: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁴

Chapter VI contains six articles – 33 to 38. In the context of this paper the text of the provisions relating to obligations of member states are highlighted. Article 33(1) reads:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”⁵

Peaceful settlement is the “first of all” obligations when a state becomes a party to a dispute. Article 33(1) strongly requires the parties to any dispute to seek a solution through peaceful means by using procedures such as negotiation, enquiry, mediation, conciliation, arbitration, as well as judicial settlement.

Article 2(4) reads as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations.”⁶

The interpretations of the provisions of Article 2(4) have been the focal point of an extensive debate among international legal scholars. Despite the divergent interpretations of Article 2(4) there is a consensus that this Article provides a general prohibition of the threat or use of armed force in inter-state relations.⁷

As a constitutive instrument covering broad issues and protecting complex and sometimes contradictive interests, UNCLOS needs some procedural guarantee to safeguard the balances and compromises achieved during the long negotiating process in drafting the document. The procedures of Part XV of UNCLOS function as a referral to achieve its primary

objective, for States parties to settle their disputes concerning the interpretations and applications of UNCLOS by peaceful means.⁸

The Association of Southeast Asian Nations (ASEAN) promotes an approach and framework that can be characterised as conflict management in the broad sense of the term. ASEAN also puts strong emphasis on the non-use of force and peaceful settlement of disputes within the ASEAN framework.⁹ This emphasis has been displayed in key ASEAN documents such as “The ASEAN Declaration”, the “Declaration of ASEAN Concord”, the “Treaty of Amity and Cooperation” (TAC), the “Declaration of ASEAN Concord II”, and the “Charter of the Association of Southeast Asian Nations”.¹⁰

China’s foreign policy is still governed by the “Five Principles of Peaceful Coexistence” which were formulated for the first time in the agreement between China and India of 29 April 1954. These principles are fundamental not only to China’s overall foreign policy but also to China’s bilateral relations with several countries. The essence of the five principles have been summarised as follows by Zou Keyuan: “(1) respect for each other’s sovereignty and territorial integrity, (2) non-aggression, (3) non-interference in each other’s internal affairs, (4) equality and mutual benefit and (5) peaceful coexistence”.¹¹ Respect for sovereignty and non-interference display strong commitment to Article 2 (7) of the Charter of the United Nations.¹² Non-aggression is in line with the prohibition of the threat or use of force since it rules out the practice of attacking another country. Peaceful coexistence implies that a country does not threaten or use force against another country. It also implies that disputes should be handled with peaceful means.

In addition the TAC has developed into an arrangement beyond the ten member states of ASEAN. In October 2003 China along side India became the first non-Southeast Asian countries to accede to the TAC. Consequently, the TAC is the key part of the ASEAN dispute management framework that can guide both the Southeast Asian claimants and China in maintaining peace and stability in the South China Sea. The TAC provides three main factors for managing inter-state relations; non-interference in the internal affairs of other countries, peaceful settlement of disputes, and overall co-operation.¹³

Conflict resolution and dispute settlement in the South China Sea region

Introduction

The South China Sea region displays a variety of approaches which aim to contribute

and promote the peaceful settlement of disputes. In the context of this paper attention is devoted to the disputes in maritime areas of the South China Sea and adjacent areas – such as the Gulf of Thailand, the Gulf of Tonkin, and the Sulu Sea – relating to maritime zones and to insular features. The overview of approaches is divided into two broad categories, first, formal settlement of disputes and, second, efforts to promote the peaceful management of disputes that have not been formally settled. The first section outlines the formally settled disputes and the second section examines approaches to peacefully manage unsettled disputes.

Formally settled disputes

The formally settled disputes are primarily bilateral ones, which involved two parties and resulted from direct negotiations between the two parties. There are a few trilateral negotiated agreements relating to tri-junction points where bilaterally agreed maritime boundaries intersect. There are two cases of disputes over insular features, which have been settled through international jurisprudence by the International Court of Justice (ICJ). The analysis of settled disputes will be devoted to the negotiated agreements in the post Cold War Era and to the cases brought to the ICJ. In addition a sub-section will be devoted to un-fulfilled agreements.

Negotiated agreements¹⁴

- On 27 October 1969 Indonesia and Malaysia reached an agreement on the delimitation of their continental shelf boundary in the central and southern parts of the Strait of Malacca and in areas to the west and east of the Natuna Islands in the South China Sea.¹⁵ On 17 March 1970 they signed an agreement delimiting their territorial sea boundary in the Strait of Malacca.¹⁶

- On 21 December 1971 an agreement was signed between Indonesia, Malaysia and Thailand relating to the establishment of a “Common point” (Tri-junction point) on the continental shelf in the Straits of Malacca and the delimitation of their continental shelf boundaries in the northern part of the Straits of Malacca.¹⁷

- On 25 May 1973 Indonesia and Singapore signed a Treaty relating to the delimitation of the territorial seas of the two countries in the Strait of Singapore.¹⁸ On 10 March 2009 they signed a further Treaty delimiting the territorial seas of the two countries in the western part of the Strait of Singapore.¹⁹

- On 24 October 1979 Malaysia and Thailand signed a Treaty relating to the delimitation of the territorial seas between the two countries in the Strait of Malacca and in the Gulf of Thailand.²⁰ On the same day, they signed a Memorandum of understanding for the partial delimitation of their continental shelves in the Gulf of Thailand.²¹

- On 7 July 1982 Vietnam and the then People's Republic of Kampuchea (PRK) signed an agreement on "historic waters" located between the coast of Kien Giang Province, Phu Quoc Island and Tho Chu islands on the Vietnamese side and the coast of Kampot Province and Pulo Wai islands on the Cambodian side. The agreement stipulated that the two countries would hold – "at a suitable time" – negotiations to determine the maritime frontier in the "historic waters". Pending such a settlement the two sides would continue to regard the Brévié Line drawn in 1939 as the diving line for the islands within the "historic waters" and the exploitation of the zone would be decided by "common agreement".²² On 20 July 1983 the two countries signed a Treaty on the settlement of border problems and an Agreement on border regulations.²³ On 27 December 1985 the Treaty on the Delimitation of the Vietnam-Kampuchea Frontier was signed.²⁴ Furthermore, in 1991 the two countries agreed on a "working arrangement" line in the Gulf of Thailand as being equidistant from Tho Chu islands on the Vietnamese side and Pulo Wai islands on the Cambodian side.²⁵ Finally, on 10 October 2005 the two countries signed a Supplementary Treaty to the 1985 Treaty.²⁶

- On 9 August 1997 Thailand and Vietnam reached an agreement delimiting their continental shelf and exclusive economic zones (EEZ) boundaries in the Gulf of Thailand to the south-west of Vietnam and to the north-east of Thailand.²⁷

- On 25 December 2000 China and Vietnam signed the "Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin".²⁸

- On 18 June 2001 Cambodia and Thailand signed a "Memorandum of Understanding" relating to the areas of overlapping claims in the Gulf of Thailand.²⁹

- On 11 June 2003 Vietnam and Indonesia signed an agreement on the delimitation of their continental shelf boundary in an area to the North of the Natuna Islands.³⁰

- On 16 March 2009 through the Exchange of Letters signed by the Sultan of Brunei Darussalam and the Prime Minister of Malaysia, Brunei and Malaysia established the final delimitation of their maritime boundaries relating to the territorial sea, EEZ and continental shelf in the South China Sea.³¹

Analysis of negotiated settlements in the post Cold War era

*Thailand-Vietnam*³²

The agreement of 9 August 1997 between Thailand and Vietnam was the first agreement in the region to use a single line for delimiting both continental shelf and EEZ between countries. It was also the first settlement of a maritime dispute in the region after the UNCLOS came into effect. It reaffirmed the tendency of using a single boundary for both continental shelf

and EEZ in an area that extends less than 400 nautical miles between opposite coasts. It is also of relevance in the context of the effects of islands for international maritime delimitation. For Vietnam it was its first agreement on maritime delimitation. The agreement entered into force on 27 February 1998, following the completion of the ratification process.

*Gulf of Tonkin*³³

The maritime delimitation agreement of 2000 on the Gulf of Tonkin was the first maritime boundary between China and Vietnam. It was also China's first maritime boundary agreement. The Agreement was reached through rounds of negotiations after the full normalisation of bilateral relations in late 1991. It reaffirms the Vietnamese position of using a single line for both the continental shelf and an EEZ in an area of less than 400 nautical miles between opposite and adjacent coasts. The Agreement is also relevant from the following perspectives: the effects of coastal and outlying islands most notably Bach Long Vi, the role of low-tide elevations in delimitation, the issues of the outlet of a boundary river, and the question of a closing line for the Gulf. On 30 June 2004 maritime delimitation agreement entered into force following the completion of the ratification process.³⁴

*Indonesia-Vietnam*³⁵

During the 1990s there was no progress made in negotiating the maritime disputes between Indonesia and Vietnam, but stability was maintained. This state of affairs continued to prevail into the early 2000s until a breakthrough was made leading to the agreement of June 2003 settling the maritime dispute relating to overlapping continental shelf claims between the two countries. This was the first maritime boundary between the two countries. However, the EEZ boundary in the same area needs to be settled. In this process of bilateral negotiation, the continental shelf and EEZ have been treated as separate issues. After the completion of the ratification process the agreement entered into force on 29 May 2007.

International jurisprudence

On 17 December 2002 the ICJ made its Judgement on the dispute over Sipadan Island and Ligitan Reef between Indonesia and Malaysia (Judgement of 17 December 2002).³⁶ On the basis of effectiveness the Court concluded that Malaysia had title to Ligitan and Sipadan.³⁷

On 23 May 2008 the ICJ made its Judgement on the dispute over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore (Judgement of 23 May 2008).³⁸ In its judgment the ICJ concluded that sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.³⁹ However, the Court found that title to Middle Rocks would

remain with Malaysia as the successor to the Sultan of Johor.⁴⁰ For South Ledge, the Court concludes that it belonged to the state in the territorial waters of which it was located.⁴¹

Analysis of International jurisprudence⁴²

The two judgments pronounced by the ICJ relate to sovereignty disputes over islands and insular features between Southeast Asian countries. The first judgment was on the dispute between Indonesia and Malaysia over Sipadan Island and Ligitan Reef (Judgment of 17 December 2002).⁴³ The second judgment was on the dispute between Malaysia and Singapore over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Judgment of 23 May 2008).⁴⁴

The two cases and judgments display some similarities. They both concern disputes relating to sovereignty over small insular features and none of them were permanently inhabited. They both also concern the original titles based on historical arguments and maps, the titles of succession through different historical periods from pre-colonial, colonial to the recent claimant states, “critical date”, and effectiveness. Both judgments were made on the basis of effectiveness.

In the case over the Sipadan Island and Ligitan Reef, the ICJ noted that the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over claimed territory. These activities were:

“modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts. They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands”.⁴⁵

The fact that the Indonesian authorities did not protest against the construction of lighthouses by the British Colony of North Borneo and after 1963 by Malaysia, was considered as unusual by the ICJ. On the basis of effectiveness, the Court concluded that Malaysia had title to Ligitan and Sipadan.⁴⁶

In the case over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, the Court found that original title to Pedra Branca/Pulau Batu Puteh should remain with Malaysia as the successor to the Sultan of Johor. However, in the conclusion of the ICJ, Singapore had sovereignty over Pedra Branca/Pulau Batu Puteh. Singapore had carried out activities such as investigating shipwrecks within the island’s territorial waters, surveying the waters surrounding the island in 1978, and planning to reclaim areas around Pedra Branca/Pulau Batu Puteh.

Malaysia and its predecessors failed to respond to the activities of Singapore and its predecessors. Even in June 2003, after the Special Agreement on submitting the dispute to the Court came into force, Malaysia just protested against Singapore's activities in 1980. Taking into account the conducts of the two parties, the ICJ concluded that sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.⁴⁷ However, the ICJ found that the original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor.⁴⁸ In the case of South Ledge, the Court concluded that it would belong to the State in the territorial waters of which it was located.⁴⁹

The ICJ did not have the opportunity to address the relationship between the dispute over sovereignty of island, reefs and low-tide elevations and maritime zones. In fact the ICJ was not asked to settle the issues relating to maritime zones around them. In the Special Agreement submitted to the ICJ, the Parties asked only for a ruling on the issue of sovereignty, separately for each of the three insular features. Malaysia and Singapore did not ask the ICJ to rule on the issue of maritime delimitation.

Un-fulfilled agreements

Not all agreements reached are fulfilled. One case is that between Cambodia and Vietnam. Their overlapping maritime claims in the Gulf of Thailand which remains unresolved despite the 1982 Agreement on "historic waters" and the 1991 "working arrangement" line in the Gulf of Thailand as being equidistant from Tho Chu islands on the Vietnamese side and Poulo Wai islands on the Cambodian side.⁵⁰ Some political factions and parties within Cambodia have opposed the agreements between Vietnam and Cambodia signed in the 1980s. New bilateral talks on the status of the borders between the two states have been initiated in order to reach a solution to the remaining disputed issues.⁵¹ The Supplementary Treaty of October 2005 relates only to the land border and not to the maritime issues between the two countries.

Another case is the 2001 "Memorandum of Understanding" relating to the areas of overlapping claims in the Gulf of Thailand between Cambodia and Thailand which has not been implemented and reports that Thailand would withdraw or terminate it led to an official protest by Cambodia in November 2009.⁵² Thus the two sides still have to reach a settlement relating to the overlapping claims to maritime zones in the Gulf of Thailand.⁵³ The tension and differences relating to the land border and the high profile dispute in the area of the temple of Preah Vihear cannot be overlooked in the context of the difficulties in managing border issues between the two countries.⁵⁴

Other approaches

For disputes in which only two parties are directly involved, the parties have mainly carried out conflict management through bilateral negotiations and other bilateral arrangements. For disputes involving more than two parties both bilateral initiatives and initiatives involving three or more parties to a dispute have been implemented. Also at regional level attempts have been initiated for the purpose of containment of dispute situations by building confidence among disputants. Following an overview of the remaining unsettled disputes key initiatives bilaterally, trilaterally and regionally will be highlighted.

Dispute situations

In the South China Sea, China's and Chinese Taipei's sovereignty claims to the Paracel archipelago overlaps with Vietnam's claim to the archipelago. China's and Chinese Taipei's sovereignty claims to the whole Spratly archipelago is another dispute with Vietnam which is bilateral – "China-Vietnam" – for areas not claimed by other Southeast Asian countries and a multilateral dispute for those areas also claimed by Brunei, Malaysia and the Philippines, respectively. Furthermore, China's and Chinese Taipei's claims within the "U-shaped nine-dashed lines"⁵⁵ in the South China Sea proper overlap to varying degrees with claims to EEZ and continental shelf areas made by Vietnam to the east of the Vietnamese coast, made by Indonesia to the north-east of the Natuna islands, made by Malaysia to the north of the coast of the state of Sarawak and to the north-west of the state of Sabah, made by Brunei Darussalam to north of its coast, and made by the Philippines to the west of the Filipino archipelago.

In the Gulf of Thailand there is a multilateral – trilateral – dispute relating to an area of overlapping claims between Malaysia, Thailand and Vietnam.⁵⁶ Also in the Gulf of Thailand the bilateral disputes between Cambodia and Thailand and between Cambodia and Vietnam, respectively, have been identified above.

Bilaterally between Malaysia and the Philippines the maritime boundaries in the South China Sea, in the Sulu Sea as well as in the Celebes Sea have not been delimited.⁵⁷ In addition the dispute over Sabah, i.e. the Philippines claim to the States of Sabah in Malaysia – still impacts on maritime differences between the two countries.⁵⁸

Indonesia and Malaysia have overlapping EEZ claims in parts of the South China Sea located north of Tanjung Datu. In addition the continental shelf boundary between the two countries in the western Celebes Sea has not been delimited. Furthermore, the two countries have overlapping claims to EEZ in the Strait of Malacca and in the western Celebes Sea.⁵⁹

Malaysia and Singapore have two disputes to resolve. First, following the ICJ ruling on the case of Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge the maritime boundaries relating to jurisdictional zones in the area needs to be settled. Second, the two sides have to agree on the offshore boundary in the Strait of Johor and the Singapore Strait to the south of Singapore.⁶⁰ Between Vietnam and Indonesia the issue of the delimitation of the EEZ between the two countries remains to be settled.

Joint Development

On 21 February 1979 Malaysia and Thailand signed a Memorandum of understanding (MoU) on the establishment of a joint authority for the exploitation of the seabed in a “defined” area of the continental shelf in the Gulf of Thailand. This MoU recognised that there was an area of overlapping claims on the adjacent continental shelves and that negotiations would continue to complete the delimitation of the boundary in the area. The two countries agreed to exploit the resources of the seabed in the disputed area through mutual co-operation. It was also decided to establish a Joint Authority to be known as Malaysia-Thailand Joint Authority. On 13 May 1990 the two countries reached an agreement on the constitution and other matters relating to the establishment of the Malaysia-Thailand Joint Authority.⁶¹

On 5 June 1992 an agreement was reached between Malaysia and Vietnam to engage in joint development in an area of overlapping claims to continental shelves to the south west of Vietnam and to the east-north east off the east coast of Peninsular Malaysia. Malaysia and Vietnam assigned their state-owned oil companies, PETRONAS and PETROVIETNAM, respectively, to undertake petroleum exploration and exploitation in 1993, and in July 1997, oil was extracted from the Bunga Kekwa field.⁶²

The Malaysia-Vietnam model is more flexible than the Malaysia-Thailand model because the former is sharply focused on facilitating petroleum exploration and exploitation at the earliest opportunity with the minimum of governmental participation or interference.⁶³

Other bilateral initiatives

*China-Vietnam*⁶⁴

The most extensive bilateral talks are the ones between China and Vietnam since the full normalisation of their relations in late 1991. 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).

Talks at the expert-level were initiated in October 1992. The talks at the government-level began in August 1993. 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 Gulf of Tonkin met seventeen times from March 1994 to December 2000 when of the Agreement on the Demarcation of Waters, Exclusive Economic Zones and Continental Shelves in the Gulf of Tonkin was signed. Talks at the expert-level on the disputes in the South China Sea proper, the so-called “sea issues”, were initiated in November 1995.

In response to the periodic increases in the level of tensions during the period 2009-2011 relating to the disputes in the South China Sea, China and Vietnam reached an “Agreement on basic principles guiding the settlement of sea-related issues” in October 2011. The two countries have taken steps to implement the agreement in 2012 and 2013, for example “departmental level” talks on “demarcation of areas outside the mouth of” the Gulf of Tonkin have been initiated as have talks on “co-operation in less sensitive fields at sea”. High-level meetings in 2013 have highlighted the continued push for management of the South China Sea situation by the two countries. In connection with the official visit of China’s Prime Minister, Li Keqiang, to Vietnam on 13-15 October 2013 the two sides agreed to: “observe the common perception reached by leaders of the two Parties and States, and stringently implement ‘the agreement on basic principles guiding the settlement of sea issues between Viet Nam and China’.”⁶⁵ Both sides also agreed to: “establish a working group in charge of cooperation for mutual development at sea as part of the Governmental Negotiation Team on Viet Nam-China Boundary and Territory.”⁶⁶

In addition it was agreed to: “intensify instructions to the existing consultation and negotiation mechanisms, boost the operation of the working group on the waters off the mouth of the Tonkin Gulf and the expert-level working group on cooperation on less sensitive issues at sea.”⁶⁷

The period of deepened management and cooperation was brought to an abrupt halt in early May when Vietnam protested against China’s drilling activities in water areas to the west of the Paracel Archipelago. The tension related to the incident has lasted longer than any incident since the 1990s and to date tension is still running high. The tension has brought to the forefront the overlapping claims of the two countries to the Paracel Archipelago. In addition differences relating to claims to maritime zones in the area have been displayed.⁶⁸

*China-Philippines*⁶⁹

In August 1995 bilateral talks between China and the Philippines following the Misschief Reef incident resulted in an eight point code of conduct in the Joint Statement of the Republic of Philippines and the People's Republic of China (RP-PRC) Consultations on the South China Sea and on Other Areas of Cooperation. In 1997 another incident occurred between the two countries relating to Scarborough Shoal despite this incident the two countries moved ahead with a bilateral dialogue and consultation relating to maritime issues. This trend prevailed during the major part of the Presidency of Gloria Macapagal-Arroyo (2001-2010).

Following several incidents that caused increased tensions between the two countries in the South China Sea in particular relating to Scarborough Shoal in 2012, the Philippines "instituted arbitral proceedings" against China on 22 January 2013. This was done under Annex VII to UNCLOS "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea."⁷⁰ On 19 February 2013, China presented a Note Verbale to the Philippines through its Embassy in Manila in which China rejected and returned the Philippines' Notification.⁷¹ Since China refuses to participate in the arbitral proceedings the initiative of the Philippines has become a unilateral one. The Philippines argues that China's "nine-dashed line" is not supported by UNCLOS. The Philippines asks the Arbitral Tribunal to rule also on the legal status of some certain insular features in the South China Sea occupied by China such as Mischief Reef, McKennan Reef, Gaven Reef, Subi Reef, Scarborough Shoal, Johnson South Reef, Cuarteron Reef, and Fiery Cross Reef.⁷²

Philippines-Vietnam

In November 1995 bilateral talks between the Philippines and Vietnam resulted in a nine point code of conduct in the Joint Statement of the Fourth Annual Bilateral Consultations between the Philippines and Vietnam.⁷³

Joint Submission to the Commission on Outer Limits of the Continental Shelf

On 6 May 2009, Malaysia and Vietnam made a joint submission to the Commission on Outer Limits of the Continental Shelf CLCS relating to their extended continental shelves in a defined area in the South of the South China Sea.⁷⁴ The Joint Submission by Malaysia and Vietnam constitutes a negotiated agreement between the two countries and this is a positive bilateral effort in conflict management.

Malaysia and Vietnam maintained the position that the joint submission would not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts in the South China Sea. Both China – on 7 May 2009 – and the Philippines – on 4 August 2009 – responded with official objections. China considered that the submission

infringed upon its sovereignty, sovereign rights and jurisdiction in the South China Sea. Furthermore, China reiterated its claims in the South China Sea and attached a map including the “nine-dashed lines”. The Philippines considered that the joint submission encompasses areas that are disputed since they overlap with that of the Philippines. Furthermore, the Philippines referred to “the controversy arising from the territorial claims on some of the islands in the area including North Borneo”, i.e. the Kalayan Island Group (part of the Spratly archipelago) and the Sabah conflict with Malaysia.⁷⁵

Trilateral initiatives

In the Gulf of Thailand the initiation of trilateral talks between Vietnam, Malaysia and Thailand relating to an area of the Gulf of Thailand where the claims of the three countries overlap was made possible through the maritime boundary agreement between Vietnam and Thailand in 1997. Although the parties agree in principle on joint development in the overlapping area, the modalities for such a trilateral scheme has yet to be agreed upon.⁷⁶

On 14 March 2005 the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea (JSMU) was signed between the national oil companies of China, the Philippines, and Vietnam – Chinese National Offshore Oil Company (CNOOC), Philippines National Oil Company (PNOC), and PETROVIETNAM.⁷⁷ All activities in the Area had to be consulted between the concerned parties. The tripartite agreement related to seismic survey and research in a 143,000-square-kilometer area in the South China Sea, including parts of the disputed Spratly archipelago, for a period of three years up to 2008. The signing of the agreement “would not undermine the basic position held by the Government of each party on the South China Sea issue”. The parties expressed their “resolve to transform the South China Sea into an area of peace, stability, cooperation and development”.⁷⁸ The cooperation undertaken by the three national oil companies was within the framework of marine scientific research and it did not include any arrangements relating to the exploitation of resources in the area.

Regional initiatives

Regional initiatives have centred on ASEAN. In 1992 it adopted the “ASEAN Declaration on the South China Sea”. The Declaration emphasizes the “necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force”. It urges “all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes.”⁷⁹

Following the Mischief Reef incident of 1995 between China and the Philippines, The

Foreign Ministers of the ASEAN member-states issued a statement – “Recent Developments in the South China Sea” – contending that all parties must apply the principles contained in the Treaty of Amity and Co-operation in Southeast Asia (TAC)⁸⁰ as the basis for establishing a code of conduct for the South China Sea for the purpose of creating an atmosphere of security and stability in the region.⁸¹

The initial ASEAN-China dialogue relating to the South China Sea was primarily characterised by the search for mutually agreeable mechanisms to manage the situation in the South China Sea. The two sides set up the “ASEAN-China Working Group on the Regional Code of Conduct on the South China Sea”, which held its first meeting on 15 March 2000, and the issue was also addressed at various levels of the ASEAN-China Dialogue. After reconciling differences between ASEAN and China as well as within ASEAN, the ten member states of ASEAN and China signed the Declaration on the Conduct of the Parties in the South China Sea (DOC) in November 2002.⁸² In July 2011 ASEAN and China adopted the “Guidelines for the Implementation of the DOC”.⁸³ There are also on-going discussions within ASEAN as well as between ASEAN and China relating to a possible Code of Conduct (COC) for the South China Sea, which are further positive steps.⁸⁴

Concluding remarks

This paper has displayed that considerable progress has been made in terms of both formal settlement of disputes and conflict resolution as well as in the broader management of disputes in the South China Sea and in particular in the Gulf of Tonkin and in the Gulf of Thailand. The settlement of maritime delimitation between two parties clearly is easier than the ones involving more than two parties. The settlement of maritime delimitation is also easier when the sovereignty over insular features is clearly defined. Direct negotiations are preferred model and approach of the Southeast Asian countries even though some cases have been brought to the international courts and tribunals.⁸⁵

Efforts have been made to resolve maritime disputes resulting in maritime delimitation agreements. It is notable that negotiated formal settlement of disputes has primarily taken place during two periods of time, first, a decade from the late 1960s to the late 1970s and second, in the post-Cold War era when almost Southeast Asian countries became members of the UNCLOS. In addition, UNCLOS came into effect in 1994. During the later period agreements have been reached between, Thailand and Vietnam in 1997, between China and Vietnam in 2000, between Indonesia and Vietnam in 2003, and between Brunei and Malaysia in 2009. The

ICJ has been invoked for settling two cases of ownership of insular features, i.e. between Indonesia and Malaysia (ruling in 2002) and between Malaysia and Singapore (ruling in 2008).

In terms of management of the un-settled dispute situations, some countries have agreed upon joint development schemes. This has allowed them to shelve the issue of maritime delimitation for the time being and to move ahead with the exploration of non-living resources, i.e. between Malaysia and Thailand and between Malaysia and Vietnam, respectively. The experiences of JDA in the Gulf of Thailand provide alternative models for JDA involving more than two parties. Thus far the inconclusive attempt among Thailand, Malaysia and Vietnam in the Gulf of Thailand indicates the difficulties regarding multilateral attempts at establishing joint development arrangements.

In the South China Sea proper, some relevant bilateral attempts can be noted. The expert-level talks between China and Vietnam relating to the South China Sea situation have been on-going since the mid-1990s. The South China Sea is also on the agenda for Government- and High-level talks between the two countries relating to their bilateral disputes. Other notable bilateral initiative was between China and the Philippines leading to the 1995 agreement on bilateral code of conduct between the Philippines and China and between the Philippines and Vietnam leading to a bilateral code of conduct later the same year. In the current situation both the China-Philippines case and the China-Vietnam case, respectively, are affected by tension rather than progress in bilateral dispute management. This has been the case between China and the Philippines for some years. Between China and Vietnam, the periodic increases in the level of tension in the 2009-2011 period were brought under control and progress was made in dispute management until renewed differences and related tensions emerged in early May 2014.

In 2009 the joint submission by Malaysia and Vietnam to the CLCS relating to the outer limits of their continental shelves in a defined part of the South China Sea was positive in the context of the bilateral relationship, but it also generated objections from both China and the Philippines.

The above bilateral examples display the complexities of the South China Sea situation with periods of progress in dispute management and periods of tension within one and the same bilateral relationship. Also progress between two countries can lead to differences with other claimants as displayed by the Malaysia-Vietnam joint submission.

Trilaterally the most interesting case thus far was the China-Philippine-Vietnam trilateral seismic survey between 2005 and 2008, which was not renewed due to the domestic situation in

one of the parties. The Philippines case against China needs to be addressed. As was noted above since China refuses to participate in the arbitral proceedings and consequently the initiative of the Philippines has become a unilateral one. In addition that case displays some differences compared to the two cases brought to ICJ, by Indonesia and Malaysia and between Malaysia and Singapore, respectively. First, the legal organ to be addressed in the Philippines' case against China is a Tribunal created under Appendix VII of UNCLOS and not the ICJ. Second, there is only one party to pursue the proceedings. Third, the request of Philippines is not focused on maritime delimitation and in addition it is not focused on sovereignty dispute over insular features.

Efforts have also been attempted at the regional level through the ASEAN-China Dialogue which led to the first regional document on the South China Sea in 2002, i.e. the DOC. It is generally acknowledged that peaceful management of the maritime disputes in the South China Sea is in the common interest of all claimants. The on-going efforts to both fully implement the DOC and to possibly agree on a "COC" are further positive developments.

Despite positive developments a number of bilateral disputes remain to be settled. Some multilateral disputes situations are also unsettled and the situation in and around the Spratly archipelago is considered the most serious from a regional perspective. Bilateral, trilateral efforts and also regional initiatives such as the ASEAN-China dialogue and the DOC are positive steps in terms of conflict management, but further efforts are needed including the on-going ASEAN-China dialogue on a possible "COC".

The parties to the disputes in the South China Sea region have been making efforts to implement the principles and provisions provided both in the Charter of the United Nations as well as in UNCLOS by settling disputes through peaceful means. The formally settled disputed have been achieved through direct negotiations or through international jurisprudence. Conflict management approaches have also been initiated at different levels including at bilateral and at regional levels. These approaches aim to maintain peace and stability, to reduce the risk of incidents causing tension, to manage tension that might occur, and to create conducive conditions for the future peaceful settlement of the disputes.

As displayed by tension between key claimants states in the South China Sea, i.e. between China and the Philippines and between China and Vietnam, respectively, incidents and associated tension negatively affects efforts aiming at promoting and implementing dispute management. This indicates that greater efforts have to be made in order to minimise the risk of incidents occurring and to contain tension when incidents do occur.

Notes

¹ This paper draws on on-going research and the empirical information is revised and updated from Ramses Amer and Nguyen Hong Thao, *Conflict Resolution in the South China Sea – An overview of Progress Made and of Remaining Challenges*, paper presented at “The South China Sea: Cooperation for Regional Security and Development”, organised by Diplomatic Academy of Vietnam and Vietnam Lawyers Association, Hanoi, 10-12 November 2013.

² For a recent survey of the relevant provisions and their interpretations including the scholarly debates see Ramses Amer and Li Jianwei, “Dispute Settlement in Practice – Assessing Progress and Challenges in the South China Sea Region,” in *30 years of the United Nations Convention on the Law of the Sea (1982-2012): Progress and Prospects*, ed. Guifang (Julia) Xue and Ashley White (Beijing: China University of Political Science and Law Press, 2013), pp. 259–271.

³ “Charter of the United Nations,” from the website of the *United Nations*, accessed 19 March 2012.

<http://www.un.org/en/documents/charter/chapter1.shtml>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ References to the discussions about Article 2(4) can be found in: Belatchew Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2 (4)*, Studies in International Law 10, Uppsala University, Swedish Institute of International Law (Uppsala: IUSTUS förlag, 1991), pp. 38–40 and 199–200, D. W. Bowett, “Collective Self-Defence Under the Charter of the United Nations,” *British Yearbook of International Law* XXXII (1955-1956), 131, and Ian Brownlie, “The Use of Force in Self-Defence,” *British Yearbook of International Law* XXXVII (1962), pp. 223–233. The continued relevance of the study of the legal regulations of the use of force in international law can be seen from more recent studies such as: Ian Brownlie, “International Law and the Use of Force by States Revisited,” *The Australian Year Book of International Law* 21 (2001), pp. 21–37, Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005), Mary Ellen O’Connell, *International Law and the “Global War on Terror”*, Cours et travaux 10, Université Panthéon-Assas (Paris II), Institute des hautes études internationales de Paris (Paris: Editions A. Pedone, 2007), and Christian Henderson, *The Persistent Advocate and the Use of Force. The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era*, The Ashgate International Law Series (Farnham and Burlington: Ashgate, 2010), pp. 9–13.

⁸ Studies on UNCLOS with specific reference to dispute settlement include: Jonathan I. Charney,

“The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea,” *American Journal of International Law* 90(1) (1996), pp. 69–75, Alan E. Boyle, “Dispute Settlement and The Law of the Sea Convention: Problems of Fragmentation and Jurisdiction,” *International and Comparative Law Quarterly* 46(1) (1997), pp. 34–54, D. Brown, “Dispute Settlement and the Law of the Sea: the UN Convention Regime,” *Marine Policy* 21(1) (January), pp. 17–43, Rosemary Rayfuse, “The Future of Compulsory Dispute Settlement under the Law of the Sea Convention,” *Victoria University of Wellington Law Review* 36(4) (2005), pp. 683–711, Christine M. Chinkin, “Dispute Resolution and the Law of the Sea,” in *The Law of the Sea in the Asian Pacific Region*, ed. James Crawford and Donald Rothwell, (Dordrecht: Martinus Nijhoff, 1995), pp. 237–262, and Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005).

⁹ For studies on ASEAN and conflict management see among others: Ramses Amer, “Conflict Management and Constructive Engagement in the Expansion of the Association of South-East Asian Nations,” in *The Political Economy of Regions and Regionalisms*, ed. Morten Boås, Marianne H. Marchand, and Timothy M. Shaw (Houndmills, Basingstoke, Hampshire and New York: Palgrave Macmillan, 2005), pp. 90–107, Ramses Amer, “The Association of Southeast Asian Nations” (ASEAN) Conflict Management Approach Revisited: Will the Charter Reinforce ASEAN’s Role?,” *Austrian Journal of South-East Asian Studies* 2(2) (2009), pp. 6–27, Ramses Amer, “The Conflict Management Framework of the Association of Southeast Asian Nations (ASEAN),” in *Conflict Management and Dispute Settlement in East Asia*, ed. Ramses Amer and Keyuan Zou (Farnham and Burlington: Ashgate, 2011), pp. 39–62, Kamarulzaman Askandar, “ASEAN and Conflict Management: The Formative Years of 1967-1976”, *Pacifica Review* 6(2) (1994), pp. 59–62, Kamarulzaman Askandar, Jacob Berkovitch, and Mikio Oishi, “The ASEAN Way of Conflict Management: Old Patterns and New Trends,” *Asian Journal of Political Science* 10(2) (2002), pp. 21–42, and Mely Caballero-Anthony, “Mechanisms for Dispute Settlement: The ASEAN Experience,” *Contemporary Southeast Asia* 21(1) (1998), pp. 38–66.

¹⁰ For an overview see Amer, “The Conflict Management Framework of the Association of Southeast Asian Nations (ASEAN),” pp. 39–62,

¹¹ Zou Keyuan, *China-ASEAN Relations and International Law* (Oxford and Cambridge: Chandos Publishing, An imprint of Woodhead Publishing Limited, 2009), p. 25.

¹² For an analysis of China’s foreign policy in relations to both the principle of non-interference and the prohibition of the use of force see Ramses Amer, “Non-Use of Force, Non-Interference and Security: The Case of Pacific Asia,” in *The Security-Development Nexus: Peace, Conflict and Development*, ed. Ramses Amer, Ashok Swain and Joakim Öjendal (London and New York: Anthem Press, 2012), pp. 98–99 and 104–106.

¹³ For a more detailed discussion see Ramses Amer, “The Dispute Management Approach of the

Association of Southeast Asian Nations (ASEAN): What Relevance for the South China Sea Situation?,” in *Non-Traditional Security Issues and the South China Sea: Shaping a New Framework for Cooperation*, ed. Shicun Wu and Keyuan Zou (Farnham and Burlington: Ashgate, 2014), pp. 47–72.

¹⁴ This list only includes agreements between countries with disputes between each other, i.e. overlapping claims, in the South China Sea area. The list of “Negotiated agreements” is partly derived from, Amer and Li, “Dispute Settlement in Practice – Assessing Progress and Challenges in the South China Sea Region,” pp. 271–273 and from Ramses Amer, “Dispute Settlement and Conflict Management in the South China Sea – Assessing Progress and Challenges,” in *The South China Sea: Towards A Region of Peace, Security and Cooperation*, ed. Tran Truong Thuy (Hanoi: The Gioi Publishers and Diplomatic Academy of Vietnam, 2011), pp. 246–249.

¹⁵ “Agreement between the Government of Malaysia and the Government of Indonesia on the delimitation of the continental shelves between the two countries, 27 October 1969,” from the website of the *United Nations*, accessed 8 July 2008, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/MYS-IDN1969CS.PDF>.

¹⁶ “Treaty between the Republic of Indonesia and Malaysia on Delimitation of Boundary Lines of Territorial Waters of the Two Nations at the Strait of Malacca,” from the website of the *U.S. Department of State*, accessed 8 July 2010, <http://www.state.gov/documents/organization/61516.pdf>.

¹⁷ “Agreement between the Government of the Republic of Indonesia, the Government of Malaysia and the Government of the Kingdom of Thailand relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Straits of Malacca,” from the website of the *U.S. Department of State*, accessed 8 July 2010, <http://www.state.gov/documents/organization/59574.pdf>.

¹⁸ “Delimitation of the Territorial Seas of Singapore and Indonesia in the Strait of Singapore, 25 May 1973,” *Law of the Sea Bulletin* (68) (2008), pp. 17–19, from the website of the *United Nations*, accessed 8 July 2010, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin68e.pdf. See also “Treaty between the Republic of Indonesia and the Republic of Singapore relating to the delimitation of the territorial seas of the two countries in the Strait of Singapore, 25 May 1973,” from the website of the *United Nations*, accessed 31 October 2013, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SGP.htm>.

¹⁹ “Indonesia and Singapore’s New Maritime Boundary,” from the website of *Asian Surveying and Mapping*, accessed 8 July 2010, <http://www.asmmag.com/features/indonesia-and-singapore-s-new-maritime-boundary>, and “Reviewing Indonesia’s Maritime Issues,” from the website of *Border Studies*,

accessed 8 July 2010, <http://www.borderstudies.info/?p=899>.

²⁰ “Treaty between the Kingdom of Thailand and Malaysia relating to the Delimitation of the Territorial Seas of the two Countries,” from the website of the *United Nations*, accessed 8 July 2010, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979T S.PDF>.

It appears as though the delimitation of the territorial sea boundary in the northern part of the Strait of Malacca between Malaysia and Thailand is identical to the continental shelf and EEZ boundaries “Figure 16. Maritime Boundaries in the Andaman Sea,” in Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Singapore, Oxford and New York: Oxford University Press, 1987), p. 98.

²¹ “Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand, 24 October 1979,” from the website of the *United Nations*, accessed 8 July 2010, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-MYS1979C S.PDF>.

²² For the full text of the Agreement of 7 July 1982 see *British Broadcasting Corporation, Summary of World Broadcasts, Part Three, Far East*, 7074 A3/7–8 (10 July 1982). The text of the Agreement has also been re-produced in an English language version as “Appendix 2” in Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, pp. 180–181, and in Ted L. McDorman, “Cambodia-Vietnam,” in *International Maritime Boundaries, Vol. III*, ed. Jonathan I. Charney and Lewi M. Alexander (The Hague: Martinus Nijhoff, 1998), pp. 2364–2365. In this context it can be noted that the “full text” of the Agreement transmitted by the official Cambodian news agency (SPK) on July 8 omitted the sentence: “Patrolling and surveillance in these historical waters will be jointly conducted by the two sides”, which was included in Article 3 of the version published by Vietnam News Agency and reproduced in Kittichaisaree’s study (*British Broadcasting Corporation*, 7074 A3/8, 7076 A3/7 (13 July 1982), and Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, pp. 180–181).

²³ *British Broadcasting Corporation*, 7393 A3/1 (23 July 1983). See also Quang Nghia; “Vietnam-Kampuchea Border Issue Settled,” *Vietnam Courier* (4) (1986), pp. 8–9.

²⁴ For reports from Vietnam and the PRK announcing the signing of the Treaty and for details see *British Broadcasting Corporation*, 8143 A3/1–3 (30 December 1985). See also Quang, “Vietnam-Kampuchea Border Issue Settled,” pp. 8–9.

²⁵ Nguyen Hong Thao, “Vietnam’s First Maritime Boundary Agreement,” *Boundary and Security Bulletin* 5(3) (1997), p. 77.

²⁶ “Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand, 9 August 1997,” from the website of the *United Nations*, accessed 3 October 2010, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-VNM1997>

B.PDF.

27 “PM Khai holds talks with Cambodian counterpart,” from the website of *Viet Nam Ministry of Foreign Affairs*, accessed 26 July 2005, <http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns05101140825>.

28 “Agreement between the People’s Republic of China and the Socialist Republic of Viet Nam on the delimitation of the territorial seas, exclusive economic zones and continental shelves of the two countries in Beibu Gulf/ Bac Bo Gulf, 25 December 2000,” *Law of the Sea Bulletin* (63) (2007), pp. 72–74, from the

Website of the *United Nations*, accessed 31 March 2012, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin63e.pdf. The text has also been reproduced in Nguyen Hong Thao, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,” *Ocean Development and International Law* 34(1) (2005), pp. 41–44, and Zou Keyuan, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin,” *Ocean Development and International Law* 34(1) (2005), pp. 22–24.

29 For the full text of the agreement including map see the website of the *Royal Thai Navy*, accessed 8 July 2010, <http://www.navy.mi.th/judge/Files/mouthaicambodia.pdf>.

30 “Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia concerning the Delimitation of the Continental Shelf Boundary, 26 June 2003,” *Law of the Sea Bulletin* (67) (2008): 39–41, from the website of the *United Nations*, 31 March 2012, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin67e.pdf.

31 “Joint Press Statement on 16 March 2009,” from the website of the *Brunei Ministry of Foreign Affairs and Trade*, accessed 8 July 2010, <http://www.mofat.gov.bn/news/20090316a.htm>.

32 For more detailed analyses see Nguyen Hong Thao, “Joint Development in the Gulf of Thailand,” *Boundary and Security Bulletin* 7(3) (1999), pp. 88–99, Nguyen Hong Thao, “Le premier accord de délimitation des frontières maritimes du Vietnam” [Vietnam’s first maritime boundary delimitation agreement], *Annuaire du droit de la mer*, Tome I (Paris: Edition A. Pédone et Institut du droit économique de la mer Monaco, 1996), pp. 259–273, and Nguyen Hong Thao, “Vietnam’s First Maritime Boundary Agreement,” *Boundary and Security Bulletin* 5(3) (1997), pp. 74–78. See also Nguyen Hong Thao, “Vietnam and Maritime Delimitation,” in *Conflict Management and Dispute Settlement in East Asia*, ed. Ramses Amer and Keyuan Zou (Farnham and Burlington: Ashgate, 2011), pp. 173–174 and 176–177, and Nguyen Hong Thao and Ramses Amer, “The Management of Vietnam’s Maritime Boundary Disputes,” *Ocean Development and International Law* 38(3) (2007), p. 311.

33 Nguyen Hong Thao, “*The Gulf of Tonkin: A case Study of Dispute Settlement*,” in *Management and Resolution of Inter-State Conflicts in Southeast Asia*, ed. Kamarulzaman Askandar (Penang: Southeast Asian Conflict Studies Network, 2003), pp. 207–214, Nguyen, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,” pp. 25–44. See also Zou, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin,” pp. 13–24, Nguyen, “Vietnam and Maritime Delimitation,” pp. 173–175 and 178–180, and Nguyen and Amer, “The Management of Vietnam’s Maritime Boundary Disputes,” pp.311–313.

34 In order for the maritime delimitation agreement to be ratified the two countries needed to complete talks on a Supplementary protocol to the *Agreement on Fishing Cooperation in the Gulf of Tonkin* signed on 25 December 2000. The agreement on the additional protocol was eventually signed in Beijing on 29 April 2004. Following a ratification process it entered into force on 30 June 2004. For details see Ramses Amer and Nguyen Hong Thao, “The Management of Vietnam’s Border Disputes: What Impact on Its Sovereignty and Regional Integration?,” *Contemporary Southeast Asia* 27(3) (2005), pp. 442–443, and Li Jianwei and Ramses Amer, “Recent Practices in Dispute Management in the South China Sea,” in *Maritime Energy Resources in Asia: Legal Regimes and Cooperation*,

ed. Clive Schofield, Special Report (37) (2012) (Seattle: National Bureau of Asian Research), pp. 94–95. The text of the Agreement on Fishery Cooperation has been reproduced in Nguyen, “Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf,” pp. 35–41.

³⁵ For a detailed analysis see Nguyen, “Vietnam and Maritime Delimitation,” pp. 173–174 and 181–182.

³⁶ “Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia /Malaysia), Judgment of 17 December 2002, General List No. 102,” from the website of the *International Court of Justice*, accessed 22 October 2008, <http://www.icj-cij.org/docket/files/102/7714.pdf>.

³⁷ *Ibid.*, para. 149–150.

³⁸ “Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, General List No. 130,” from the website of the *International Court of Justice*, accessed 22 October 2008, <http://www.icj-cij.org/docket/files/130/14492.pdf>.

³⁹ *Ibid.*, para. 276.

⁴⁰ *Ibid.*, para. 290.

⁴¹ *Ibid.*, para. 291.

⁴² For a more detailed analysis see Nguyen Hong Thao and Ramses Amer, “A New Legal Arrangement Forthe South China Sea?,” *Ocean Development and International Law* 40(4) (2009), pp.341–342.

⁴³ “Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia /Malaysia)”.

⁴⁴ “Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)”.

⁴⁵ “Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia /Malaysia),” para. 149.

⁴⁶ *Ibid.*, para. 147–148.

⁴⁷ “Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),” para. 276.

⁴⁸ *Ibid.*, para. 290.

⁴⁹ *Ibid.*, para. 299.

⁵⁰ Amer, “Dispute Settlement and Conflict Management in the South China Sea – Assessing Progress and Challenges,” pp. 247–248.

⁵¹ During the 1990s there were periods of deep tension relating to the border issues between Cambodia and Vietnam. For details on the on-going talks and the periods of tension, see Ramses Amer, “The Border Conflicts Between Cambodia and Vietnam,” *Boundary and Security Bulletin* 5(2) (1997), pp. 80–91, and Ramses Amer, “Expanding ASEAN’s Conflict Management Framework in Southeast Asia: The Border Dispute Dimension,” *Asian Journal of Political Science* 6(2) (1998), pp. 47–48. See also Ramses Amer, “Cambodia and Vietnam: A Troubled Relationship,” in *International Relations in Southeast Asia: Between Bilateralism and Multilateralism*, ed. N. Ganesan and Ramses Amer (Singapore: Institute of Southeast Asian Studies, 2010), pp. 99–101 and 104–107.

⁵² “Thailand terminates maritime pact with Cambodia,” from the website of *Energy-pedia News*, 8 July 2010, <http://www.energy-pedia.com/article.aspx?articleid=137744>, and “Thailand to cancel Thai-Cambodian maritime deal,” from the website of *Maritime Updates*, accessed 8 July 2010, [http://www.maritimeupdates.com/index.php?option=com_tag&task=tag&tag=memorandum+of+unde+rstanding+\(mou\)](http://www.maritimeupdates.com/index.php?option=com_tag&task=tag&tag=memorandum+of+unde+rstanding+(mou)). For the Cambodian reaction see “Thailand Can Not Cancel Unilaterally the MOU on Overlapping Maritime Boundaries,” from the website of the *Permanent Mission of the Kingdom of Cambodia to the United Nations*, accessed 8 July 2010, http://www.un.int/cambodia/Bulletin_Files/Nov09/Thailand_cannot_cancel.pdf.

⁵³ Victor Prescott, *The Gulf of Thailand* (Kuala Lumpur: Maritim Institute of Malaysia (MIMA), 1998), and Clive Schofield, “Unlocking the Seabed Resources of the Gulf of Thailand,”

Contemporary Southeast Asia 29(2) (2007), pp. 301–303.

⁵⁴ See Ramses Amer and Nguyen Hong Thao, “Regional Conflict Management: Challenges of the Border Disputes of Cambodia, Laos, and Vietnam,” *Austrian Journal of South-East Asian Studies* 2(2) (2009), pp. 59–60 and 75–79.

⁵⁵ In this context it should be observed that Chinese Taipei refers to eleven dashes two of which are in the Gulf of Tonkin.

⁵⁶ For an overview of the maritime conflicts and co-operative agreements in the Gulf of Thailand see Prescott, *The Gulf of Thailand*. The area is currently included in the JDA between Malaysia and Thailand but is recognised by the two countries as claimed by Vietnam.

⁵⁷ Mark J. Valencia, *Malaysia and the Law of the Sea. The foreign policy issues, the options and their implications* (Kuala Lumpur: Institute of Strategic and International Studies (ISIS Malaysia), 1991), pp. 54–66, 80–85 and 136–137.

⁵⁸ On the “Sabah claim” see Ramses Amer, “Sabah claim,” in *Southeast Asia A Historical Encyclopedia, From Angkor Wat to East Timor, Vol. III: R-Z*, ed. Ooi Keat Gin (Santa Barbara, Denver, and London: ABC-CLIO, 2004), pp. 1163–1164.

⁵⁹ Valencia, Valencia, *Malaysia and the Law of the Sea. The foreign policy issues, the options and their implications*, pp. 46–48, 80–84 and 135.

⁶⁰ *Ibid.*, 31–35, 37, and 136.

⁶¹ “Malaysia-Thailand (Gulf of Thailand Continental Shelf) (1979),” in *International Maritime Boundaries Volume I*, ed. Jonathan I. Charney and Lewis M. Alexander (Dordrecht, Boston and London: Martinus Nijhoff Publishers and the American Society of International Law, 1993), pp. 1111–1123. In this source this Agreement is presented as Annex III to the Memorandum on the delimitation of the continental shelf. See also Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*, pp. 100–103 and 189–194, David Ong, “Thailand/Malaysia,” *International Journal of Estuarine and Coastal Law* 6(1) (1991), 57–72, and David M. Ong, “The 1979 and 1990 Malaysia-Thailand Joint Development Agreements: A Model for International Legal Co-operation in Common Offshore Petroleum Deposits?,” *The International of Marine and Coastal Law* 14(2) (1999): 207–246.

⁶² Text of the Agreement is reproduced in Ted L. McDorman, “Malaysia-Vietnam,” in Charney and Alexander, *International Maritime Boundaries Vol. III*, pp. 2341–2344. See also Nguyen Hong Thao, “Joint Development in the Gulf of Thailand,” pp. 79–88, and Nguyen Hong Thao, “Les delimitations maritimes concernant le Vietnam: accords conclus et négociations en cours” [The Maritime Delimitations Relating to Vietnam: Agreements Reached and On-going Negotiations], in *Le Vietnam et la mer* [Vietnam and the Sea], ouvrage coordonné par Monique Chemillier-Gendreau (Travaux du colloque organisé les 16 et 17 juin 2000 par l’Association d’Amitié Franco-Vietnamienne) (Paris: Les Indes Savantes, 2002), pp. 53–56.

⁶³ Nguyen, “Joint Development in the Gulf of Thailand,” p. 83, and Schofield, “Unlocking the Seabed Resources of the Gulf of Thailand,” p. 299.

⁶⁴ For details see Ramses Amer, *The Sino-Vietnamese Approach to Managing Boundary Disputes*, Maritime Briefing 3(5) (Durham: International Boundaries Research Unit, University of Durham, 2002), and Ramses Amer, “Sino-Vietnamese Border Disputes,” in *Beijing’s Power and China’s Borders: Twenty Neighbors in Asia*, ed. Bruce Elleman, Stephen Kotkin and Clive Schofield (Armonk, New York and London: M.E. Sharpe, 2012), pp. 295–309. For recent developments see also Ramses Amer and Li Jianwei, “Recent Developments in the South China Sea – An Assessment of the Core Bilateral Relationship Between China and Vietnam,” in *Maritime Security Issues in the South China Sea and the Arctic: Sharpened Competition or Collaboration?*, ed. Gordon Houlden and Nong Hong (Beijing: China Democracy and Legal System Publishing House, 2012), pp. 41–75, Ramses Amer, “China, Vietnam and the South China Sea – Disputes and Dispute Management,” *Ocean Development and International Law*, 45(1) (2014), pp. 17–40, relevant parts of Ramses Amer and Li Jianwei, “Recent Developments in the South China Sea – Assessing the China-Vietnam and China-Philippines Relationships,” in

Recent Developments in the South China Sea Dispute. The Prospect of a Joint Development Regime, ed. Shicun Wu and Nong Hong (London and New York: Routledge, 2014) (forthcoming), and relevant parts of Li Jianwei, *Managing Tensions in the South China Sea: Comparing the China-Philippines and the China-Vietnam Approaches*, RSIS Working Paper (273) (2014) (Singapore: S. Rajaratnam School of International Studies, Nanyang Technological University).

65 “VN, China issue joint statement,” (16 October 2013), from the website of *Viet Nam Ministry of Foreign Affairs*, accessed 1 November 2013, <http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns131016041515>.

66 *Ibid.*

67 *Ibid.*

68 For Vietnam’s position see: “Vietnam opposes illegal foreign activities in its waters,” (4 May 2014), from the website of *Nhan Dan*, accessed 11 June 2014, <http://www.nhandan.com.vn/en/politics/external-relations/item/2482902-vietnam-opposes-illegal-foreign-activities-in-its-waters.html>, “Vietnam resolutely opposes China’s oil rig operation on Vietnamese continental shelf,” (7 May 2014), from the website of *Nhan Dan*, accessed 11 June 2014, <http://www.nhandan.com.vn/en/politics/external-relations/item/2489402-vietnam-resolutely-opposes-china-s-oil-rig-operation-on-vietnamese-continental-shelf.html>, and “Haiyang Shiyou 981 oil rig’s new location still violates Vietnamese waters,” (27 May 2014), from the website of *Nhan Dan*, accessed 11 June 2014, <http://www.nhandan.com.vn/en/society/item/2539902-haiyang-shiyou-981-oil-rig-s-new-location-still-violates-vietnamese-waters.html>. For China’s position see “The Operation of the HYSY 981 Drilling Rig: Vietnam’s Provocation and China’s Position,” (8 June 2014), from the website of the *Ministry of Foreign Affairs of the People’s Republic of China*, accessed 9 June 2014, http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/yzs_663350/xwlb_663352/t1163264.shtml.

69 For a broad overview including also recent tension between the two countries see relevant sections of Amer and Li, “Recent Developments in the South China Sea – Assessing the China-Vietnam and China-Philippines Relationships”. See also relevant parts of Li, *Managing Tensions in the South China Sea: Comparing the China-Philippines and the China-Vietnam Approaches*.

70 See pdf file “Notification and Statement of Claims on the West Philippine Sea,” in “SFA Statement on the UNCLOS Arbitral Proceedings against China,” from the website of the *Department of Foreign Affairs, Republic of the Philippines*, accessed 1 November 2013, <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos>.

71 “Foreign Ministry Spokesperson Hua Chunying’s Remarks on the Philippines” Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea”, (26 April 2013), from the website of the *Permanent Mission of the People’s Republic of China to the UN*, accessed 1 November 2013, <http://www.china-un.org/eng/fyrth/t1035577.htm>.

72 See note 70.

73 Nguyen Hong Thao, “Vietnam and the Code of Conduct for the South China Sea,” *Ocean Development and International Law* 32(1-2) (2001), pp. 126–127.

74 “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,” Commission on the Limits of the Continental Shelf (CLCS), Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam, from the website of the *United Nations*, accessed 13 May 2009, http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf.

75 For a detailed analysis of the submission and reactions see Nguyen Hong Thao and Ramses

Amer, "Coastal States in the South China Sea and Submissions of the Outer Limits of the Continental Shelf," *Ocean Development and International Law* 42(3) (2011), pp. 251–259.

76 Ramses Amer, "Conflict Management within the Association of Southeast Asian Nations (ASEAN): Assessing the Adoption of the „Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia“,” in *Management and Resolution of Inter-State Conflicts in Southeast Asia*, ed. Kamarulzaman Askandar (Penang: Southeast Asian Conflict Studies Network, 2003), pp. 117–118, and Nguyen, "Joint Development in the Gulf of Thailand," p. 86.

77 "Tripartite Agreement for joint marine seismic undertaking in the agreement area in the South China Sea Answer to correspondent by Mr. Le Dzung, the spokesman of the Vietnamese Ministry of Foreign Affairs on 14th March 2005," from the website of the *Viet Nam Ministry of Foreign Affairs*, accessed 22 March 2005, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns050314164241/.

78 *Ibid.*

79 "ASEAN Declaration on the South China Sea," from the website of the *Association of Southeast Asian Nations (ASEAN)*, accessed 17 May 2010, <http://www.aseansec.org/13163.htm>.

80 "Treaty of Amity and Cooperation in Southeast Asia," from the website of the *Association of Southeast Asian Nations (ASEAN)*, accessed 13 November 2008, (<http://www.aseansec.org/1217.htm>).

81 "Recent Developments in the South China Sea (1995) 18 March 1995," from the website of the *Association of Southeast Asian Nations (ASEAN)*, accessed 11 November 2010, <http://www.aseansec.org/5232.htm>.

82 "Declaration on the Conduct of Parties in the South China Sea," from the website of the *Association of Southeast Asian Nations (ASEAN)*, accessed 12 October 2010, <http://www.aseansec.org/13163.htm>.

83 "Guidelines for the Implementation of the DOC," from the website of the *Association of Southeast Asian Nations (ASEAN)*, accessed 17 October 2011, <http://www.aseansec.org/documents/20185-DOC.pdf>.

84 For analysis of both the internal ASEAN dimension and the ASEAN-China dimension see Ramses Amer, "The South Chins Sea: Challenge for ASEAN," *Policy Brief*, No. 150 (31 March 2014) (Nacka: Institute for Security & Development Policy), Ramses Amer and Li Jianwei, "ASEAN, China and the South China Sea Dispute Management," *China-US Focus* (5 September 2012), accessed 6 September 2012, <http://www.chinausfocus.com/foreign-policy/asean-china-and-the-south-china-sea-dispute-management/>. See also Carlyle A. Thayer, "ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?", *The Asia Pacific Journal* 10(34) (4) (20 August 2013), accessed 1 November 2013, http://japanfocus.org/-Carlyle_A_-Thayer/3813.

85 The preference for bilateralism in dealing with inter-state relations has been evidently displayed is a recent book on the Southeast Asian region for details see *International Relations in Southeast Asia: Between Bilateralism and Multilateralism*, ed. N. Ganesan and Ramses Amer (Singapore: Institute of Southeast Asian Studies, 2010).

An ‘Early Harvest’ Package for the Code of Conduct in the South China Sea

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Abstract: This paper discusses the evolution of consultations between members of the Association of Southeast Asian Nations (ASEAN) and China in implementing the Declaration of Conduct of Parties in the South China Sea (DOC) and Code of Conduct in the South China Sea (COC). The paper is divided into four parts. Part 1 discusses recent China-Vietnam discussions on maritime cooperation. Part 2 provides an overview of the evolution of ASEAN policy on the South China Sea including its proposal for an early harvest package for the COC. Part 3 discusses the implications of the current crises between China and Vietnam over China’s placement of an oil drilling platform in Vietnam’s Exclusive Economic Zone (EEZ). Part 4 sets out proposals for a binding Code of Conduct for Southeast Asia’s Maritime Common and sets out six proposals to enhance maritime cooperation.

China-Vietnam Maritime Cooperation

In 2000, the state presidents of Vietnam and China codified their bilateral relations in a Joint Statement for Comprehensive Cooperation in the New Century. This document created the framework for long-term state-to-state relations. In 2006, Vietnam and China set up a Joint Steering Committee on Bilateral Cooperation at deputy prime ministerial level to coordinate all aspects of their relationship. In June 2008, following a summit of party leaders in Beijing, bilateral relations were officially raised to that of strategic partners, and a year later this was upgraded to a comprehensive strategic partnership.¹

¹ Carlyle A. Thayer, ‘Vietnam on the Road to Global Integration: Forging Strategic Partnerships Through International Security Cooperation’, Keynote Paper to the Opening Plenary Session, 4th International Vietnamese Studies Conference, co-sponsored by the Vietnam Academy of Social Sciences and Vietnam National University, Hanoi, Vietnam, November 26-30, 2012, 14. Available at: <http://www.scribd.com/doc/114091180/Thayer-Vietnam-Strategic-Partnerships-and-International-Security-Cooperation>. The China-Vietnam comprehensive strategic partnership is also referred to as a strategic cooperative partnership or comprehensive strategic cooperative partnership.

Despite these positive developments China-Vietnam relations began to experience some turbulence in 2007 and subsequently due to their conflicting territorial claims in the South China Sea. During this difficult period the two sides attempted to compartmentalize their maritime dispute and prevent it from affecting their broader bilateral relations. A major turning point was reached in October 2011 when China and Vietnam signed in Beijing an Agreement on Basic Principles Guiding the Settlement of Maritime-Related Issues.

Under the terms of this agreement the two sides committed themselves ‘to seek basic and long-standing solutions acceptable to both sides for sea-related disputes’ on the basis of international law and to resolve their maritime disputes ‘through friendly talks and negotiations’. Pending the settlement of their disputes, China and Vietnam agreed to ‘actively discuss transitional and temporary measures that do not affect the stances and policies of the two sides, including studies and discussions on cooperation for mutual development’.²

The year 2013 witnessed a steady improvement in relations between China and Vietnam. On March 21, Secretary General Nguyen Phu Trong telephoned Xi Jinping, General Secretary of the Chinese Communist Party (CCP), to congratulate him on his election as state president. The two leaders discussed ‘major orientations to elevate the two countries’ comprehensive strategic partnership’.³ On May 11, China and Vietnam held the sixth session of their Joint Steering Committee for Bilateral Cooperation in Beijing.⁴

President Truong Sang made a state visit to China from June 19-21.⁵ On July 27, the CCP and Vietnam Communist Party (VCP) held their ninth theoretical seminar in Dalian city.⁶ China’s Foreign Minister Wang Yi paid an official visit to Hanoi from August 3-6.⁷ And finally,

² VietnamPlus, ‘VN-China basic principles on settlement of sea issues,’ Ministry of Foreign Affairs, October 10, 2013.

³ Vietnam News Agency, ‘Vietnamese, Chinese Party chiefs hold phone talks,’ Ministry of Foreign Affairs, March 21, 2013.

⁴ VietnamPlus, ‘Viet Nam, China boost bilateral cooperation,’ Ministry of Foreign Affairs, May 12, 2013. The Joint Steering Committee is co-chaired at deputy prime minister level (both deputy prime ministers are also members of their respective party Politburos).

⁵ VietnamPlus, ‘Vietnamese, Chinese Presidents hold talks in Beijing,’ Ministry of Foreign Affairs, June 20-, 2013 and VietnamPlus, ‘Viet Nam, China issue joint statement,’ Ministry of Foreign Affairs, June 21, 2013.

⁶ VietnamPlus, ‘Vietnamese, Chinese Parties hold 9th theoretical seminar,’ Ministry of Foreign Affairs, July 29, 2013.

⁷ VietnamPlus, ‘Chinese FM visits Viet Nam to boost ties,’ Ministry of Foreign Affairs, August 4, 2013; Vietnam Government Portal, ‘PM Dung receives Chinese Foreign Minister,’ Ministry of Foreign Affairs,

on September 2, Premier Li and Prime Minister Nguyen Tan Dung met in Nanning city on the sidelines of the tenth annual China-ASEAN Expo and the tenth China-ASEAN Business Investment Summit.⁸ It was at this meeting that Prime Minister Dung extended an invitation to Premier Li to visit Vietnam.

Premier Li's official visit to Hanoi from October 13-15, marked a new high in bilateral relations.⁹ At the conclusion of his trip the Chinese media reported that a 'breakthrough in bilateral cooperation' had taken place.¹⁰ According to the Joint Statement the two leaders discussed three major areas of cooperation – on-shore, monetary and maritime.¹¹

On maritime cooperation, Dung and Li agreed to 'stringently implement' the 2011 Agreement on Basic Principles Guiding the Settlement of Maritime-Related Issues and to pursue maritime cooperation following the principles of the 'easy-first, difficult-later' and 'step by step'.¹² They reaffirmed the role of the existing government-level mechanism on boundary and territory negotiations and agreed to pursue 'mutually acceptable fundamental solutions that do not affect each side's stance and policy, which will include studies and discussions pertaining to cooperation for mutual development'.¹³

The two leaders agreed to instruct the Working Group on the Waters off the Mouth of the Gulf of Tonkin and the expert-level Working Group on Cooperation on Less Sensitive Issues at Sea to step up their consultations and negotiations. They also agreed to establish a joint Working Group on Cooperation for Mutual Development at Sea under the existing government-level mechanism on boundary and territory negotiations.

August 5, 2013 and VietnamPlus, 'Viet Nam prioritises fostering ties with China,' Ministry of Foreign Affairs, August 5, 2013.

⁸ Vietnam Government Portal, 'Vietnamese, Chinese PMs talk ties,' Ministry of Foreign Affairs, September 2, 2013.

⁹ Vietnam Government Portal, 'PM holds talks with Chinese counterpart,' Ministry of Foreign Affairs, October 14, 2013. All references to the Ministry of Foreign Affairs website may be located at: <http://www.mofa.gov.vn/en>. Premier Li also paid courtesy calls on Vietnam's President Truong Tan Sang and Secretary General of the Vietnam Communist Party (VCP) Nguyen Phu Trong. Vietnam Government Portal, 'VN, China strengthen cooperative partnership,' Ministry of Foreign Affairs, October 14, 2013 and VietnamPlus, 'Party chief welcomes Chinese Premier,' Ministry of Foreign Affairs, October 14, 2013.

¹⁰ Xinhua, 'China-Vietnam relations witness substantial progress: Li,' October 14, 2013.

¹¹ Vietnam Government Portal, 'VN, China issue joint statement,' Ministry of Foreign Affairs, October 15, 2013.

¹² Vietnam Government Portal, 'VN, China issue joint statement.'

¹³ Vietnam Government Portal, 'VN, China issue joint statement.'

Priority was assigned to implementing two cooperative projects in the Gulf of Tonkin, a joint project for environment protection for islands and waters and a survey on Holocene-era sediments in the Red River Delta (and Chang Jiang Delta in China). In addition, the two leaders agreed to kick-start a joint survey in the waters off the mouth of the Gulf of Tonkin before the end of 2013.

With respect to their South China Sea territorial disputes Prime Minister Dung and Premier Li reaffirmed existing agreement to implement the 2002 Declaration on Conduct of Parties in the South China Sea and ‘based on mutual consensus, both sides will do more for the adoption of a Code of Conduct’ in the South China Sea. The two leaders also agreed ‘to exercise tight control of maritime disputes and not to make any move that can further complicate or expand disputes’.¹⁴ In this regard both sides vowed to make use of hot lines established between their ministries of foreign affairs and ministries of agriculture.

A closer look at what was agreed during Premier Li’s visit to Hanoi reveals that maritime cooperation is inching forward in a positive direction but so far only includes peripheral or less sensitive issues. There can be no doubt, however, that Premier Li’s visit to Vietnam marked a culmination of the trend of improved ties between Beijing and Hanoi during 2013.

Towards an Early Harvest Package for the COC

On April 2, 2013 at the 19th ASEAN-China Senior Officials Consultation, a Chinese representative announced his country’s agreement to commence discussions with ASEAN on a COC later in the year. This marked a major change in China’s approach to this issue.

In late April/early May 2013 China’s new Foreign Minister Wang Yi visited Thailand, Indonesia, Singapore and Brunei to discuss the South China Sea issue prior to the scheduled ASEAN-China ministerial meeting. In Jakarta, Indonesia’s Foreign Minister Marty reaffirmed agreement had been reached to hold a meeting of the ASEAN-China Working Group on the Implementation of the DOC ‘in the near future’ to discuss the COC. Marty also endorsed a Chinese proposal, made in April the previous year, and reiterated by Foreign Minister Wang Yi, to set up an Eminent Persons Group to complement the government-to-government talks.¹⁵

¹⁴ Vietnam Government Portal, ‘VN, China issue joint statement.’

¹⁵ Kyodo News International, “China, Indonesia suggest talks on binding rules in S. China Sea,” *GlobalPost.com*, May 1, 2013 and Bagus BT Saragh, “China closer to South China Sea Code of Conduct, Marty says,” *The Jakarta Post*, May 3, 2013.

On June 30, 2013 the foreign ministers from ASEAN and China met in Brunei to discuss preparations for the commemorative summit to mark the tenth anniversary of the ASEAN-China Strategic Partnership (2003-13). This meeting touched on both maritime cooperation and the South China Sea. With respect to the former, the ministers agreed to use the ASEAN-China Maritime Cooperation Fund to ‘promote practical cooperation in fishery, maritime connectivity. Marine science and technology, disaster prevention and reduction, and navigation safety and search and rescue...’¹⁶

With respect to the South China Sea, the ministers stressed the importance of fully implementing the DOC and ‘the need to steadily move towards the conclusion’ of a COC. The ministers welcomed the forthcoming ‘official consultations on the COC within the framework of the implementation of the DOC.’ Finally, the ministers also agreed, ‘that steps will be taken to establish an Eminent Persons and Expert Group (EPEG) and/or other mechanisms to provide support to the above official consultation.’

Early the following month, Foreign Minister Wang Yi visited Malaysia, Laos, and Vietnam. He also visited Thailand to attend the High-Level Forum on the 10th Anniversary of China-ASEAN Strategic Partnership on August 2. Minister Wang used his trip to promote joint development and dialogue on South China Sea matters. At a press conference on August 5 he noted that China and ASEAN had only ‘agreed to hold consultations [as distinct from negotiations] on moving forward the process on the “Code of Conduct in the South China Sea (COC)” under the framework of implementing the “Declaration on the Conduct of Parties in the South China Sea (DOC)...”’

Wang Yi further stated that China ‘has noticed that there came out some different ideas from some parties concerned on how to promote the process of COC.’ Wang then sounded a note of caution:

First, reasonable expectations. Some countries are talking about ‘quick fix’, like reaching consensus on COC within one day. It is an attitude neither realistic nor serious...

Second, consensus through negotiations... Wills of individual country or of a few countries should not be imposed on other countries, as an old Chinese saying, nothing forcibly done is going to be agreeable.

¹⁶ Joint Press Release of the ASEAN-China Foreign Ministers’ Meeting, July 1, 2013.

Third, elimination of interference. China and ASEAN countries tried several times to discuss on COC before, but got stuck due to some interferences...

Fourth, step-by-step approach. The formulation of COC is stipulated in DOC. COC is not to replace DOC, much less to ignore DOC and go its own way. The top priority now is to implement DOC, especially promoting maritime cooperation. In this process, we should formulate the road map for COC through consultations, and push it forward in a step-by-step approach.¹⁷

On August 29, 2013 China-ASEAN Foreign Ministers held a Special Meeting in Beijing co-chaired by Wang Yi and Thailand's Foreign Minister Surapon Tovichakchaikul. This meeting was mainly concerned with planning for the China-ASEAN Commemorative Summit. The two sides reached agreement on seven points, only one of which touched on the South China Sea. Point five called on the parties 'to make good use of the China-ASEAN Maritime Cooperation Fund.'¹⁸ A separate press release noted that discussion on the COC 'aims to be a rule-based framework in managing the conduct of parties in the South China Sea' and will commence the following month.¹⁹

The Sixth China-ASEAN Senior Officials' Meeting and 9th Working Group Meeting on the Implementation of the Declaration on Conduct of Parties in the South China Sea met in Suzhou from September 14-15. At this meeting ASEAN and China held their first round of formal consultations on the COC and drew up a work plan on the DOC for 2013-14, approved an expert group to assist in developing the COC, and agreed to hold their next meeting in Thailand in early 2014.²⁰

In October 2013, Thailand hosted a special meeting of foreign ministers in Bangkok before the ASEAN-China Summit.²¹ China-ASEAN Senior Officials held their 6th Meeting and 9th Working Group Meeting on the Implementation of the Declaration on Conduct of Parties;

¹⁷"Foreign Minister Wang Yi on Process of 'Code of Conduct in the South China Sea'," Ministry of Foreign Affairs of the People's Republic of China, August 5, 2013. <http://www.fmprc.gov.cn/eng/zxxx/t1064869.shtml>.

¹⁸ Ministry of Foreign Affairs, People's Republic of China, "Special China-ASEAN Foreign Ministers' Meeting Held in Beijing," August 29, 2013.

¹⁹ "Press Release: Special ASEAN-China Foreign Ministers' Meeting, Beijing, China, 28-30 August 2013.

²⁰ "China to promote maritime cooperation with ASEAN countries," Xinhua, September 19, 2013 and "China, ASEAN 'make progress' on code of conduct in S China Sea," Kyodo, September 16, 2013.

²¹ Kyodo News International, "ASEAN leaders discuss how to deal with China on South China Sea," *GlobalPost.com*, April 30, 2013.

and held their first formal consultations on a COC prior to the ASEAN Summit. The 23rd ASEAN Summit was held in Bandar Seri Begawan on October 9. The Chairman's Statement issued afterwards welcomed China-ASEAN consultations and

*looked forward to intensifying official consultations with China on the development of the Code of Conduct in the South China Sea (COC) with a view to its early conclusion. The COC will serve to enhance peace, stability, and prosperity in the region. We also looked forward to developing the ideas of establishing hotlines of communication to further enhance trust, confidence and to respond to emergency situations at sea and cooperate in the area of search and rescue for vessels in distress as part of an 'early harvest' package of the COC.*²²

The reference to an 'early harvest package' of the COC refers to a proposal to begin implementation of cooperative measures as soon as they are agreed upon rather than wait until the final COC is negotiated. In order for ASEAN to achieve an early harvest package for the COC Malaysia's Foreign Minister suggested separating the DOC discussions with China from the COC discussions.²³

Premier Le Keqiang's visited Brunei, Thailand and Vietnam from October 9-15 and, *inter alia*, promoted maritime cooperation and joint development. On October 13, Xinhua urged other regional states to follow suit and 'take up the magic wand of joint development.' A day later, as noted above, Xinhua reported a 'breakthrough in bilateral cooperation' between Beijing and Hanoi.

According to Hua Yiwen, a specialist on global issues, writing in the *People's Daily Online* (October 18), Premier Li 'put forward three "breakthrough" ideas to handle maritime disputes in a peaceful manner: controlling divergence, exploring joint development, and promoting maritime cooperation.' Hua also argued that members of ASEAN who were not parties to the South China Sea dispute could draw on the China-ASEAN Cooperation Fund and 'work together to build a 21st century maritime Silk Road.'

²² "Chairman's Statement of the 23rd ASEAN Summit, Bandar Seri Begawan, 9 October 2013." <http://www.asean.org/news/asean-secretariat-news/item/chairman-s-statement>.

²³ In August 2013, at the special China-ASEAN talks, Malaysia's Foreign Minister Datuk Seri Anifah Aman stated, 'consultations on the COC must start as soon as possible and should not be tied to the implementation of the DOC, both should run parallel to each other'. 'South China Sea issues must be managed through dialogue: Anifah', *The Sun Daily*, August 30, 2013. <http://www.thesundaily.my/news/816837>.

On March 18, 2014 the 10th Working Group Meeting on the Implementation of the Declaration on Conduct of Parties in the South China Sea met in Singapore to resume consultations on the COC that began last September. Thailand, in its role as ASEAN's country coordinator for China, submitted a document setting out areas that China and ASEAN has already agreed on relating to the South China Sea. At the subsequent Seventh China-ASEAN Senior Officials' Meeting held in Pattaya on April 27, China submitted a document outlining areas of agreement reached between China and ASEAN that contained differences in interpretation from the Thai document submitted to the Working Group. China also declined to be drawn on possible early harvest proposals; it insisted that each of ASEAN's ten members set out their positions first.

China's Drilling Platform

China's placement of the giant state-owned drilling rig M/V Hai Yang Shi You 981 (HYSY 981) in Block 143 inside Vietnam's EEZ on May 2 marked a reversal of the positive trends discussed above. China's move was unexpected and provocative. This incident marks the first time China has placed one of its drilling rigs in the EEZ of another state without prior permission. This was an unexpected move because China-Vietnam relations have been on an upward trajectory since the visit to Hanoi by Premier Le Keqing in October. At that time both sides indicated they had reached agreement to carry forward discussions on maritime issues. China gave Vietnam no advanced notification of its intended actions. China's move was also unexpected because Vietnam had not undertaken any discernable provocative action that would justify China's unprecedented actions.

China's deployment of the rig was provocative because the HYSY 981 was accompanied by as many as eighty ships, including seven People's Liberation Army Navy warships. When Vietnam dispatched Coast Guard and Fishery Surveillance Force vessels to defend its sovereign jurisdiction, China responded by ordering its ships to use water cannons to demast the communications antennae of Vietnamese vessels and to deliberately ram the Vietnamese vessels. These actions were not only highly dangerous, but caused injuries to the Vietnamese crew. At least one Vietnamese fishing boats was such as a result of rammng.

China's deployment of the HYSY 981 and accompanying armada of military, paramilitary and civilian fishing boats has created the most severe crisis in bilateral relations

between China and Vietnam since their 1979 border war.²⁴ Not only has it undermined strategic trust between China and Vietnam, but is also a cause for regional and international concern.

In response, on May 10, 2014 ASEAN Foreign Ministers issued a stand alone statement expressing ‘their serious concerns over the on-gong developments in the South China Sea, which increased tensions in the area.’ It is significant that ASEAN ministers issued a separate statement on the South China Sea. This statement demonstrates ASEAN unanimity. Prior to this ASEAN states long treated the Paracels as a separate bilateral matter between Vietnam and China.

The ASEAN Foreign Ministers’ statement did not specifically mention China by name but it reiterated ASEAN’s standard policy on the South China Sea.²⁵ The statement urged the parties concerned to act in accord with international law including the United Nations Convention on the Law of the Sea, to exercise self-restraint, avoid actions that could undermine peace and stability, and to resolve disputes by peaceful means without resorting to the threat or use of force. The ASEAN Foreign Ministers’ Statement called on all parties to fully and effectively implement the DOC. The Statement also called for the need for ‘expeditiously working towards an early conclusion of the Code of Conduct in the South China Sea.’ ASEAN leaders, meeting at their 23rd Summit, endorsed the statement by their foreign ministers.

Code of Conduct for Southeast Asia’s Maritime Commons

Both China and ASEAN are in agreement that the 2002 DOC should be implemented. China appears to have made implementation of the DOC a prerequisite to the conclusion of a COC.

The 2002 DOC makes provision for five cooperative activities: marine environmental protection; marine scientific research; safety of navigation and communication at sea; search and rescue operation; and combating transnational crime, ‘including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms’. Only four expert working groups have been set up. No working group on safety of navigation and communication at sea has been formed due to China’s sensitivity.

²⁴ For background see: Carlyle A. Thayer, “China’s Oil Rig Gambit: South China Sea Game-Changer?,” *The Diplomat*, May 12, 2014. <http://thediplomat.com/2014/05/chinas-oil-rig-gambit-south-china-sea-game-changer/> and Carlyle A. Thayer, “China and Vietnam Square Off in War of Attrition Over Disputed Waters,” *Asian Currents* [Asian Studies Association of Australia], forthcoming.

²⁵ The failure to mention China by name is standard ASEAN convention. ASEAN’s first two statements on the South China Sea, in 1992 and 1995, did not mention China.

The working groups to implement the DOC must determine exactly where China will agree to conduct cooperative activities. According to ASEAN diplomats China also insists that claimant states first recognize China's sovereignty before cooperative projects can be implemented.

At the same time ASEAN should commission a group of Southeast Asian experts to form a study group to research and report on various proposals for confidence building and cooperation. This group should be explicitly charged with exploring the historical record to determine if in fact confidence-building measures are likely to lead to trust and hence address the core security issues raised by territorial disputes in the South China Sea.²⁶

ASEAN has been reluctant to draft its own Code of Conduct without simultaneously discussing its content with China. ASEAN fears that if they drew up their own COC China would reject it. ASEAN's reluctance to draft its own COC was illustrated by its quiet rejection of Indonesia's Zero Draft Regional Code of Conduct.²⁷ ASEAN's current approach of seeking an 'early harvest package' appears to be heading no where.

ASEAN-China consultations/negotiations on a DOC/COC are necessary but not sufficient to obtain a binding Code of Conduct. ASEAN's dogged focus on negotiating a binding COC with China in the South China Sea, while an important security goal, is fundamentally a misplaced priority. Negotiations between China and ASEAN on a COC have resulted in the division of ASEAN into two groups, claimants and non-claimants, and make it extremely difficult for ASEAN to adopt a common policy. This approach also allows China to play on differences among ASEAN members and drag out not only discussions on DOC cooperative measures but on the COC as well. This provides China the time to consolidate its presence and hence control over waters and features in the South China Sea.

If ASEAN does not act it means that China will protract the consultation process. China's actions in confronting the Philippines at Second Thomas Shoal, the placement of

²⁶ Carlyle A. Thayer, 'Do Confidence Building Measures Really Address the Major Challenges to Maritime Security?', Presentation to Joint Meeting of the 36th Australia Council for Security Cooperation in Asia and the Pacific Meeting (AUS CSCAP) and ANU Centre of Excellence in Policing and Security (ANU-CEPS) Maritime Expert Networks Meeting, The Australian National University, Canberra, March 22-23, 2012. <http://www.scribd.com/doc/91612112/Thayer-South-China-Sea-Do-Confidence-Building-Measures-Address-Major-Challenges-to-Maritime-Security-in-the-South-China-Sea>.

²⁷ For a detailed discussion see: Carlyle A. Thayer, "South China Sea in Regional Politics: Indonesia's Efforts to Forge ASEAN Unity on a Code of Conduct," Presentation to Third Annual CSIS Conference on Managing Tensions in the South China Sea, Center for Strategic & International Studies, Washington, D. C., June 5-6, 2013. http://csis.org/files/attachments/130606_Thayer_ConferencePaper.pdf.

HYSY 981 in disputed waters, and its land reclamation activities all indicate that the ‘facts of the ground’ are likely to be altered irrevocably before a COC is agreed. ASEAN should insist on the standing up of the working group on safety of navigation and communication at sea as part of the DOC process. The HYSY 981 crisis has made it more urgent for ASEAN to expeditiously pursue a binding COC for the South China Sea.

Negotiating a COC in the South China Sea with China is too restrictive geographically. International law, and UNCLOS, covers the world’s oceans and maritime domains not just the South China Sea. ASEAN-China discussions on a South China Sea COC do not cover Southeast Asian waters outside of the South China Sea.²⁸

Southeast Asia’s maritime domain encompasses not only the South China Sea and Gulf of Thailand but also the waters and seas surrounding the littoral and archipelagic states. This is a vast area encompassing the Exclusive Economic Zones of all ten of Southeast Asia’s states, including Timor-Leste (but omitting landlocked Laos).

Southeast Asia is roughly divided between its land mass and maritime domain. The majority of Southeast Asia’s population lives in the coastal strip adjacent to the sea. The fish in the South China Sea are a vital source of protein for the diet of Southeast Asia’s population. The sea is important for other natural resources such as oil and gas. Southeast Asian waters are vital for transport, trade and commerce for regional states as well as external powers. In sum, important issues of human, food and energy security are at stake. These issues are interrelated.

ASEAN littoral states encounter difficulties in developing the resources that lie in their EEZs due to China’s nine-dash line ambit claim over approximately eighty percent of the South China Sea. Sino-U.S. strategic rivalry is likely to exacerbate regional insecurity and make exploitation of South China Sea resources more difficult.

Because ASEAN-China discussions on the DOC/COC are likely to be protracted if not interminable, ASEAN needs to acquire leverage. ASEAN should insist that the DOC and COC consultations be split into two separate sets of negotiations. At the same time ASEAN should begin consultations to reach consensus among its members on what they consider the essential components of a COC.

²⁸ In fact, as difficulties over negotiating accession of nuclear powers to the Southeast Asia Nuclear Weapons Zone Treaty indicate, there is no agreement over what constitutes the geographic area covered by the South China Sea.

ASEAN should proceed to reach consensus on its own draft COC in order to present a united front in consultations with China. ASEAN officials at working group level should be tasked with revising and updating Indonesia's Zero Draft Regional Code of Conduct into a final draft. This should then be passed to ASEAN Senior Officials and then Foreign Ministers for their approval. This draft should then be presented to government leaders at an ASEAN Summit. Once approved this document should be circulated to all of ASEAN's dialogue partners for endorsement.

The Code of Conduct for Southeast Asia's Maritime Commons proposal is based on two premises. First, the security of the maritime domain in Southeast Asia is indivisible for all ASEAN members, whether coastal or landlocked. The Treaty would make all ASEAN members equal stakeholders. This would overcome the present division of ASEAN states into claimant and non-claimant states with respect to the South China Sea.

Second, international law, including UNCLOS, applies equally throughout Southeast Asia's maritime domain and not just the South China Sea. It is applicable to all states. The adoption of the Code of Conduct for Southeast Asia's Maritime Commons would reinforce ASEAN's corporate and legal identity and enhance its ability to deal with external powers. It would give ASEAN the needed leverage in dealing with China.

The Code of Conduct for Southeast Asia's Maritime Commons should form an integral part of the ASEAN Political-Security Community. ASEAN agreement on the Code of Conduct for Southeast Asia's Maritime Commons could be the start of other agreements that address security issues affecting ASEAN member states. For example, ASEAN could adopt a declaration on sustainable development in the Lower Mekong to address concerns of its riparian state members (Myanmar, Thailand, Laos, Cambodia and Vietnam).

This treaty would be designed to resolve Southeast Asia's numerous maritime boundary and maritime territorial disputes. Regional maritime disputes involve both claims to sovereignty over islands and features and sovereign rights over resources in the sea and continental shelf. The purpose of Code of Conduct for Southeast Asia's Maritime Commons would be to set a frame for the peaceful resolution of these disputes, in accord with international law. In other words, ASEAN can best position itself by first getting its own house in order with respect to maritime disputes among its members. This would enhance ASEAN's unity and cohesion and better enable ASEAN to promote Southeast Asia's autonomy and ASEAN's centrality in the region's security affairs.

All ASEAN states should bring their maritime claims into accord with international law, with particular attention to eliminating excessive baselines. States should then demarcate the territorial sea, contiguous zone, EEZ and continental shelf. States should also clearly distinguish islands from rocks for purposes of maritime delimitation.²⁹ The expertise of an independent panel of technical and legal experts could be called upon to assist in determining base lines and that the classification of islands and rocks conform to international law.

States should also indicate what land and other features in the maritime domain that they claim sovereignty over. A special ASEAN Commission should review claims to islands to ensure that they conform to international law and are not being used to claim excessive maritime jurisdiction.

ASEAN members should consider placing prohibitions on the use of national fishing fleets as an instrument of maritime enforcement. ASEAN members could incorporate the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation in their COC. Other relevant international conventions such as the Code for Unalerted Encounters at Sea.

Once this process is completed all states should enter into negotiations to resolve outstanding disputes where maritime zones overlap or where there are conflicting sovereignty claims to land features. States should agree to a deadline after which, if any dispute is unresolved, they agree to arbitration under the ASEAN High Council, the provisions under UNCLOS (International Tribunal on Law of the Sea or International Court of Justice), or other mutually agreed procedure.³⁰ In exceptional cases the parties could agree to shelf sovereignty disputes indefinitely

The Code of Conduct for Southeast Asia's Maritime Commons should also contain provisions for all parties to cooperate in marine scientific research, marine pollution, fisheries

²⁹ A ruling on the Philippine claim to the UN Arbitral Tribunal on this point would greatly assist the process of determining baselines and classifying rocks, islands and other features. See: Carlyle A. Thayer, 'The Philippines' Claim to the UNCLOS Arbitral Tribunal: Implications for Viet Nam', Presentation to International Workshop on The Sovereignty Over Paracel and Spratly Archipelagoes – Historical and Legal Aspects, Pham Van Dong University, Quang Ngai City, Vietnam, April 27-28, 2013. <http://www.scribd.com/doc/138615869/Thayer-The-Philippines-Claim-to-the-UNCLOS-Arbitral-Tribunal-Implications-for-Viet-Nam>.

³⁰ Indonesia and Malaysia took their dispute over Ligitan and Sipadan islands to the International Court of Justice (ICJ) which ruled on 17 December 2002; Malaysia and Singapore took their dispute over Pedra Branca/Pulau Batu Puteh and Middle Rocks to the ICJ which ruled on 23 May 2008; and Bangladesh and Myanmar resolved their maritime delimitation dispute through the International Tribunal for the Law of the Sea, which ruled on 14 March 2013.

management, search and rescue, anti-piracy and other agreed areas. For purposes of security, including protection against piracy and armed criminals, police or coast guard personnel may be stationed on occupied features. An agreement should be developed for cooperation among these agencies in the maritime domain.

The Code of Conduct for Southeast Asia's Maritime Commons should include provision for setting up a body to oversee its implementation and to handle complaints and disputes that may arise. Such a body could be included under the ASEAN Political-Security Community Council or the ASEAN High Council

Who should be included in Code of Conduct for Southeast Asia's Maritime Commons?
What area should it cover?

The Code of Conduct for Southeast Asia's Maritime Commons should include all ten ASEAN members and future members such as Timor-Leste. The Treaty should cover Southeast Asia's entire maritime domain - not just the South China Sea - in a manner analogous to the Zone of Peace Freedom and Neutrality (1971), Treaty of Amity and Cooperation (1976) and Southeast Asia Nuclear Weapons Free Zone Treaty (1995). The Treaty should be open to accession by ASEAN's dialogue partners and other maritime powers. In order to prevent one state from seeking advantage over another, ASEAN should follow the precedent set for the SEANWFZ Treaty: accept individual offers of accession but wait until a critical mass is reached before granting approval.

While ASEAN is drafting its Code of Conduct for Southeast Asia's Maritime Commons it should consider six other steps

Fisheries Management

First, the management of fisheries in the South China Sea is a key issue affecting regional food security. Already fish stocks are being depleted through pollution and overfishing. There is increased friction between states over fishing rights including the use of violence at sea by private fishing fleets as an adjunct of national policy. The Asia Pacific Economic Cooperation (APEC) forum takes the lead in addressing this issue. This is because it is a non-governmental body that includes Taiwan that plays a major fishing role in the South China Sea. A formal liaison mechanism linking APEC to the EAS should be established.

ASEAN Coast Guard

Second, priority should be given to standing up an effective Heads of ASEAN Coast Guards Meeting and quickly develop practical multilateral cooperation to deal with challenges to maritime security, including assistance to fishermen in distress and the humane treatment of fishermen caught poaching. The ASEAN Coast Guards should work cooperatively with the ASEAN Defence Ministers' Meeting (ADMM) as part of the ASEAN Political-Security Council (APSC).

The Heads of ASEAN Coast Guards should work out a common position to present at the annual meeting of the Heads of Asian Coast Guard Agencies, an organization that comprises nine ASEAN states (Laos is landlocked) as well as Bangladesh, China, Hong Kong, India, Japan, South Korea, Maldives, Pakistan, and Sri Lanka.

Expanded ASEAN Maritime Forum

Third, priority should be given to institutionalizing and enhancing the role of the Expanded ASEAN Maritime Forum (AMF) and developing an agenda that addresses the most pressing security issues such as maritime incidents between warships, maritime incidents between civilian enforcement ships, prohibition in the use of fishing boats in maritime enforcement measures, and freedom on navigation and over flight. The Expanded AMF should forward its finding and recommendations to the East Asia Summit.

ASEAN Political-Security Council

Fourth, ASEAN needs to create an effective ASEAN Political-Security Council by prioritizing the objectives of the multiple institutions working on maritime security and streamline their reporting functions. The APSC should coordinate and shape the recommendations from both civilian and military organisations (such as the AMF and ADMM) before presenting them to the ASEAN Consultative Council and in turn to the ASEAN Summit.

Proactive ASEAN Defence Ministers Meeting

Fifth, the ASEAN Defence Ministers need to become more proactive in setting the priorities for subordinate agencies. For example, the ASEAN Chiefs of Navy Meeting should be

tasked with promoting greater interoperability among its members to address current challenges to maritime security.

Streamling Regional Architecture

Sixth, in order to address the range of issues impacting on the maritime commons, the regional architecture needs to be streamlined.³¹ There is considerable overlap between multiple organisations concerned with maritime security (e.g., the ASEAN Regional Forum Inter-Session Meeting on Maritime Security and the ADMM Plus Expert Working Group on Maritime Security).

Regional cooperation on maritime security has largely been a bottom up process. What is missing in the regional security architecture is direction from above. The East Asia Summit (EAS) should become the prime leaders-led forum to consider inputs from the ARF, the ADMM Plus, and the Expanded AMF Plus. The EAS should give top down direction to implement recommendations related to the management of the maritime commons in the South China Sea.

Within the EAS, ASEAN leaders should position ASEAN between the global powers as the brokers of consensus on what form a streamlined regional architecture should take and what policy priorities should be adopted to ensure the security of the maritime commons in Southeast Asia.

³¹ Carlyle A. Thayer, "Maritime Security and the 2014 ASEAN Agenda," Presentation to Public Forum on ASEAN's Role in Providing Maritime Security, CNAS Maritime Security Project, Center for a New American Security, Willard International Continental Hotel, Washington, D.C., February 13, 2014. This presentation may be accessed at: <http://www.youtube.com/watch?v=3Nu58TwLlcU> and <http://youtu.be/IM7ZnbPgbxc> and Carlyle A. Thayer, "Beyond Territoriality: Managing the Maritime Commons in the South China Sea," Paper delivered to the 28th Asia-Pacific Roundtable, Institute for Strategic and International Studies, Kuala Lumpur, , Malaysia, June 2-4, 2014.