University of Alberta

Law and Politics in the South China Sea

Assessing the Role of UNCLOS in Ocean Dispute Settlement

by

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Law and Politics in the South China Sea

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NONG HONG

Abstract

This dissertation evaluates the applicability and effectiveness of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as a settlement mechanism for addressing the South China Sea (SCS) dispute, the most complex and challenging ocean-related regional conflict in East Asia. This dissertation answers these broad questions: Does UNCLOS create a constitution for the ocean? Is UNCLOS successful in preventing or managing conflicts pertaining to marine resources? Hoes does the SCS dispute settlement bridge the gap of International Relations (IR) and International Law (IL)?

Since 1980s, the regime concept came to be used as one vehicle to cross the disciplinary divide between IL and IR. This dissertation seeks to foster dialogue between political scientists and international lawyers by viewing UNCLOS as an international regime and exploring its internal coherence and its external relationship with other international regimes and institutions in this region. I argue that there can be little doubt about the centrality of UNCLOS in the legal framework for ocean management, albeit it may be perceived to have certain shortcomings. The most pervasive threats to the SCS stability and obstacles to solve the dispute are caused by the lack of political will to implement the dispute settlement mechanism of UNCLOS. This paper proposes a pragmatic settlement regime of five dimensions to solve the SCS dispute and accelerate ocean governance in this region.

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List of Abbreviations

AIS	Automatic Identification System
AMMTC	ASEAN Ministerial Meeting on Transnational Crimes
APEC	Asian Pacific Economic Cooperation Forum
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEAN+1	ASEAN, China
ASEAN+3	ASEAN, China, Japan, South Korea
BASEL Convention	Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989
BRMM-CT	The Convening of the Bali Regional Ministerial Meeting on Counter Terrorism
CBM	Confidence Building Measure
CLCS	United Nations Commission on the Limits of the Continental Shelf
CMI	Comite Maritime International
CNOOC	China's state-run China National Offshore Oil Company
COBSEA	Coordinating Body on the Seas of East Asia
COLREG	International Regulation for Preventing Collisions at Sea
COS	China Oilfield Services Ltd.
CS	Continental Shelf
CSCAP	Council for Security cooperation in the Asia Pacific
CSI	Container Security Initiative
DFA	Department of Foreign Affairs
DOC	2002 Declaration on the Conduct of Parties in the SCS
DOD	U.S. Department of Defense
DRV	Democratic Republic of Vietnam
EAS/RCU	East Asian Seas Regional Coordinating Unit
EEZ	Exclusive Economic Zone
EU	European Union
EW	Electronic Weapons
FPDA	Five Power Defence Arrangements
GATS	General Agreement on Trade and Services
GEF	Global Environment Facility
HSC	1958 High Seas Convention
IR	International Relations
ISM CT-TC	Inter-sessional Meeting on Counter-Terrorism and Transnational Crime
JCLEC	Jakarta Center for Law Enforcement Cooperation
JCG	Japanese Coast Guard
ICJ	International Court of Justice
JDZ	Joint Development Zones
JMSU	Joint Maritime Seismic Undertaking
JMZs	Joint Management Zones
ICAO	International Civil Aviation Organization

IGO	Intergovernmental Organizations
IMB	International Maritime Bureau
IL	International Law
IMO	International Maritime Organization
IPCC	Inter-governmental Panel on Climate Change
ISC	Information Sharing Center
ISPS	International Ship and Port Security Code
ITLOS	International Tribunal for the Law of the Sea
LME	Large Marine Ecosystem
LNG	Liquefied Natural Gas
MDG	Military Data Gathering
MEH	Marine Electronic Highway
NISCS	National Institute for the South China Sea Studies
PLA	People's Liberation Army
PLAN	People's Liberation Army Navy
PNOC	Philippine National Oil Company
PSI	Proliferation Security Initiative
OPRC	International Convention on Oil Pollution Preparedness, Response and Co operation 1990
RAMSAR	Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971
ReCAAP	Regional Cooperation Agreement on Anti-Piracy in Asia
RMSI	Regional Maritime Security Initiative)
ROC	Republic of China (Taiwan)
SAP	Strategic Action Programme
SARS	Severe Acute Respiratory Syndrome
SRV	Socialist Republic of Vietnam
SCS	South China Sea
SEACAT	Southeast Asia Cooperation against Terrorism
SIGINT	Signals Intelligence
SLOC	Sea Lanes of Communication
SCS Informal Workshop	Workshops on Managing Potential Conflicts in the South China Sea
SOLAS	International Convention for the Safety of Life at Se Convention
SUA Convention	Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)
TCT	Transformed Conflict Theory
TDA	Transboundary Diagnostic Analysis
TS	Territorial Sea
WOC	World Ocean Conference
WTO	World Trade Organization
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNDOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
UNEP	United Nations Environment Programme
VFA	Visiting Forces Agreement

Introduction: Regime Theory and UNCLOS

The divide between International Relations (IR) and International Law (IL) has varied over time. International relations is generally considered to be a relatively young academic discipline which grew out of a split between two groups of Anglo-American international lawyers during the 1930s and 1940s. The two fields, however, have for much for the post WWII era, engaged relatively little with one another. "International Relations scholars have simply dismissed international law as either irrelevant or epiphenomenal: in general, 'law' has been left, rather unceremoniously, to the lawyers".[1] The most prestigious graduate programs in political science/international relations, with few exceptions, do not offer international law as a major or minor field of concentration. The greatest majority do not offer even one course in this discipline.[2] International Law scholars, meanwhile, have ignored routinely the work of political scientists on international rules and institutions.[3] Some international lawyers also argued that there is too little politics in the law.[4]

The lengthy law of the sea negotiations refocused attention on normative questions, but international law still forms a minor and relatively unimportant subfield in political science. Stephen Krasner claims that the break came because of change in the study of international relations, rather than in the study of international law. "Following political science more generally, International Relations scholars became more self-consciously social scientific. Since the 1970s, the study of international relations has been driven by a set of theoretical frameworks that have generated more specific research programs or theories".[5]

Politics as observed through state practice advances and works alongside international law. Douglas Johnston is one of those international maritime law figures who crossed the divide.[6] However, the two fields have drifted apart so that a divide continues to exist which

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1 Robert J. Beck, Arend Anthony Clark, Lugt Robert D. Vander, *International Rules: Approaches From International Law And International Relations* (New York: Oxford University Press, 1996), p.3

2 James Larry Taulbee , "Images of International Law: What Do Students Learn from International Relations Textbook?", *Teaching Political Science*, 15:2 (1998: Winter), p.74

3 Beck, Clark, & Vander, 1996, p.3

4 David Kennedy, "The Disciplines of International Law and Policy", 12 *Leiden Journal of International Law* 9, 1999, pp.9-132

5 Stephen D. Krasner, "International Law and International Relations: Together, Apart, Together?", in *Chicago Journal of International Law*, Vol.1 No.1 (2000), p.94. For an overview of thee developments see Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner, "International Organization and the Study of World Politics", 52 *International Organizations* 645 (1998)

6 See Johnston's work, e.g. *The future of ocean regime-building : essays in tribute to Douglas M. Johnston* (Leiden ; Boston : Martinus Nijhoff Publishers, c2009.); *Pacific Ocean boundary problems : status and solutions* (Dordrecht ; Boston : Martinus Nijhoff Publishers ; Norwell, MA, U.S.A. : Sold and distributed in the U.S.A. by Kluwer Academic Publishers, c1991.); *Ocean boundary making : regional issues and developments* (London ; New York : Croom Helm, c1988.); *Canada and the new international*

is my central point in moving forward in this dissertation. As Henkin, and more recently Kenneth Abbott, Robert Keohane, Anne-Marie Slaughter, Oran Young and Michael Byers call for, such pervasive academic insularity must not be allowed to continue.[7] The interdisciplinary research demonstrates a number of contemporary trends that are often ill-addressed by scholars of either field including the increased importance of non-state actors and the ramification of state weakness and state illegitimacy. It also shed light upon the ways in which policymakers operate at the intersections of law and politics in the international sphere, notwithstanding the gap between the two domains highlighted by scholars.[8]

Customary international law has established a set of norms and principles on the use of oceans, such as the 3-nm territorial sea and 1945 Truman Proclamation on the Continental Shelf, followed by the negotiation on LOS Convention or UNCLOS, an ambitious exercise in international cooperation. The United Nations' first Conference on the Law of the Sea (UNCLOS I) was held at Geneva, Switzerland in 1956 which resulted in resulted in four treaties concluded in 1958.[9] In 1960, the United Nations held the second Conference on the Law of the Sea ("UNCLOS II"); however, the six-week Geneva conference did not result in any new agreements. Generally speaking, developing nations and third world countries participated only as clients, allies, or dependents of United States or the Soviet Union, with no significant voice of their own. At about the same time when the UNCLOS III (1973-1982) negotiators were approaching the end of the enormous task, political scientists in the United States were developing the concept of an international regime by which to analyze processes of international cooperation. In other words, regime theory emerged at a time when International Relations scholars rarely used the 'l' world although the term 'regime' is familiar to lawyers.[10] With interest in interdisciplinary dialogue

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law of the sea (Toronto : Published by the University of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada, 1985.)

[7] See Louis Henkin (ed.), *International Law: Cases and Materials* (St. Paul, Minn.: West Pub. Co., 1993.); Anne-Marie Slaughter, "International Law in a World of Liberal States ", *European Journal of International Law 1995 6*(1):503-538; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press: 1999)

[8] Beck, Clark, & Vander, 1996, pp.3-4

[9] Convention on the Territorial Sea and Contiguous Zone,Convention on the Continental Shelf, Convention on the High Seas, Convention on Fishing and Conservation of Living Resources of the High Seas.

[10] Shirley V. Scott, "The LOS Convention as a Constitutional Regime for the Ocean", in Alex G. Oude Elferink (eds.) *Stability and Change in the Law of the Sea: The Role of The LOS Convention* (Leiden: Nartinus Nijhoff Publishers, 2004), p.9

increasing, the regime concept came to be used as one vehicle by which to cross the disciplinary bridge between International Law and International Politics.

This dissertation approaches UNCLOS as an international regime and seeks to foster dialogue between political scientists and international lawyers regarding the nature of this regime (e.g. does UNCLOS create a constitution for the ocean?) and the effectiveness of the regime (e.g. is UNCLOS regime successful in perverting or managing a range of conflicts pertaining to marine resources?)

The case of the South China Sea (SCS) is applied in this research to assess the effectiveness of UNCLOS regime. The case is chosen due to two main reasons. First, the SCS dispute is regarded as the most complex and challenging ocean-related regional conflict in East Asia. The security in the SCS is a concern for both the regional countries, e.g. China, Vietnam, the Philippines, and the extra-regional countries, e.g. the United States, Russia and Japan due to their strategic and economic interests in this region. Historical context on sovereignty, contention on energy, significance of the geographic location, threat to maritime security, overlapping maritime claims caused by the new established maritime regimes authorized by UNCLOS are all sources of the SCS dispute. The multilateral overlapping maritime claims particularly make the situation even more intricate than other regions due to the fact that it involves the most disputants among all the maritime disputes in the world, including China, Vietnam, the Philippines, Malaysia, Indonesia, Brunei and Taiwan. Any conflict in the SCS will pose threat to the regional and international security. Seeking for a peaceful solution to this dispute thus becomes an important agenda for these countries' foreign policy makers. Second, the adoption of UNCLOS in 1982 has led to a period of relative stability in the law of the sea. The Convention offers a legal framework for the sustainable development of the oceans and its natural resources. However, especially in recent times there have been calls to amend the Convention because of supposed shortcomings. Renegotiation of the Convention in all probability would be a time consuming process, the outcome of which is highly uncertain. Such a process would almost certainly negatively impact upon international cooperation in the management of ocean space as it is bound to lead to uncertainty and conflict over the applicable legal regime. The rationale of this dissertation is intended to contribute to the discussion on the significance of the Convention as the basis for the legal order of the ocean. The disputes and conflicts

contained in the SCS cover almost every aspect in LOS Convention, e.g., maritime delimitation, historic title, territorial sovereignty, use of force, military activities, fishing, marine scientific research, freedom of navigation, marine environment protection and deep seabed mining. The SCS disputes involve maritime power like China, archipelago states like Indonesia and the Philippines, strait states like Malaysia and Indonesia, non-UNCLOS state like Thailand, strait user states like the US, Japan and others, the composition of which reflect many dimensions of the users of UNCLOS. To sum up, the implication of this dissertation is two-fold. On one hand, it aims at finding the most practical mechanism to settle the SCS disputes. On the other hand, it bears the responsibility of assessing the effectiveness and implementation of UNCLOS as an international regime.

My dissertation aims to answer the following question: 1. Does UNCLOS create a constitution for the ocean? (Is the LOS Convention Regime effective? Can the LOS Convention Regime adapt to changing circumstances?) 2. Is UNCLOS successful in preventing or managing conflicts pertaining to marine resources? (Is UNCLOS playing a positive role in addressing the SCS dispute? To what extent do the States involved in the SCS recognize the connection and relevance of UNCLOS and the settlement of the disputes in this region?) 3. How does the SCS dispute settlement bridge the gap of International Relations (IR) and International Law (IL)?

1. Regime Theory

The concept of a regime is relatively new, coming into common parlance in the 1970s. Ruggie first advocated the regime concept, defining it as "a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of States."[11] There is various definition of a regime, but the one formulated by Stephen Krasner remains the standard formulation. He has drawn a fundamental distinction between the principles and norms of a regime which are "the basic defining characteristics of a regime" and "the rules and decision-making procedures which, if changed, are changes within regimes which do not alter the regime itself."[12] Although not expressly making the point, Krasner's illustrations make it clear that if international law is relevant to international regimes, it is only so at the level of rules and decision-making

[11] J.G. Ruggie, "International Responses to Technology: Concepts and Trends" (1975) 29, *International Organization*, pp. 557-583, at p. 570
[12] Stephen D. Krasner, *International regimes* (Ithaca: Cornell University Press, 1983), p.187.

procedures rather than at the level of principles and norms.[13] A considerable body of regime literature had been produced since 1982. Andrew Hurrell contrasts Krasner's 1982 definition of a regime with that of Robert Keohane who in 1989 defined regimes as being "institutions with specific rules, agreed upon by governments, which pertain to particular sets of issues in international relations."[14] Despite clarifying which definition better explains the nature of a regime, Hurrell pointed out the trend amongst regime theorists to focus less on the "rather generalized definitions of regimes" and more on "the need to focus on specific sets of rules."[15]

Literature on international regimes can be readily classified into one of several broad groupings.[16] Adherents of major theoretical traditions in International Relations, including realism and neo-liberalism, have retained their foundational assumptions in working with the regime concept.[17] Those who view the world through what can broadly be termed 'realist' or 'structuralist' lenses continue to downplay the possibility of regimes playing any independent role in world politics; those seeing the world through what can broadly be termed 'liberal' lenses, begin with the assumption of the possibility of cooperation and investigate questions deriving from those assumptions, such as how to make regimes more effective. Regime theory has been closely associated with neo-liberalism. And yet underlying much of the early literature on international regimes was the question as to why States engage in regime building. The distance between neo-liberal institutionalism and realism is not as great as one might have assumed.[18] Confusion has been increased by the fact that neo-liberalism has often been used interchangeably with terms such as 'neo-liberal institutionalism' or 'the new liberal institutionalism'.[19] Hence, in much regime scholarship it has been "unclear whether neo liberalism is a paradigm in its own right, or a sort of supra-paradigm encompassing Realist and liberal explanations."[20]

There are numerous categories of international regimes. Following Friedrich A. Hayek, Young has interpreted some regimes as self-generating or spontaneous institutional

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[13] Ibid, p.188

[14] Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989), p.4.

[15] Andrew Hurrell and Benedict Kingsbury, *The international Politics of the Environment: Actors, Interests, and Institutions* (Oxford: Clarendon Press, 1992), p.209.

[16] Andreas Hasenclever, Peter Mayer, and Volker Rittberger, for example, divided the literature into realism, neo-liberalism, and cognitivism. See A Hasenclever, P. Mayer and V. Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), pp. 8-22

[17] Scott, "The LOS Convention as a Constitutional Regime for the Ocean", 2004, p. 21

[18] Ibid.

[19] R.M. A. Crawford, *Regime theory in the Post-Cold War World: Rethinking Neoliberal Approaches to International Relations* (Aldershot, Dartmouth: 1996), p. 72

[20] Ibid, p.71, see also Scott, "The LOS Convention as a Constitutional Regime for the Ocean", 2004, p. 21

arrangements, in which "they do not involve conscious coordination among participants, do not require explicit consent on the part of subjects or prospective subjects, and are highly resistant to efforts at social engineering."[21] A second category of regimes can be described under the rubric of negotiated institutional arrangements, which are "characterized by conscious efforts to agree on their major provisions, explicit consent on the part of individual participants, and formal expression of the results" and have the following types: constitutional contracts, legislative bargains, and comprehensive arrangements (such as the arrangements for the deep seabed).[22] A third category entails imposed institutional arrangements, such as the July 1944 Bretton Woods Agreements or system of international monetary management regime, which are fostered through a combination of coercion, cooptation, and the manipulation of incentives and overshadow negotiated regimes when an overt hegemon or leadership group succeeds in inducing subordinate actors to accept the arrangements as legitimate.[23] Mark J. Valencia has added a fourth category; namely, "led" international regimes, implying that one or more regime members are leaders and some regime members play the role of followers.[24]

While consensus has not been reached on a number of decisions in relation to the concept, useful work continues to be done within the regime framework. This is particularly true in relation to certain aspects of regime life, such as questions of regime effectiveness and the role of non-State actors in regime evolution.[25] In a regime exchange between Oran Young, on the one hand, and Jon Hovi, Detlef Sprinz, and Arild Underdal on the other,[26] both sides adopted a pragmatic approach, deciding not to solve all the conceptual problems before addressing the empirical issue at hand, such as regime effectiveness. For the purposes of this paper, retention within regime theory of the major disciplinary theoretical divides is not a problem since some of the questions arising out of those theoretical schools correspond to broad issues of contemporary concern in International Law. Rather, UNCLOS as an international regime and its effectiveness in maintaining ocean order is the

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21 Oran R. Young, *International Cooperation* (Ithaca, NY: Cornell University Press, 1989), 29, at pp.84–85; See also Peter Kien-Hong Yu, "Setting Up International (Adversary) Regimes in the South China Sea: Analyzing the Obstacles from a Chinese Perspective", *Ocean Development & International Law*, 38:147-56, 2007.
22 Young, *International Cooperation,* 1989, pp.86–87
23 Ibid. p.88 & 94.
24 Mark J. Valencia, *A Maritime Regime for North-East Asia* (Hongkong: Oxford University Press, 1996), p.61 and 302.
25 Scott, "The LOS Convention as a Constitutional Regime for the Ocean", p.21
26 See O.R. Young "Inferences and Indices: Evaluating the Effectiveness of International Environmental Regimes" (2001:1), *Environmental Politics*, pp. 99-121; J. Hovi, D.F. Sprinz and A. Underdal "The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Reponse, and the Road Ahead" (2003:3), *Global Environmental Politics*, pp. 74-96; O.R. Young "Determining Regime Effectiveness: A Commentary on the Oslo-Potsdam Solution" (2003:3) *Global Environmental politics,* pp. 97-104; J. Hovi, D. Sprinz and A. Underal, "Regime Effectiveness and the Oslo-Potsdam Solution: A Rejoinder to Oran Young" (2003:3) *Global Environmental Politics*, pp. 105-107

focus of this research.

2. Regime Effectiveness

Over the last decade, there has been considerable academic debate regarding regime effectiveness, particularly on the part of those concerned with the environment.[27] The rationale behind the emphasis on regime effectiveness is straightforward: if the international community is going to direct most of its efforts to minimizing negative human impacts on the environment through multilateral regime, then it is critical to evaluate whether such efforts are paying off. Questions of regime effectiveness are, though, of relevance to all regimes. There has, similarly, been a growing recognition in International Law, that simply getting more and more treaties needs to give way to refining and making more effective the treaties that have already been negotiated.[28] This theme is identifiable in many fields of international law, including international humanitarian law, international human rights and international environmental law as well as the law of the sea.

The questions as to whether a regime has achieved its goal or successfully addressed the issue with which it was established to deal is addressed by regime theorists under the banner of assessing 'regime effectiveness'. The empirical study of regime effectiveness has raised a number of methodological issues, most fundamental, it has revealed a lack of agreements as to what we meant by an effective regime. Bernauer argues that perhaps the most common criterion of regime effectiveness is that of achieving goals.[29] Most basically:

> *International organizations and regimes are established in order to perform a particular function or achieve a certain goal. One of the basic questions to be asked about these institutions is therefore how effective they are in delivering what they were established and designed to achieve.*[30]

This approach suggests comparing the actual performance of the regime against the best possible state of affairs. A second approach to ascertaining whether regime 'make a difference' is that of the 'no-regime counterfactual' by which outcomes are compared with what might have been the state of play if no regime had been established.[31] The actual

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[27] See M. Zuern, "The Rise of International Environmental Politics: A Review of Current Research" (1998) 50, *World Politics*, pp.617-649.

[28] Scott ,'The LOS Convention as a Constitutional Regime for the Ocean"', p.23

[29] See T. Bernauer, "The Effectiveness of International Environmental Institutions: How We Might Learn More" (1995) 49 *International Organization*, pp.351-377, at p.369

[30] J. Hovi, D.F.Sprinz and A. Underdal, "The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Response, and the Road Ahead" (2003:3), *Global Environmental Politics*, pp.74-96, at p.74

[31] Scott ,'The LOS Convention as a Constitutional Regime for the Ocean"', p.23.

performance of a regime can be compared against two points of reference. One is the hypothetical state of affairs that would have come about had the regime not existed. This is clearly the standard we have in mind when arguing that 'regime matter'. The alternative option is to evaluate the actual state of affairs against some idea of what constitutes a 'good' or 'optimal' solution. This is the appropriate standard if we want to know whether or to what extent a problem is in fact 'solved' under present arrangements. These two standards can easily be combined, as suggested by Helm and Sprinz.[32] Their formula below measures the effectiveness of a regime in terms of the extent to which it in fact accomplishes all that can be accomplished.

$$\frac{\textit{Actual regime solution} - \textit{No-regime counterfactual}}{\textit{Collective optimum} - \textit{No-regime counterfactual}}$$

By this logic, we would consider regime X as more effective than regime Y to the extent that it succeeds in tapping more of the joint gain potential. For comparative research, such a standardized notion of relative effectiveness is particularly attractive in that it helps solve the common metric problem. But any attempt at measuring regime effectiveness involves causal inference requiring that we separate changes that can be attributed to the existence and operation of the regime itself from those that have been brought about by other factors.[33] This is by no means a trivial exercise. The effective regime will be characterized by particular configurations of scores on the set of independent variables, as indicated in the following table by Miles.[34] More specifically, I suggest that there are two main paths to effectiveness. One goes through type of problems; benign problems are easier to solve than those that are malign. Moreover, problems that are well understood are easier to deal with than those that are clouded in uncertainty about cause-and-effect relationship. The other path goes through problem-solving capacity; other things being equal, the greater the problem-solving capacity of a system, the more effective the solutions it produces. High problem-solving capacity is likely to be a necessary, but not sufficient, condition for developing effective solutions to truly malign problems. Benign problems can, however, be solved effectively even with modest capacity.

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[32] D.F. Sprinz and C. Helm, "The Effect of global Environmental Regimes: A measurement Concept", *International political Science Review* (1999), 20, p.359-369.1999
[33] Arild Underda, "The Concept of Regime Effectiveness", *Cooperation and Conflict* (1992), 27, p.227
[34] Edward L. Miles, Arild Underdal, Steinar Andresen, Jorgen Wettestad, Jon Birger Skjarseth, and Elaine M. Carlin. *Environmental Regime Effectiveness: Confronting theory with Evidence* (Cambridge: the MIT Press, 2002), p.63

Table Introduction.1

Hypothesized configuration of scores for effective regimes

Independent Variable	*Hypothesize Score*
Type of problem	. Predominantly benign or at least mixed . State knowledge: good
Problem-solving capacity	High, as indicated by . Decision rules providing for adoption of rules by (qualified) majority . An IGO with significant actor capacity serving the regime . A well-integrated epistemic community .Distribution of power in favor of pushers or pushers + intermediaries .Instrumental leadership by one or a few parties or by individual delegates or coalitions of delegates
Political Context	Favorable, as indicated by .Linkages to other, benign problems .Ulterior motives or selective incentives for cooperation

Source: Miles etc. *Environmental Regime Effectiveness: Confronting theory with Evidence*, p.63

These propositions apply as we consider each problem in isolation and on its own merits only. In real life, regime-formation and implementation processes always take place within a broader political context that may enhance or impede success. A favorable political context can to some extent reduce the demands on problem-solving. These variables listed in this table would be applied in the discussion in the following chapters respectively.

3. UNCLOS as an International Regime

Representing the culmination of 24 years of international negotiation to formulate and articulate rules to govern ocean space, UNCLOS codified one of the most far-reaching changes of the 20th century in the institutional structure of international society and, in the process, formalized a complex governance system—in 17 parts, 320 Articles, and 9 Annexes —dealing with a broad array of human uses of marine resources. A sense of its breadth and of its nature was captured in Tommy Koh's famous reference to the Convention as a 'constitution for the ocean'.[35] Earlier than him, the first reference of this term was introduced by E.M. Borgese in 1975,[36] and it has been repeated on numerous occasions[37] to the extent that some scholars suggest that it has become integral to our understanding of UNCLOS and deserving of greater analysis.[38] Small wonder, then, that this institutional change has attracted the interest of students of international relations as well as international legal scholars.

There is little doubt that the regime concept is applicable to the process of international cooperation founded on UNCLOS. Few would deny that UNCLOS contains 'principles, norms, rules, and decision-making procedures around which actors' expectations converge'.[39] But is UNCLOS regime a 'typical international regime'? Many will respond 'no', most basically because of the sheer number of issues addressed by the Convention. Regime is usually

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[35] Statement of Ambassador Tommy T. B. Koh, President of the Conference, at its final session in Montenegro Bay, Jamaica, 11 December 1982 (reprinted in the Law of the Sea; Official Text of the United Nations Convention on the Law of the Sea (New York: United Nations: 1983), xxxiii

[36] P.B. Payoyo, *Cries of the Sea. World Inequality, sustainable Development and the Common Heritage of Humanity* (The Hague: Martinus Nijhoff Publishers, 1997), at p.49 fn.2, citing E.M.Borgese "A Constitution for the Oceans" in E.M.Borgese and D. Krieger (eds.) Tides of Change (1975)

[37] Scott, "The LOS Convention as a Constitutional Regime for the Ocean", at p.12, fn.11, citing US Department of State A Constitution for the Sea (US Government Printing Office, Washington DC: 1976) and US Commission on Ocean Policy An Ocean Blueprint for the 21st Century; Final Reports(Washington, DC: 2004) www.oceancommission.gov.

[38] Scott, "The LOS Convention as a Constitutional Regime for the Ocean", p.12

[39] Although exactly how to define each regime component is not straightforward. Onuf commented that Krasner's definitions fail to differentiate regime components systematically. "As prescriptive statements, principles, norms, and procedures all take the linguistic form of a rule, as that term is conventionally defined by philosophers" (See N. Onuf, "The Constitution of International Society" (1994) 5 *EJIL* pp.1-19, at pp.9-10).

identified by the issue or issues they were designed to address. Many regimes can be readily identifiable as responding to one specific issue, such as climate change or ozone depletion. By resolution 2750 (XXV) the General Assembly decided to convene a conference to deal

> *with the establishment of an equitable international regime – including an international machinery – for the area and the resources of the sea-bed and the ocean floor, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research.*[40]

UNLCOS seems not to meet this criterion since it addresses more than one issue – from jurisdictional zones, such as territorial sea (TS), Exclusive Economiz Zone (EEZ), Continental Shelf (CS) to various marine issues, such as marine pollution, fishing and navigation. Scott raises the question whether scope-defined either functionally or spatially – have to do with the question of whether a regime is or is not typical? International regimes come in a variety of sizes and shapes. The regime created in the 1970s for the protection of polar bears focuses on a single species in a limited spatial setting; the regime dealing with water quality in the Great Lakes of North America is a bilateral regime addressing a well-defined set of environmental concerns in a circumscribed geographical area. Other regimes (e.g. the governance system for international trade) are global in scope and address a wide range of specific concerns. In this respect, UNCLOS regime occupies one end of an institutional spectrum; it is among the broader institutional arrangements in terms of both functional scope and spatial domain.

Another question centers on the distinction between regulative and constitutive arrangements.[41] As Scott observes, many — perhaps most — international regimes address well-defined problems—marine pollution, ozone layer depletion, climate change, biological diversity — and seek to find solutions to the problem at hand. Others are more constitutive in nature in the sense that they endeavor to create mechanisms that their members can use in seeking to come to terms with a variety of specific problems. The UNCLOS regime — along with the trade regime, the regime for Antarctica, and the emergent regime for human

[40] Adopted on 17 December 1970; Doc. A/RES/2750 (XXV) (Resolutions adopted by the General Assembly during its 25th Session, pp.25-27). See also the summary of issue in T.T.B. Koh, "Negotiating a New World Order" in A.K. Henrikson (ed.) *Negotiating World Order: The Artisanship and Architecture of Global Diplomacy* (Wilmington, Delaware: Scholarly Resources Inc., 1986), pp.33-45, at p.37

[41] Oran R. Young, "Commentary on Shirley V. Scott 'The LOS Convention as a Constitutional Regime for the Ocean", in Elferink (eds.) *Stability and Change in the Law of the Sea: The Role of The LOS Convention*", pp.39-47, at p.40

rights — exemplifies the category of constitutive arrangements. Its purpose is to create procedures for addressing a wide range of issues from harvesting living resources to mining deep seabed minerals; it creates jurisdictional arrangements and allocates authority regarding decision-making within these areas, without specifying substantive rules dealing with specific human activities involving marine resources. Here, too, UNCLOS regime occupies one end of a spectrum.[42]

It may help to consider the distinction between the model of comprehensive arrangements and the framework/protocol strategy that has become popular in recent decades. The key to this distinction is as much functional as it is political. In addressing a specific problem (e.g. long-range trans-boundary air pollution), it may make good sense to start with a simple framework and proceed over time to add protocols dealing with specific concerns (e.g. the protocols on sulfur dioxide, nitrogen oxides, volatile organic compounds).[43] But this approach does not make sense in a regime whose purpose is to establish a general governance system for a well-defined domain such as the oceans. Those who espouse the framework/protocol approach and contrast it with the more comprehensive and jurisdictional approach of UNCLOS regime often lose sight of this distinction.

For many of those involved in UNCLOS III, the aim was to devise no less than a 'constitution for oceans', the goal of which was building a 'comprehensive' law of the sea regime and establishing a legal order for the oceans. General Assembly Resolution 3076 of 16 November 1973,[44] convening UNCLOS III, referred in its preambular paragraphs to the need to proceed to the inauguration of a conference to complete the drafting and adoption of articles for a "comprehensive convention on the law of the sea." The conference was to be mandated with adopting a convention dealing with "all matters relating to the law of the sea.[45] The fourth preambular paragraph of UNCLOS refers to establishing a 'legal order for the sea and oceans'.

> *The LOS Convention has a quite comprehensive objective; it establishes a legal order for the seas and oceans, including the deep seabed and the subsoil thereof. Such legal order is meant to promote the peaceful uses of the seas and oceans by providing a balance between the different forms of usage and by coordinating the various rights and interests of State Parties.*[46]

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[42] Ibid, p.40

[43] Adopted on 13 November 1979; 1302 UNTS 217.

[44] *Doc. A/Res/3067 (XXVIII)* (Resolutions adopted by the General Assembly during its 28th Session Vol.1, p.13-14).

[45] Ibid.

[46] R. Wolfrum, "The Legal Order for the Seas and Oceans" in M.H. Nordquist and J.Norton Moore (eds.) *Entry into Force*

Writing in 1983 Allott described the Convention as 'legally comprehensive':

> *It has a rule for everything. The rule may be a permissive rule. It may be an obligation. It may confer an explicit freedom or leave a residual liberty by not specifying a right or a duty. But a Flying Dutchman wandering the sea areas of the world, carrying his copy of the Convention, would always be able to answer in legal terms the questions: who am I? Who is that over there? Where am I? What may I do? What must I do now? The convention would never fail him.*[47]

This dissertation approaches UNCLOS as an international regime, the mission of which is providing a comprehensive framework in addressing global ocean disputes or interpreting differences among states with regard to the context of the Convention itself in different political context. Whether UNCLOS has successful played this role is the essence of this research project.

4. Effectiveness of UNCLOS

The ocean, approximately 71% of the Earth's surface, plays a vital role in supporting the human population. Every state in the world has economic, political, strategic and social interests in the ocean, no matter whether they are coastal states or landlocked states. Ocean has become increasingly important after the ratification of UNCLOS in 1982 which gives coastal states more rights to access the ocean space by claiming territorial seas, EEZ and CS, among others. The new ocean regimes have stirred lots of disputes, especially maritime delimitation among states. Among the 144 coastal states in the world, there are more than 380 maritime delimitations to be resolved, among which only one third have been settled so far. The significance of UNCLOS is not only found in its far-reaching control over activities in all maritime zones, but also in the procedures it provides for States to resolve their differences in respect of competing claims. While UNCLOS is seen as a significant achievement and deemed by many maritime countries as the efficient and justice channel to solve the ocean related, others have been highly skeptical of its comprehensiveness and effectiveness.

To evaluate the effectiveness of UNCLOS regime, we should seek to answer a serial

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of the Law of the Sea Convention (The Hague: Martinus Nijhoff Publishers, 1995), pp.161-185 at p.161

[47] P. Allott, "Power Sharing in the Law of the Sea" (1983) 77 *American Journal of International Law*, p.1-30, at p.8

of questions. How should we judge the performance of UNLCOS regime? How successful has this regime been in addressing the major problems of ocean governance, and how would human uses of ocean resources have evolved in the absence of UNCLOS? Through the discussion in chapter 2 to 4, the performance of UNLCOS as an international regime to address ocean disputes will be addressed based on the indicators in Table above.

The varying definitions of regime allow for a wide range of topics or fields of international law to be investigated under regime theory. These include, inter alia, the GATT, the United Nations and any number of environmental agreements. In the context of the LOS Convention, such as the 'continental shelf regime' and the 'dispute settlement regime', might be more susceptible to typical regime theory analysis. Whilst the focus on the internal coherence of UNCLOS as a regime is important and may help us to understand its significance and contribution to international order, I wonder whether this focus may not be subsidiary to questions concerning the external coherence UNCLOS regime. In this context I refer to the relationship between the LOS Convention and more general institutions of international law and with other substantive fields. Whether we use the language of international relations or international law, it is axiomatic that a variety of regimes or legal institutions exist. These also exist at different levels, i.e. global or regional, and in relation to structural and substantive matters. Accordingly, there is much scope for overlap and interaction between regimes, like concentric or intersecting circles. If we embrace such a variety of regimes, which concern themselves with different subject matter and which operate at different levels, then we should seek to understand the inter-relationship between such regimes because any single regime will invariably impact upon others. However, the difficulty here is that at present such an understanding of complex relations and phenomena is absent or incomplete. Despite some indicia of worldwide organization, an effective and universal international order does not exist at present and there is often little external coherence between regimes or constitute parts of the international legal order.[48] This deficiency must impact on any evaluation of the LOS Convention. It seems that the external relationship between the LOS Convention and other 'regime' is a matter of fundamental importance, and until such relationships are better understood and defined with greater certainty, then any analysis of the internal constitutionality of the LOS Convention would appear to remain incomplete or vulnerable. To summarize, it is necessary to look at both the

[48] Scott , "The LOS Convention as a Constitutional Regime for the Ocean".

internal regimes of UNLCOS and the relationship of UNCLOS and other regimes and institutions in the SCS in order to evaluate the role of UNLCOS in addressing the SCS dispute, and various ocean related disputes in general.

5. Literature Review

Literatures on the SCS mostly focus on the historical explanation on the origin of the respective disputes,[49] development of the disputes under new international order,[50] geopolitics,[51] legal mechanism[52] or policy paper from the perspective of each claiming states respectively.[53] There are also many literatures discussing the resolution of the SCS disputes.[54] Some emphasizes on approaches of regional cooperation,[55] or from other ocean-related perspectives,[56] such as marine environment, marine scientific research.

Many SCS scholars have made tremendous efforts in seeking resolution of the SCS disputes. In the 1980s and 1990s, Mark J. Valencia at the East-West Center in Hawaii presented a series of alternative proposals on how the SCS could be delimited into zones of national jurisdiction. The proposal were based on the presumption that the conflict would be resolved diplomatically, through arbitration or a court ruling, rather than militarily. Indonesian's scholar Hasjim Djala's so-called 'doughnut formula' argued that there would be an area of High Seas left in the middle of the SCS (more than 200 nautical miles from all shores) and that this area could form the basis for a Joint Development Zones (JDZ)

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[49] Wu Shicun, *A Comprehensive Study on the Spratly Islands Dispute* (Hainan: Hainan Publishing House, 2005); Valencia Mark J., "The Spratly Islands: dangerous ground in the SCS", *The Pacific Review*, 1(4): pp.438～443; Steven Kuan-tsyh Yu, "Who Owns the Paracels and Spratlys? An Analysis of the Nature and Conflicting Territorial Claims," *Chinese Yearbook of International Law and Affairs* 9 (1989-1990): 1–27 (substantiating the Chinese claims) and Chang, "China's Claim of Sovereignty," pp.399–420.

[50] Song Yann-huei, The Overall Situation in the SCS in the New Millennium: Before and after the September 11 Terrorist Attacks, *Ocean Development & International Law*, 34, 2003, pp229-77; Choon-ho Park, "The SCS Disputes: Who Owns the Islands and the Natural Resources?" in *The Law of the Sea: Problems from an East Asian: proceedings of two workshops of the Law of the Sea Institute held in Seoul, Korea, 1975.*

[51] O'Neill Robert (ed.), *The Security of Sea-lanes in Southeast Asia. In: Security in East Asia.* (London, International Institute of Strategic Studies, 1984); Guo Yuan, *Geopolitics Study of the SCS* (Xiamen University, 2006)

[52] Kittichaisaree Kriangsak, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia*. Singapore: (Oxford University Press, 1987); Lewis M. Alexander, "Baseline Delimitation and Maritime Boundaries", *Virginia Journal of International Law*, vol. 13, no.4 (1983), pp.504-36; Brown, E.D. "Dispute settlement and the law of the sea: the UN Convention regime", 21 (1) *Marine Policy* (1997), pp. 17–43; (Kittichaisaree, 1987; Lewis M. Alexander, 1983, Brown, 1997)

[53] Alatas, Ali, "SCS – views from ASEAN", *Indonesian Quarterly*, vol.18, no.2 (1990), pp.114-70； Lo Jung-pang, "Emergence of China as a sea power during the late Sung and early Yuan periods", *Far Eastern Quarterly*, 1995. 14: 489～503

[54] Caballero-Anthony, Mely, "Mechanisms of Dispute Settlement: The ASEAN Experience", *Contemporary Southeast Asia*, vol.20, no.1 (April 1998)； Hasjim Djalal, "Indonesia and the SCS Initiative", *Ocean Development & International Law*, vol. 32, no.2 (2001), pp.97-105； Valencia, Mark J. and Jon M. Van Dyke, "Comprehensive Solutions to the SCS Disputes: Some Options", in Gerald Blake, Martin Pratt, Clive Schofield and Janet Allison (eds.), *Boundaries and Energy: Problems and Prospects* (London: Kluwer Law International, 1998), pp.85-117

[55] Bateman, Sam and Stephen Bates (eds.) Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation, *Canberra Papers on Strategy and Defence* no.114, 1996; Chen Hurny-yu, "The Prospects for joint Development in the SCS", *Issues & Studies*, vol.27, no.12 (1991), pp.112-25;

[56] Brian Morton (ed.) *The Marine Biology of the SCS III* (University of Washington Press, 1998),

regime.[57] Cooperative schemes less ambitious than outright JDZs or Joint Management Zones (JMZs) have also been discussed, the purpose of which would then be to carry out oceanographic research and research on biological diversity, protect the natural environment, and manage fish stocks. Besides, more traditional kind of proposal for dispute resolution has aimed at resolving the sovereignty dispute to the Paracel and Spartly Islands on the basis of international law. Several scholars have assumed that the sovereignty disputes concerning the islands must be resolved before one can get on with delimitating maritime zones. Other scholars, such as the leading SCS specialist Mark J. Valencia and the legal scholar Jon M. Van Dyke has pointed to the fact that it may actually be dangerous to start by resolving the sovereignty disputes.[58] Valencia, Ludwig and Van Dyke have included among their several models on how to divide the SCS, one where the islands as such have no influence on the delimitation. Instead the zones are delineated on the basis of distance from the coasts of the surrounding countries, with a system of moderate compensation for geographically disadvantaged states. This has inspired a third kind of proposal which suggests that the conflict could be resolved diplomatically by the regional countries themselves, on the basis of the UNCLOS, but without resolving the tortuous question of sovereignty to the Spratlys. Timo Kivimaaki brought forward three approaches, namely direct containment of violence, dispute resolution, and conflict transformation approach.[59] Despite the mentioned efforts made by both political and academic level, e.g. diplomatic negotiation and mutual development, the settlement of the decades-old maritime disputes in the SCS seems to be politically deadlocked, and encounter difficulties to be settled in a short time, if not at all.

Literatures on the law of the sea abound with the UNCLOS being ratified in 1982 and coming into force in 1994.[60] The question of whether UNCLOS is effective is not easy to answer due to both conceptual complications and to analytic difficulties. Partly, this is a matter of defining appropriate criteria of evaluation. Scott, wanting us to accept a relatively benign view of the effectiveness of the UNCLOS regime, suggests that UNCLOS regime can be assessed as 'legally' effective insofar as it "provides clearly for a system within which

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[57] Hasjim Djalal, "Indonesia and the SCS Initiative".

[58] Valencia, Mark J. and Jon M. Van Dyke, "Comprehensive Solutions to the SCS Disputes: Some Options", in Gerald Blake, Martin Pratt, Clive Schofield and Janet Allison (eds), *Boundaries and Energy: Problems and Prospects* (London: Kluwer Law International, 1998), pp.85-117

[59] Timo Kivimaeki (ed.) *War or Peace in the SCS* (Copenhagen: NIAS Press, 2002), pp.131-165

[60] Adede, A. O., *The System For Settlement of Disputes Under The United Nations Convention On The Law Of The Sea : A Drafting History and A Commentary* (Dordrecht ; Boston : M. Nijhoff ; Hingham, MA, USA: Distributors for the U.S. and Canada, Kluwer Academic Publishers, 1987); Churchill, Robin, "Dispute settlement under the UN Convention on the Law of the Sea: survey for 2004", 21 (1) *The International Journal Of Marine And Coastal Law* (2006), pp. 1–14; Natalie Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge : Cambridge University Press, 2005)

to address substantive issues as they arise", and she draws attention to the role of the regime in preventing conflict.[61] E.D. Brown acknowledges that the scheme for settlement of disputes embodied in Part XV of UNCLOS has already been successful by breaking the mould and establishing a more positive attitude to compulsory third party settlement than previously existed.[62] Natalie Klein, focusing on one particularly unusual feature in UNCLOS— the inclusion of a compulsory dispute settlement system as on integral feature of the Convention, however argues that though UNCLOS is a significant advancement in international law, it does not contain a comprehensive dispute settlement system in view of the remaining gaps and ambiguities.[63] She further argues that the existence of mandatory dispute settlement under UNCLOS has the potential to create novel complications in the international dispute settlement. Judge Thomas A. Mensah argues that the dispute settlement regime of UNCLOS has many undeniable merits, although it does, have many shortcomings.[64] It is flexible because it makes it possible for States to choose from a reasonably wide range of options; but it is comprehensive in that it ensures that, for the most part, its provisions can be enforced by means of mandatory procedures which result in binding decision. And the regime is 'user-friendly' in the sense that it takes due account of, and accommodates, the legitimate concerns of States which wish to exclude issues of vital and sensitive national interest from the ambit of the mandatory judicial procedures. The regime of the Convention advances the principle of the rules of law in international relations, while recognizing the necessary limits of that principle in a world of sovereign states, most of which are still jealous of their sovereign rights and prerogatives.

This dissertation, built on the findings from existing literatures review, will take an interdisciplinary approach, by which to gain theoretical inspiration from the interaction of International Relations and International Law, particularly the law of the sea. I argue, from the analysis on the internal regimes of UNCLOS, that there can be little doubt about the centrality of UNCLOS in the legal framework for ocean management, albeit it may be perceived to have certain shortcomings. The most pervasive threats to the SCS stability and obstacles to solve the dispute, based on the findings from the states practices of UNCLOS and its relationship with other intuitions or regimes in the SCS, are caused by the lack of

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[61] Scott, "The LOS Convention as a Constitutional Regime for the Ocean".2004.
[62] Brown, E.D. "Dispute settlement and the law of the sea: the UN Convention regime", 21 (1) *Marine Policy* (1997), pp. 17–43.
[63] Natalie Klein, *Dispute settlement in the UN Convention on the Law of the Sea*.
[64] Thomas A. Mensah, Statement Of Thomas A. Mensah, President Of The International Tribunal For The Law Of The Sea, On Agenda Item 39: Oceans And The Law Of The Sea, Distributed At The Plenary Of The Fifty-Second Session Of The United Nations General Assembly, 26 November 1997.

political will to implement the dispute settlement mechanism of UNCLOS, and lack of effective regime to promote and implement regional cooperation in such various fields as marine environmental protection and energy joint development. This paper calls for the states involved to set up a pragmatic settlement regime to accelerate ocean governance in this region.

This dissertation will contribute to, theoretically, (1) the ongoing research on interdisciplinary cooperation between International Relations and International Law; (2) the dialogue between political scientists and international lawyers by approaching UNCLOS as an international regime; (3) the literatures on the SCS from a new angle, and practically, (4) a practical settlement mechanism for the SCS dispute, and, (5) last but not the least, the inspiration to the settlement of other ocean-related disputes settlement.

6. Methodology and Research Methods

This research project is conducted through a case study on the SCS. Both qualitative and quantitative methods are applied in this research. The effectiveness of UNCLOS is assessed from both the coherence of its internal regimes and the applicability of its dispute settlement regime in the SCS, states practices of UNCLOS and its relationship with other intuitions or regimes in the SCS. The indicators in Table Introduction.1 will be applied throughout the discussion.

The research process of the dissertation is composed of three parts:

1. Literatures review (archival research, interdisciplinary study of international law and international relations, legal case study)

2. Participatory research (The International Tribunal for the Law of the Sea (ITLOS) internship, ITLOS Capacity-Building and Training Programme on Dispute Settlement under the United Nations Convention on the Law of the Sea, etc.)

3. Field research (empirical case study, interview)

Literature review. I have conducted a thorough research on the literature on the case of the SCS, from history of the conflict, geopolitics, ocean policy, environment, maritime security to legal study of the law of the sea. The PhD programme of political science, with focus on international relations at the University of Alberta enhances my understanding of

the discipline of international relations as another important academic approach to this project.

Participatory research. My previous training on ocean governance (Dalhousie University), and ocean law and policy (Rhodes Academy of Ocean Law and Policy, Virginia University Center for Ocean Law and Policy) will be my unique advantage in terms of legal element of the research. Particularly, my internship in ITLOS, and the networking with United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALOS) gave me a precious chance to talk to and gain update information from the Judges and legal officials who are highly involved in the maritime dispute settlement. All these previous experiences have built up a solid foundation in terms of the research on international law, particularly on the law of the sea. The participation in the programme of ITLOS Capacity-Building and Training Programme on Dispute Settlement under UNCLOS helps me strengthen the understanding of international dispute settlement through the lectures, case studies, and training in negotiation, mediation, and delimitation of maritime areas.

Field research. Field research is crucial to this dissertation because the SCS involves such many states as China, Vietnam, the Philippines, Malaysia, Indonesia, Brunei, and Taiwan. I conducted a field research in 2008 in China and Vietnam, and had developed interview via telephone or email with the distinguished scholars of the SCS and the senior officials of ocean policy making in these countries with regard to their attitude and position towards the third-party compulsory settlement on the SCS and the impact of the UNCLOS on the State practices. I also developed research on the ocean policy of these countries, including archival research, official statement, ocean legislation etc. Third, I have interviewed the regional organizations specialized in ocean affairs since the effectiveness of implementing UNCLOS requires the promotion either through independent marine-oriented organizations or through specifically marine-oriented organs of the regional multipurpose or economic organization. Most countries in the SCS are developing or less-developed countries who have only recently begun to appreciate and to reach agreement on the areas of shared interests and a continuing common concern for their realization, being the necessary conditions of institutionalizing effectively regional approaches to solving ocean problems. A regional institution becomes, therefore, a means of necessary, coordinated, and joint efforts of states aimed at the establishment, implementation, and consolidation of required national marine affairs policies, which take due account of

interactions between terrestrial, coastal, and ocean activities.

7. Organization of the Dissertation and Framework of Analysis

Chapter I provides a background of the SCS dispute from several dimensions, including history, economy (energy), military and security, the claims of each State involved in the disputes and the nature of their claims, and the most recent development in 2009 in the SCS. Chapter II to IV then assess the effectiveness of UNCLOS as an international regime in addressing ocean disputes. Chapter II focuses on the internal coherence of the LOS Convention regime. This chapter analyzes 'dispute settlement regime' and its applicability in addressing differences or disputes among coastal States in the areas of Territorial Sea Regime, EEZ and Continental Shelf Regime, and in other issues (fishing, freedom of navigation, marine environment, military activity, marine research, and deep seabed mining etc.) Chapter III analyzes state practices in the SCS with regards to the internal regimes of UNCLOS discussed in chapter three. The concept of international law, participation in the UNCLOS negotiation, maritime legislation, and dispute settlement practice of relevant States will be considered in turn in the practice of relevant States. Chapter IV explores the relationship between UNCLOS and other regimes and institutions in general in the SCS. This chapter reviews four fields respectively, namely maritime security, marine environment protection, oil and gas joint development and political interaction (ASEAN+1 Model). The discussion on 'UNCLOS – other regimes' relationship will be developed in the framework of these four fields. Chapter V explores a pragmatic settlement regime for the SCS and proposes a few recommendations for policy makers and academics. The conclude part brings in discussion on interdisciplinary collaboration between International Relations and International Law in the field of ocean dispute settlement.

Chapter I Development of the SCS Disputes

This chapter provides a background of the SCS dispute development from several dimensions, including geopolitics, history, military and security, the claims of each State and the external players involved in the disputes, and the recent development in 2009.

1. Geopolitics

The SCS is usually defined as encompassing a proportion of the Pacific Ocean stretching roughly from Singapore and the Strait of Malacca in the southwest to the strait of Taiwan in the northeast.[65](See Map I.1) The area includes more than 200 small islands, rocks and reefs used to bolster claims to the surrounding sea and its resources.[66] The SCS is of vital importance to the surrounding countries because of its rich natural resources such as oil, gas and fish. It is an integrated ecosystem, one of the richest seas in the world in terms of marine flora and fauna, coral reefs, mangroves, sea grass beds, fish and plant.[67] In addition to marine living resources, mineral reserves including oil and gas have a huge potential. The SCS is sometimes called a "second Persian Gulf".[68]

In addition to the economic potential, the importance of the SCS as a strategic passageway is also unquestioned. It contains critical sea lanes through which oil and many other commercial resources flow from the Middle East and Southeast Asia to Japan, Korea, and China (See Map I.2). More than 80 per cent of the crude oil supplies for Japan, South Korea and Taiwan flow through the SCS from the Middle East, Africa and SCS nations such as Indonesia and Malaysia. Besides, more than half of the world's merchant fleet tonnage passes annually through the Straits of Malacca, Sunda, and Lombok, with the majority continuing into the SCS. Liquefied Natural Gas (LNG) is also shipped through this route. About two thirds of South Korean energy supplies and almost 60 per cent of Japan's and Taiwan's energy supplies flow through the SCS.[69] Almost all shipping that passes through the Malacca and Sunda Straits must pass near the contested Spratly Islands.[70] Therefore,

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65 Ingolf Kiesow, China, *Taiwan, USA and the SCS*, at http://www.foi.se/upload/rapporter/taiwan-taliban/172kiesow.pdf (accessed on February 17, 2007)

66 United States Energy Information Administration, *The SCS Region (*2001), www.eia.doe.gov, (accessed 21 August 2006).

67 See Daniel Y, Coulter, "SCS Fisheries: Countdown to Calamity", *Contemporary Southeast Asia*, vo.17, no.4

68 Zou Keyuan, "Cooperative Development of Oil and Gas Resources in the SCS", in Sam Bateman and Ralf Emmers, *Security and International Politics in the SCS* (London and New York: Routledge, 2009)

69 United States Energy Information Administration, *SCS Region (*2001) www.eia.doe.gov (accessed 21March 2007).

70 Ingolf Kiesow, China, *Taiwan, USA and the SCS, at http://www.foi.se/upload/rapporter/taiwan-taliban/172kiesow.pdf . (accessed on March 3*

stabilized transportation through these waters is a prerequisite for a continuation of world trade of present proportions.

At stake is also the strategic control over the free passage of foreign warships and military aircraft. Safety of navigation and overflight and the freedom of sea lanes of communication are critical strategic interests of the United States, which uses the SCS as a transit point and operating area for the U.S. Navy and Air Force between military bases in Asia and the Indian Ocean and Persian Gulf areas.[71] Any military conflict in the SCS that threatens the strategic interests of the United States or the security and economic interests of Japan might be seen as sufficiently destabilizing to invite U.S. involvement to preserve navigational freedom in these critical sea lanes.

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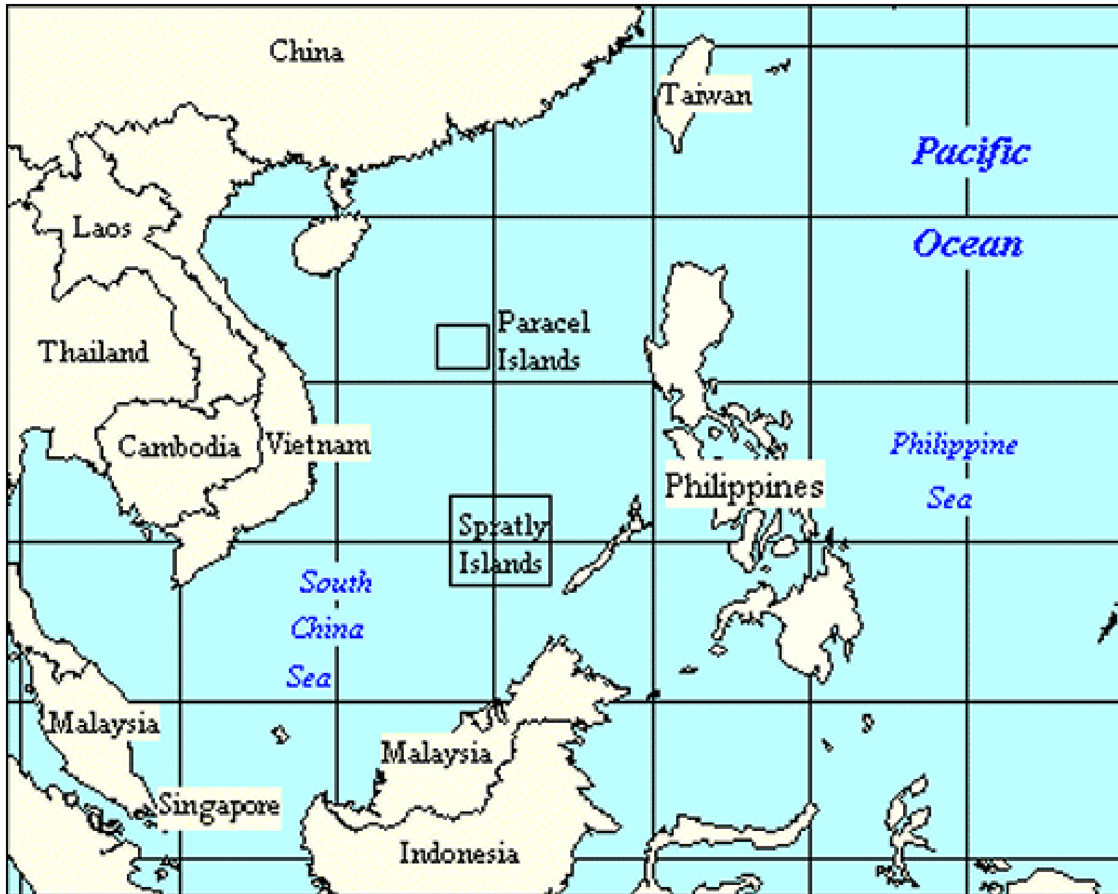
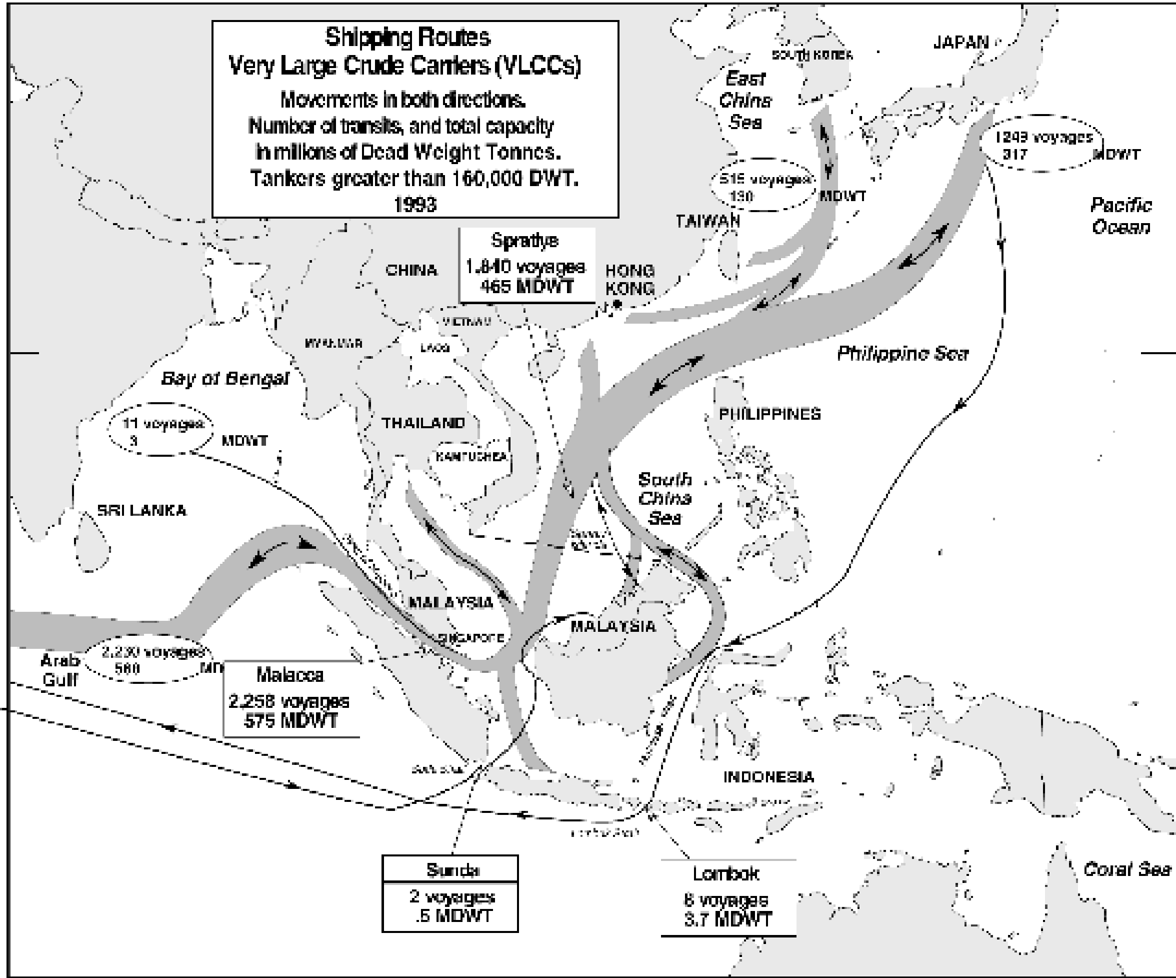
[71]Scott Snyder, the SCS Dispute: Prospects for Preventive Diplomacy, *Special Report* No. 18, United States Institute of Peace.

Map I.1 The South China Sea Layout



Source: Image taken from Energy Information and the South China Sea Region by the Energy Information Administration

Map I. 2 Major Shipping Routes in the Regions



Source: Image taken from Energy Information and the South China Sea Region by the Energy Information Administration

2. History

Although history does not need to be as important for the legal resolution of the dispute as is often imagined, it still plays a certain role. Tonnesson suggests that the history of the disputes in the SCS can be written in three approaches.[72] The first approach is to apply a national perspective, go as far back in history as possible in order to find evidence that the sea and its islands have been inviolable parts of one's own national patrimony.[73] The second is to compose a non-partisan legal treatise, present the chronology of conflicting claims to sovereignty, and evaluate their relative merits on the basis of international law.[74] The third is to write an international history, where events and trends are analyzed on the basis of changes in the international system and the balance-of-power.[75] In this section, we shall mostly follow the third approach, but with a side glance to the second. Table I.1 lists the main actors and major events in the SCS in different historic periods, which will be elaborated in the following sub-sections respectively.

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[72] See Stein Tonnesson, "the History of the Dispute", in Timo Kivimaki, *War or Peace in the SCS?* (Copenhagen: NIAS Press, 2002), pp.6-23
[73] Chinese and Vietnamese historians are here the main practitioners.
[74] Good examples of the second kind of history can be found in Greg Austin, *China's Ocean Frontier. International Law, Military Force and National Development* (St Leonards: Allen & Unwin, Austalia, 1998); see also Mark J. Valencia, John Van Dyke and Noel Ludwig, *Sharing the Resources of the SCS* (the Hague: Kluwer Law International, 1997)
[75] See for example Michael Yahuda, *the International Politics of the Asia-Pacific*, 1945-1995 (London: Routledge, 1996)

Table I.1: Historic Events in the SCS

Period	Main Actors	Key Events
12th to the mid-15th centuries	China	- Chinese ships dominated trade in the SCS
The Colonial Period	European and American	- In 1877, British Crown claimed formally two islands, the first modern, and Western-style legal claim to any of the Paracels or Spratly Islands.
World War I	Japan, France	- Japan started exploitation of guano both in the Paracels and the Spratlys, but without making formal claims. - 1930-33, France claimed the Spratlys - 1938 France established a permanent presence in the Paracels - 1939, Japan established a military presence both in the Paracels and the Spratlys
World War II	China, France	- 1947-48, Chiang Kai-shek's government issued the U-shaped Line map - 1946-47, France sent expeditions to the Spartlys and the Paracels
Cold War	Japan, France, Philippines, Vietnam	- 1951 - Peace conference in San Francisco - 1956, The Cloma Brothers occupied the islands west of Pawawan and proclaimed a new Kalya'san
UNCLOS III, (1973-82)	Philippines, South Vietnam, Malaysia	- 1971, the Philippines officially declared the Kalaya'an to be part of the Philippines - 1973, South Vietnam awarded a number of oil exploration contract to US companies in the area west of the Spatlys - 1982, Vietnam drew a system of straight baselines along most of its coast, as a basis for claiming a vast continental shelf and EEZ. - 1966 and 1969, Malaysia passed a continental shelf act
1990s	ASEAN, China	- 1992, the foreign ministers of ASEAN agreed on a joint declaration on the SCS - 1999, ASEAN agreed on a draft 'code of conduct'; PRC agreed to negotiate with ASEAN on the draft.
21st Century	ASEAN, China	- 2001, EP-3 incident[76] - 2002, DOC[77] - February 2009, the Philippines Congress passed a territorial Sea Baseline Bill. - March, 2009, Malaysia's Prime Minister announced Malaysia's claim to sovereignty over the islands - Swallow Reef and Ardasier Reef. - March, 2009, confrontation of USNS Impeccable and Chinese Navy vessels in China's EEZ.

Source: Summarized by the author.

[76] On April 1, 2001, a mid-air collision between a United States Navy EP-3E ARIES II signals surveillance aircraft and a People's Liberation Army Navy (PLAN) J-8II interceptor fighter jet resulted in an international dispute between the United States and the People's Republic of China (PRC) called the Hainan Island incident.

[77] In November 2002 the ASEAN states and the People's Republic of China agreed upon a Declaration on the Conduct of Parties in the SCS.

2.1 Ancient time

From the 12th to the mid-15th centuries, Chinese ships dominated the trade in the SCS. Chinese commercial and naval shipping went through a period of intense expansion in the 14th to early 15th centuries, leading one expedition all the way to Africa.[78] Then suddenly the emperor ordered an end to the building of ocean-going ships. This decision provided new opportunities for other maritime nations, such as the Ryukuyu Kingdom in Okinawa and later, the Portuguese who took Melaka in 1511 and Macao in 1557, and later the Dutch. The Dutch dominated the lucrative spice trade during the 17th century.[79] In the 18th and 19th centuries there was a Vietnamese Nguyen Kings, Gia Long (1802-20) and Minh Mang (1820-47), pursued an active maritime policy, and claimed sovereignty to the Paracels which, probably on the basis of erroneous Western maps, they believed to be a far more significant group of islands than it was in reality. After the 1830s, when the Europeans started systematic surveys of the tiny Spartlys and Paracels and produced more accurate maps, there is little evidence that the Nguyen dynasty upheld its claim through declarations, effective occupation or utilization.[80]

2.2 The Colonial Period

The Europeans brought fire power, silver, gold and opium, along with concepts such as 'sovereignty' and 'freedom of navigation'.[81] They drew a crucial distinction between land and sea. Land was to be divided into territories with mapped and demarcated borders. The sea should be free for all, except for a narrow band of territorial waters along the coast.[82] Most of the countries around the SCS were made into British, French and Spanish colonies (the Spanish Philippines became American in 1898), and treaties were drawn up to separate them from each other. The monarchies in China, Japan and Thailand were not fully subjugated, but forced to open themselves up while also being invited to join the European international society. Thus they would have the right to sign treaties of their own and act as sovereign states. Their governments had to learn European ways: to map and demarcate land borders, delineate territorial waters, plant flags and set up sovereignty markers on islands,

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78 See Stein Tonnesson, "the History of the Dispute", p.8
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.

and tear down markers erected by others.[83]

The European and Americans were not much interested in the Paracels and the Spratlys.[84] To Europeans the reefs and islets were mainly a danger to navigation, but British ships explore them and gave them British names. In the 1870s a group of merchants in northern Borneo wanted to exploit guano (bird dung used as fertilizer and for producing soap) on Spratly Island and Amboya Cay.[85] As a consequence, these two islands were claimed formally by the British Crown in 1877. This was probably the first time that any state made a modern, Western-style legal claim to any of the Paracels or Spratly Islands.[86] From then until 1933 Spratly Islands and Amboyna Cay were regularly included in the British colonial list, but little was done to exploit them or sustain the British sovereignty claim.[87]

Although the Paracels occupied a strategic position alone the shipping route between Singapore and Hong Kong, and were positioned between French Indochina and Hainan, neither Britain nor France took any steps to claim the archipelago before the 1930s.[88] In the first decades of the 20th century, only the Chinese empire displayed an interest in the Paracels, notably by sending a mission to claim the island group in 1909, two years before the Qing dynasty succumbed to the Chinese Revolution.[89] In the next three decades, China fell apart and suffered a series of civil wars, and was not in a position to uphold its claims to the islands through effective occupation or utilization.

2.3 Japan's Presence

Japan destroyed the Chinese navy in the war of 1894-95 and established a presence in the SCS through the annexation of Taiwan.[90] In the years following First World War (1914-18), Japanese companies in Taiwan started a systematic exploitation of guano both in the Paracels and the Spratlys, but without making formal claims. It was the fear of Japanese expansion that led France to gain an interest both in the Spratlys and the Paracels.[91] In 1930-33, France claimed the Spratlys for itself and also occupied some of them. In 1938 it established a permanent presence in the Paracels, which were now being claimed on behalf

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83 Thongchai Winichakul, Siam Mapped. A *History of the Geo-body of a Nation* (Honolulu : University of Hawaii Press, 1994)
84 Stein Tonnesson, "the History of the Dispute", p.9
85 Ibid.
86 Ibid.
87 See Geoffrey Marston, "Abandonnement of Territorial Claims : the Case of Bouvet and Spratly Islands" , *British Yearbook of International Law*, 1986, pp.337-356
88 Stein Tonnesson, "the History of the Dispute", p.9
89 Ibid.
90 Ibid.
91 Ibid. p.11

of the protectorate Annam (today's central Vietnam), with basis in the claims made by the Nguyen dynasty in the early 19th century.[92] France recognized, however, that there was a rival Chinese claim, and told the Chinese government that the stationing of a French garrison in the Paracels had a defensive purpose and would not prejudice the legal resolution of the dispute. Britain chose not to oppose the French actions in either the Spratlys or the Paracels, although it did not abandon its own claim to the Spratly Islands and Amboyna Cay from 1877, but merely let the claim stay dormant.[93]

In 1939, before it occupied Hainan, Japan established a military presence both in the Paracels and the Spratlys. To the dismay of Great Britain, who had relied on France to defend Western interests in the area, the French did not offer active resistance. Japan now launched its own formal claim to the two archipelagos as parts of the Japanese empire.[94] The Western powers, including the United States, delivered protests in Manila, but the USA did not protest on anyone else's behalf, just against the unilateral Japanese action. China, ravaged by civil war, could not let its interests be heard, although the provincial Guangdong government was involved in rival demands for concessions to exploit guano in the Paracels.[95]

2.4 China vs. France

Towards the end of the Second World War, the most active claimant was the Republic of China (the government of Chiang Kai-shek) who sent naval expeditions both to the Paracels and the Spratlys in 1945-46, set up sovereignty markers, and established a permanent presence on Woody Island and Itu Aba, respectively the largest island in each group.[96] In 1947-48, Chiang Kai-shek's government also published a map with a dotted U-shaped line[97] encompassing virtually all of the SCS. (See map I.3)

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92 Ibid.
93 Ibid. p.10
94 Ibid.
95 See Marvyn S. Samuels, *Contest for the SCS* (New York: Methuen, 1982)
96 Stein Tonnesson, "the History of the Dispute", p.11
97 As some western scholars pointed out that t it is not a line at all – Chinese (and Taiwanese) maps of the SCS show eleven dashes just off the coastlines of the other littoral states. In the mid-1990s the US Department of State produced a map "joining up" the dashes, which was withdrawn after China pointed out that the resulting line did not represent its position at all, and replaced by the version shown as Map I-5 in the thesis.

Map I.3: The U-Shaped Line issued by Chiang Kai-shek's government in 1947

China's Nine-Dash Line Map of South China Sea Claims

Map 2: Official Chinese map of the South China Sea with the nine-dotted line

Source: The Traffic and Tourist Map of Hainan, 1999.

Adapted from Stein Tonnesson, "China and the South China Sea: A Peace Proposal," *Security Dialogue*, vol. 31, no. 3, September 2000

Source: http://www.southchinasea.org/9-dotted%20map/map_small.gif

France also sent expeditions to the Spartlys and the Paracels in 1946-47, reiterated its claims to both archipelagos, and made an unsuccessful attempt to force a Chinese garrison to depart from Woody Islands in the eastern Paracels. After the failure France established a permanent presence instead, on behalf of Vietnam, on Pattle Island in the western part of the Paracels.[98] In 1949, Chiang Kai-shek's government fled to Taiwan after losing the civil war to the Communist Party, shortly afterwards the troops on Itu Aba and Woody Island were withdrawn to Taiwan. Thus Itu Aba and Woody Island, as well as the other Spratly and Paracel islands, remained unoccupied for a period of six years.[99]

2.5 Decolonization and the Cold War

In the following decades, the conflicts in the SCS were affected by the two dominant political processes of the period: decolonization and the Cold War. The first decolonized states to emerge in the region were the Philippines and Vietnam. The Philippines gained independence in 1946, but when nationalists within the Philippine government wanted to claim the Spratlys, their American advisors discouraged them.[100] The Spanish-American treaty of 1898 made it clear that the western limit of the Philippine islands did not include the Spratlys.[101]

When Vietnam was recognized as an independent state in 1950, it had two rival regimes. The Democratic Republic (under President Ho Chi Minh) was recognized by the PRC, the Soviet Union and the East European states. The State of Vietnam (under former emperor Bao Dai) was recognized by Britain and the United States.[102] Ho Chi Minh depended on support from the PRC and was not in a position to oppose the view of the socialist camp, which held that the Paracels and Spratlys belonged to the PRC. The leaders of the State of Vietnam tried to push France towards a more active irredentism on behalf of Vietnam both in the Paracels and the Spratlys. France held that the whole of the Paracels was Vietnamese, but claimed that the Spratlys was French possession, not Vietnamese.[103]

At the peace conference in San Francisco in 1951, Japan formally abandoned its claims to Hainan, Taiwan and all other islands in the SCS, but the treaty did not say to whom the other islands were ceded, although it was clear that Taiwan and Hainan would be Chinese.

[98] Ibid. p.11
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.

Neither or the two Chinese regimes was present in San Francisco. At this stage the whole socialist camp supported the PRC's claim, but France and the State of Vietnam (who were both present in San Francisco) maintained their own claims to the two island groups.[104] The USA and Britain preferred to let the matter remain unsettled.[105]

A group of Philippine maritime activists, led by the brothers Thomas and Filemon Cloma in 1956, had grown tired of their government's passivity with regard to the western islands.[106] With encouragement from the Philippine vice-president, and claiming that the islands west of Pawawan had become *res nullius* after Japan had abandoned them, they sent an expedition to occupy a number of them and proclaimed a new Kalya'san (Freedomland). Thomas Cloma introduced a distinction between his Freedomland and the 'Spratly Islands' further to the west. This distinction, which later became a part of the Philippines policy, was never fully clarified, but it seems that Freedomland encompasses most of what others call the Spratly Islands, but not Spratly Island itself and the banks and reefs lying west of it.[107]

2.6 Law of the Sea Conference III (1974-1982)

At the end of the 1970s, the General Assembly passed the Declaration of Principles relating to the seabed beyond national jurisdiction, decided to convene a Third United Nations Conference on the Law of Sea in 1973. This refocused attention on how far national jurisdiction of the continental shelf could extend from the shore of a coastal state. In the light of these discussions it seemed increasingly important to possess all kinds of islands, since they could serve as arguments to claim an extensive continental shelf.[108]

In 1971, clearly motivated by the prospect of finding oil, the Philippines officially declared the Kalaya'an (the eastern part of the Spratlys) to be part of the Philippines. In 1974, while awarding a concession to a consortium of companies to explore for oil, the Philippines occupied five islets in the Reed Bank area. The claim to Kalaya'an was reiterated in 1978, when the Philippines occupied two additional features.

In 1973, the same year as UNCLOS III started, South Vietnam awarded a number of oil exploration contract to US companies in the area west of the Spratlys, and at the same

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[104] Ibid. p.11

[105] Ibid, p.12

[106] Stein Tonnesson, "the History of the Dispute", p.13

[107] The *Philippines and the SCS Islands: Overview and Documents (* Manila: Center for International Relations and Strategic Studies, Foreign Service Institute, CIRSS Papers no.1, December 1993); Ruben C. Carranza Jr, "The Kalayaan Islands Group: Legal Issues and Problems for the Philippines", *World Bulletin* vol. 10, no.5-6 (September- December 1994), p.49

[108] See Clyde Sanger, *Ordering the Oceans. The making of the Law of the Sea* (Toronto: University of Toronto Pres, 1987)

time took steps to include the Spratlys under the administration of a South Vietnamese province.[109] The unified Socialist Republic of Vietnam, which was founded in 1976, took over the South Vietnamese claims. In 1982, when UNCLOS was signed, Vietnam drew a system of straight baselines along most of its coast, as a basis for claiming a vast continental shelf and EEZ.[110]

Malaysia passed a continental shelf act in 1966 and 1969, and in 1979 published a controversial map with an extensive continental shelf claim north of Borneo.[111] It also claimed a number of islands and reefs within the area of the continental shelf claim, and sent troops to permanently occupy one of them in 1983, another in 1986.[112]

The prospects of finding oil and the new law of the sea regime thus prompted a scramble for claiming continental shelf areas and for possessing reefs and islands. The most hotly contested area was the Spratlys. Vietnam moved in from the west, the Philippines from the east and Malaysia from the South, while Taiwan kept Itu Aba. By the mid-1980s, these four states had occupied virtually all such features that were permanently above the sea. The loser in the scramble for occupation of the Spratlys was the PRC, who came too late for the better pieces. (See Map I.4 for the occupied SCS islands)

[109] Stein Tonnesson, "the History of the Dispute", p.15
[110] Ibid, p.15
[111] Ibid. p.15
[112] Ibid. p.15

Map I.4: Occupation of the SCS Islands

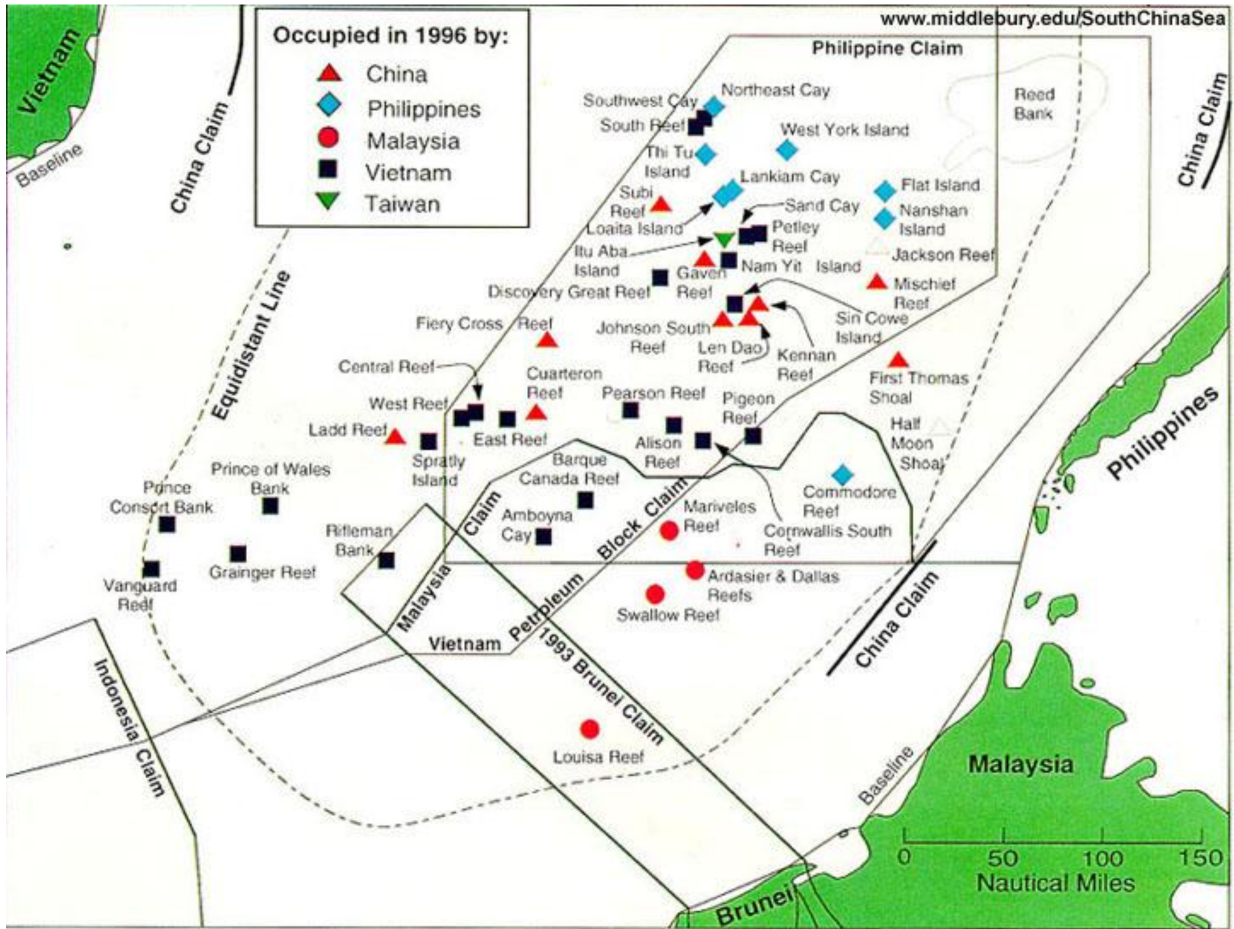

Plate 1 The Spratly features, their occupants as of 1996, and jurisdictional claims. China has placed markers on features with open triangles, but does not occupy them

Source: http://southchinasea.org/macand/index.htm

2.7 ASEAN versus China (post 1990)

In the 1990s, the main constellation was ASEAN versus China (with Taiwan still maintaining the same claims on behalf of 'China' as the PRC). At the same time the general relations between the states in the region tended to improve. This increased the possibilities of conflict management and dispute resolution, although little progress was made in the central part of the SCS.[113]

With regard to the disputes in the central part of the SCS, there were frequent informal and formal talks throughout the 1990s, and also a great number of incidents between naval forces, coastguards and fishermen, but no progress was made towards conflict resolution. The foreign ministers of ASEAN agreed on a joint declaration on the SCS in July 1992 and surprised the PRC by strongly supporting the Philippines in a dispute with the PRC over Mischief Reef in March 1995.[114] ASEAN's unity was less firm towards the end of the decade. Malaysia's relations with the Philippines, Indonesia and Singapore worsened as a result of the dramatic political events caused by the Asian crisis of 1997-98 in Indonesia and Malaysia. In 1999, Malaysia pursued its own course in the Spratlys, occupying new features and moving closer to the PRC.[115]

In the first half of the 1990s, the PRC refused to discuss the SCS with ASEAN, preferring to discuss the problem bilaterally with each of the states concerned. The PRC later softened its attitude and allowed the matter to be raised in the ASEAN Regional Forum (ARF), as well as in meetings between China and ASEAN representatives. In 1999, ASEAN agreed on a draft 'code of conduct' with the aim of preventing occupation of additional features and preventing conflict in disputed areas. The PRC agreed to negotiate with ASEAN about such a 'code of conduct', but came up with its own proposal, emphasizing joint cooperation more than conflict prevention.[116] In November 2002 the ASEAN states and the People's Republic of China agreed upon a Declaration on the Conduct of Parties in the SCS.

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[113] Ibid, p.17

[114] The Philippines had discovered new Chinese military installations on this submerged reef, which is located in the eastern part of the Spratlys. Mischief Reef remained a serious bone of contention between the PRC and the Philippines throughout the decade.

[115] Stein Tonnesson, "the History of the Dispute", p.18

[116] There were several rounds of negotiations in 2000-01, with the aim of merging the two proposals into a common text. However, when the ASEAN leaders met with China to discus the SCS at the ASEAN summit in Hanoi in July 2001, the disagreement between Malaysia and the other ASEAN states seemed more acute than the disagreements between the ASEAN states and China.

2.8 New Development in 2009

Early 2009 has seen three major developments that stirred up controversy in the SCS all over again, and highlighted the difficulties of maintaining stability in the region. In mid-February 2009, the Philippines Congress passed a territorial Sea Baseline Bill, laying claim to China's Scarborough Shoal (Panatag Shoal) and a number of islands in the SCS. On March 5, Malaysia's Prime Minister Abdullah Ahmad Badawi landed on Swallow Reef and Ardasier Reef, and announced Malaysia's claim to sovereignty over the islands. China condemned both actions. The third is the clash on 8 March between Chinese vessels and a U.S. ocean surveillance ship in China's EEZ, which is a similar area to where a Chinese fighter crashed after colliding with a USN intelligence collection aircraft in April 2001. The U.S. Department of Defense (DOD) claims that five Chinese vessels—ranging from two small trawlers to three larger vessels—deliberately interfered with the operations of the unarmed USNS Impeccable while it was conducting surveillance in international waters some 75 miles (120 kilometers) south of China's Hainan Island. Chinese officials did not deny the details of the incident, but characterized the American surveillance activities as fundamentally improper and arrogant. Chinese denunciations continued after the Pentagon ordered U.S. warships to escort the Impeccable and the other unarmed surveillance ships operating near China which again threatens the fragile US-Sino military relations. One analyst claims that if the military planners' nightmare scenario of a superpower war in Asia were ever to come true, the SCS might very well be where it all starts.[117] The military exercises in the SCS among ASEAN and between U.S. and ASEAN member States in recent years indicate a new round of tension SCS regions.[118]

On 6 May 2009, Malaysia and Vietnam lodged a joint submission with the United Nations Commission on the Limits of the continental Shelf (CLCS).[119] Predictably the Vietnamese and Malaysian submission provoked a furious response from China. The day after Malaysia and Vietnam delivered their joint submission to the CLCS, China lodged a strong protest with the UN Secretary-General. It alleged that the joint submission "seriously infringed China's sovereignty, sovereign rights and jurisdiction in the South China Sea" and "seriously request" the Commission not to consider the submission. Submissions from other

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[117] Richard Lloyd Parry ,"Analysis: so much more than a naval water fight", at http://www.timesonline.co.uk/tol/news/world/asia/article5879033.ece#cid=OTC-RSS&attr=797093 (accessed on May 13, 2009)

[118] See Table II.3 in section 4.2.3

[119] This was in relation to an area of 'outer' or 'extended' continental shelf located beyond their respective 200 nautical mile EEZs in the southern South China Sea.

SCS littoral states are likely to follow. These extended continental shelf submissions have served to highlight existing disputes and appear likely to add an extra dimension to them. Indeed, there are already indications that the situation is escalating. China has said it will send more patrol ships to the disputed islands. The Philippines has announced it will improve military structures on the islands it claims.[120]

3. Disputant States and Their Claims to the SCS Islands

3.1 China's Claim and the Weakness

China claims both the Paracel Islands in the north and the Spratly Islands in the southern sector of the SCS. Its claim to the islands is based on historical usage, its ship captains having sailed across the SCS 2000 years ago and having used the Sea as a regular navigational route during the Han dynasty (206-220 A.D.)[121] As Chinese voyages increased in frequency and range during the Tang Dynasty (618-906 A.D.), so did Chinese awareness of the Spratlys.[122] From the 12th through the 17th centuries, Chinese records made occasional reference to the islands, including maps displaying elevations.[123] During this period, China viewed "itself as the center of a universal state" which "oversaw as hierarchy of tributary states".[124] From this perspective, it has no reason to make any formal claim of sovereignty. China's presence in the Spratly area is more consistently documented from 19th century onward.[125] In 1876, the first formal act of a sovereignty claim was made, when China's ambassador to England claimed the Paracel Islands as Chinese territory, and in 1883, a German survey team on the Spratly Islands was expelled by the Chinese.[126] An 1887 boundary treaty between France and China allocated all the islands east of 108 degrees, 43 minutes east of Greenwich (or 195 degrees 43 minutes east of Paris) to China (which would cover all the Spratly if the line were extended indefinitely to the south), but this basis for China's claim is weak because the treaty does not name any islands and France later augured

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[120] Sam Bateman and Clive Schofield, "Outer Shelf Claims in the South China Sea: New Dimension to Old Disputes", *RSIS Commentaries*, July 2009

[121] R. Haller-Trost, *International Law the History of the Claims to the Spartly Islands* (SCS Conference, American Enterprise Institute, Sept. 7-9, 1994), p.10; Chi-Kin Lo, *China's Policy Towards Territorial Disputes: The Case of the SCS Islands*, 1998, p.15

[122] Ning Lu, *The Spratly Archipelago: The Origins of the Claims and Possible Solutions* (International Center, Washington, D.D., 1993), p.12

[123] Jon M. Van Dyke & Dale L. Bennett, Islands and the Delimitation of Ocean Space in the South chins Sea, *Ocean Yearbook* 10, 1993, 62

[124] Ning Lu, *The Spratly Archipelago: The Origins of the Claims and Possible Solutions,* p.22.

[125] Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the SCS* (Martinus Nijhoff Publishers, 1997), p.21

[126] Jon M. Van Dyke & Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South chins Sea", *Ocean Yearbook* 10, 1993, p.64.

that this line covered only the northern part of the SCS.[127]

Chinese authors claim that China has met the requirements found in the Isle of Palmas arbitration[128] by effectively exercising sovereignty over the Spartly islets without challenges for centuries until the French intrusion in 1933, and that SCS islands have "always been part of Chinese territory."[129] However, China's claim has been argued by some commentators to be weak. China's exercise of authority over the islands was only occasional and sporadic up through the end of World War II, and that China's claim to have exercised its authority continuously is weak.[130] If the limited actions required by Emperor Victor Emmanuel in the Clippperton case[131] were applied here, then China might well prevail, but the later cases emphasize effective occupation and control more than original discovery.[132] The opposition of foreign states also weakens China's claims. Other nations did not 'acquiesce' to China's assertions of sovereignty.[133] Currently, the Philippines, Malaysia, and Brunei, as well as Vietnam, all have significant claims to all or some of these islets[134].

3.2 Taiwan's Claim and the Weakness

Taiwan's involvement in the SCS controversies increases the complexity of these issues. Taiwan refers to itself as the 'Republic of China' and has historically claimed to be the legitimate government of all of China. It is the heir of the Nationalist Government of China which in 1947 issued the map containing the interrupted lines (U-shape line), which apparently constitutes a claim to all the waters of the SCS. On March 10, 1993, Taiwan adopted "Policy Guidelines for the SCS", which asserted sovereignty over "the Spratly Islands, the Paracel Islands, Macclesfield Bank and the Pratas Islands" and also stated that:

> *The SCS area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests.*[135]

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[127] Chi-Kin Lo*, China's Policy Towards Territorial Disputes: The Case of the SCS Islands*, 1998, 31

[128] Island of Palmas Casewas a case involving a territorial dispute over the Island of Palmas (or Miangas) between the Netherlands and the United States which was heard by the Permanent Court of Arbitration. This case is one of the most highly influential precedents dealing with island territorial conflict.

[129] See, e.g., Ji Guoxing, *The Spratlys Disputes and prospects for Settlements* (ISIS, Malaysia, 1992); Teh-Kuang Chang, *China's Claim of Sovereignty Over Spratly and Paracel Islands: a Historical and Legal Perspective*, 23 Case *We. Res. J. Int'l* L.299 (1991)

[130] Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the SCS*, p.22

[131] Ownership of Clipperton was disputed between France and Mexico. Both countries agreed on March 2, 1909, to seek the arbitration of the King of Italy, Victor Emmanuel, who on January 28, 1931, declared Clipperton a French possession. The French rebuilt the lighthouse and settled a military outpost on the island, which remained for seven years before being abandoned. In 1935 France took possession; it has since been administered by the French colonial high commissioner for French Polynesia.

[132] Ibid, p.23

[133] Ibid, p.24

[134] Before 1970s, Vietnam recognized that China has sovereignty over the Spratlys Islands.

[135] Valencia, Mark J., John Van Dyke and Noel Ludwig, *Sharing the Resources of the SCS*

The competing claims to the Spratlys were intensified after the outbreak of the Sino-Japan war in the early 1930s. After this war, some countries like Japan and France had taken advantage of Chinese weakness by occupying the Spratlys. Nevertheless, Taiwan stated that there was an understanding with Japan that the islands occupied by Japan in the SCS would be placed under Chinese jurisdiction in due course.[136] Taiwan maintained that it restored its own sovereignty over the Spratlys in 1947. Taiwan also cited the 1952 Sino-Japanese Treaty which recognized its sovereignty over the Spratlys. Taiwan insisted that although the 1951 San Francisco Treaty did not include the Spratlys as part of Taiwan, its sovereignty over the Spratlys cannot be nullified.[137]

3.3 Vietnam's Claim and the Weakness

In its three White Papers issued in 1979, 1982 and 1988 respectively, Vietnam asserted that the Spratly Islands were the *Chang Sha* Islands in Vietnamese's history, and Vietnamese government had exercised jurisdiction over the Spratly Islands.[138] Vietnam claims sovereignty over the whole Spratly Islands based on the following aspects:

a. Historical base. Vietnam also provides its own historical records in a similar fashion to China to justify its claims. According to Vietnam, the Spratlys, along with the Paracels, had been mapped as part of its territory in the 18th century and it called them *Houng Sa* and *Troung Sa* respectively.[139]

b. Preoccupation. Considering that it cannot provide better historical evidences than China regarding original discovery and historical right, Vietnam focuses more on principle of "preoccupation". It asserted that Spratly Islands are '*res nullius*' (no man's land) before 1933. In 1884, the French established a protectorate over Vietnam and began to assert a claim to the Paracel and Spratly islands.[140] French asserted physical control over nice of the Spratly islets between 1933 and 1939[141], and published a formal notice of annexation in its own official Journal on July 26, 1933.[142] Vietnam continued to assert its sovereignty at an international level, including meetings of the World Meteorological Organization, the 1951

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136 Steven Kuan-tsyh Yu, "Who Owns the Paracels and Spratlys? An Evaluation of the Nature and Leal Basis of the Conflicting Territorial Claims", paper presented at *Workshop On Managing Potential Conflicts In the SCS,* Bandung, Indonesia, 15-18 July 1991, p1-29.
137 Bob Catley & Makmur Keliat, *Spratlys: The Dispute in the SCS* (Singapore: Ashgate, 1997), p.34
138 Wu Shicun, *A Comprehensive Study on the Spratly Islands Dispute* (Hainan: Hainan Publishing House, 2005)
139 Catley and Keliat, *Spratlys: The Dispute in the SCS,* p. 34
140 Van Dyke, Jon M. & Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South Chins Sea", *Ocean Yearbook* 10, 1993, p.70
141 Lee. G. Cordner, The Spratly Islands Dispute and the Law of the Sea, *25 Ocean Development and International Law* 64, 1994, p.65
142 Ning Lu, *The Spratly Archipelago: The Origins of the Claims and Possible Solutions* (International Center, Washington, D.D., 1993, p.31

Peace Conference in San Francisco, and as part of the Geneva agreements for the return of Vietnam by France[143].

c. Effective occupation. Vietnam has "continue to maintain precarious garrisons on up to 22 features in the Spratlys, supporting a claim to effective occupation of part of the Spratly archipelago since 1973".[144]

Vietnam's historical evidence in support of its claim to sovereignty over the Spratly is sparse, anecdotal and inconclusive. One commentator has said that "the Vietnamese classical texts have not provided clear proof of Vietnamese knowledge of the Spratly Islands, let alone claim."[145] Another difficulty faced by Vietnam concerns statements made by North Vietnam's Second Foreign Minister Ung Van Khiew in 1956[146] and again by Prime Minister Van Dong in 1958[147] which seemed to acknowledge Chinese authority over the Spratlys.[148] The Vietnamese now argued that these statements were a pragmatic necessity to gain the support of an ally during a militarily difficult time, and say that they subsequently reasserted their rights to the islets.[149] Nonetheless, these statements continue to haunt the Vietnamese and weaken their position. The strongest factor in Vietnam's favor is its physical possession and occupation of the largest number of Spratly features.

3.4 The Philippines' Claim and Weakness

The Philippines claims most of the Spratly islets. Its claim is more recent than that of China and Vietnam, and is based on a theory that the islets are adjacent or contiguous to the main Philippine islands, that this region is vital to the country's security and economic survival, that the islets were *res nullius* or 'abandoned' after World War II, and that the recent

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143 Socialist Republic of Vietnam Ministry of Foreign Affairs, *The Hoang Sa and Truong Sa Archipelagoes and International Law* (Hanoi 1988), at 7, p.19

144 Cordner, Lee. G., The Spratly Islands Dispute and the Law of the Sea, *25 Ocean Development and International Law* 64, 1994, p.66. Nine of these Vietnamese-occupied features are naturally exposed at high-tide-Spratly Island, West London Reef, Amboyna Cay, Pearson Reef, Sin Cowe Island, Namyit Island, Sand Cay, Barque Canada Reef, and Southwest Cay. Vietnam has maintained garrisons on at least five of these islets with a total of some 350 troops estimated to be on them in 1988, see Mark J. Valencia, *Malaysia and the Law of the Sea, p.*61 (Kuala Lumpur: ISIS, 1991)

145 Ning Lu, *The Spratly Archipelago: The Origins of the Claims and Possible Solutions , p.*50

146 See Ji Guoxing, *The Spratlys Disputes and Prospects for Settlements* 16 (ISIS< Malaysia, 1992): "Vice Foreign Minister Ung Van Khiem stated on June 15, 1956, to the Chinese Charged d'Affaires that 'According to Vietnamese date, the Xisha and Nansha Islands are historically part of Chinese territory'.

147 A formal note from Pham Van Dong to Chinese Premier Zhou Enlai stated: "The Government of the Democratic Republic of Viet Nam recognizes and supports the declaration of the Government of the People's Republic of China on china's territorial sea made on September 4, 1958". "…The Government of the Democratic Republic of Viet Nam respects this decision". Ning Lu, *The Spratly Archipelago: The Origins of the Claims and Possible Solutions* (International Center, Washington, D.C., 1993), p.*55*

148 The Vietnamese acknowledged the 1956 and 1958 statements in a publication put out by their Ministry of Foreign Affairs in 1988 entitled The Hoang Sa and Truong Sa Archipelagoes and International Law.

149 In its 1988 publication entitled The Hoang Sa and Truong Sa Archipelagoes and International Law, the Vietnamese Foreign Ministry explains that the statements were made "when Vietnam had to fight against U.S. intervention and aggression," and when Vietnam and China had become "true allies in their common struggle against the U.S."

Philippine occupation of some of the islets gives it title either through 'discovery' or 'prescriptive acquisition.'[150] It also has mentioned its continental shelf extension as a basis for its claim.

The *res nullius* claim stems from the 'discovery' and 'occupation' of the Spratlys by a Filipino businessman and lawyer, Tomas Cloma, who claimed the islets in 1947 and established settlements there.[151] Cloma's claims were announced in 1956 after he declared a 'protectorate' over the islets, named them 'Kalaya'an' or 'Freedomland', and appointed himself the Chair of the Supreme Council.[152] In 1974, Cloma deeded Kalay'an to the Philippine government.[153] In 1971 and again in 1978, President Ferdinand Marcos formally declared the 'Kalaya'an Island Group' to be part of the Philippines.[154] Marcos also issued a separate Presidential Decree that same day in 1978 that claims an exclusive economic zone around all the Philippine islands, which can be interpreted to include the 'Kalaya'an' islands as well.[155] When it ratified the Law of the Sea Convention, the Philippines states that its ratification "shall not in any manner impair or prejudice" its sovereignty over the Kalaya'an Islands and its appurtenant waters.[156]

Another branch of the *res nullius* claim is based on the 1951 San Francisco Peace treaty, after which-according to the Philippines-the Spratlys were "*de facto* under the trusteeship of the Allied Powers".[157] According to the Philippine view, the status of the islands as 'trusts' nullified any previous ownership of them, and justifies its occupation of the features. The Philippines also argues that the Spratlys were 'abandoned' during the 1950-56 period, when no nation paid any attention to them.[158] It asserts that Japan had acquired the islands but renounced its sovereignty over the Spratlys at the time of 1951 San Francisco treaty without ceding them to any other country. The Philippines has reinforced its *res nullius*/occupation claims by sanctioning drilling off the Reed Band area since 1971[159] and occupying eight of

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150 See generally Haydee B. Yoroc, The Philippine Claim to the Spratly islands Group, 58 *Philippine L.J.*42, pp.52-62 (1983); Valencia, "Spratly Solution, Still at Sea", 6:2 *The Pacific Review* pp.155-70 (1993)
151 Haller-Trost, R. (1994) "International Law and the History of the Claimsto the Spratly Islands," preprint.(Melbourne: Monash University. Haus, K. and Chanda), at pp.21-22; Cordner, "The Spratly Islands Dispute and the Law of the Sea", p.66
152 Jorge R. Coquia, Maritime Boundary Problems in the SCS, 24 *U.B.C. L. Rev.* p,117, 119 (1990); Haller-Trost (1994), "International Law and the History of the Claimsto the Spratly Islands," at p.22
153 Haller-Trost (1994), "International Law and the History of the Claimsto the Spratly Islands," at p.25
154 Presidential Decree No. 1596 (June 11, 1978), cited in Haller-Trost (1994), at 27; Ning Lu, at 65
155 Presidential Decree No. 1599, cited in Haller-Trost (1994), at 28
156 *Law of the Sea Bulletin*, special Issue 1, March 1987, at p6.
157 Van Dyke, Jon M. & Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South Chins Sea", at p.74; Cordner, "The Spratly Islands Dispute and the Law of the Sea", p, 66.
158 Valencia, Mark J., John Van Dyke and Noel Ludwig, *Sharing the Resources of the SCS*, at p.34
159 Van Dyke & Bennett, at p.75

the features since 1978[160].

There are criticisms of the Pilipino claim. First, the view that the islets had been abandoned is challenged by China and Vietnam. Cloma's occupation of the Spratly Islands lasted only a few months,[161] and, in any event, the independent territorial claims of private individual are not equivalent to governmental claims unless the individual is acting on the authority of government or the government asserts jurisdiction over the individuals.[162] At the time Cloma made his claim, the Philippine government neither approved nor disapproved his actions.[163] Furthermore, a 1955 government declaration on straight baselines around the Philippine archipelago did not include the Kalaya'an area in the baselines.[164] The continental shelf claim is also weak because the deep Palawan Trough separates the Spratly Islands from the Philippine archipelago and thus there is no natural prolongation as required by Article 76 of the UNCLOS to extend such a claim beyond the 200 nautical-mile limits[165].

3.5 Malaysia's Claim and the Weakness

Malaysia is the only claimant laying its claim without providing historical record. Malaysia claims twelve islands and features of the SCS (in the southeast part of the Spratly Islands), six of which it 'occupies'.[166] Malaysia asserts two legal bases for its claims: continental shelf extension and discovery/occupation. Malaysia's continental shelf claim arises out of the Geneva Conventions of 1958 pertaining to territorial waters and continental shelf boundaries[167], which Malaysia signed in 1960.[168] Malaysia passed its own Continental Shelf Act in 1966 and 1969, defining its continental shelf as "the seabed and subsoil of submarine areas adjacent to the coast of Malaysia," up to 200 meters deep or the limit of exploitability.[169] A related legislative act, the Petroleum Ming Act in 1966, governs the exploration and development of natural resources "both on-and offshore".[170] The most

160 Van Dyke & Bennett, at p.58
161 Haller-Trost, R., *International Law and the History of the Claims to the Spartly Islands* (SCS Conference, American Enterprise Institute, Sept. 7-9, 1994), p.28
162 Ibid. at p.31
163 Ibid. at p.21
164 Valencia, Mark J., John Van Dyke and Noel Ludwig, *Sharing the Resources of the SCS,* at p.35
165 Ibid. p.35
166 Haller-Trost, R., *International Law and the History of the Claims to the Spartly Islands*, pp.35-36
167 *Convention on the Continental Shelf*, April 29, 1958; *Convention on the Territorial Sea and Contiguous Zone*, April 29, 1958
168 Cordner, " The Spratly Islands Dispute and the Law of the Sea", at p.67, 70; Halelr-Trost , *International Law and the History of the Claims to the Spartly Islands,* at p.32
169 Halelr-Trost, 1994, at p.32
170 Ibid.

explicit depiction of Malaysia's continental shelf claim is a map it published in 1979 entitled "Map Showing the Territorial Waters and Continental Shelf Boundaries".[171] In this map, Malaysia defined its continental shelf area and claimed all islands arising from it.[172]

Malaysia has publicly defended its claims on several occasions. In 1983, the Deputy Minister asserted that Malaysia's claim to Amboyna Cay "was simply a question of geography".[173] In the spring of 1995, Malaysia's Prime Minister Mahathir visited Terembu Layang-Layang to reaffirm Malaysia's claim to this feature.[174]

Malaysia's claims are difficult to justify under a continental shelf theory.[175]Although Malaysia may have asserted this claim only in order to protect its other maritime zones, neither UNCLOS nor Malaysia's own Continental Shelf Act of 1966 indicate that the continental shelf pertain to land or rocks that rise above sea level.[176] The wording of both acts addresses only submerged land and rocks, and Article 76 (1) of UNCLOS refers to "*the seabed and subsoil of the submarine areas that extend…[from a] natural prolongation of its land to the other edge of the continental margin.*"[177]

Malaysian officials appear to have recognized the weaknesses in their claim of sovereignty over islands based on the natural prolongation of the continental shelf, and now tend to emphasize Malaysia's second basis for its claims, discovery and occupation of the islands, which is a traditional method of exerting sovereign control over new territory. This claim is based on the 1979 map. In addition, Malaysia established a garrison on one of the Spratly islets in 1983; and in 1986, it occupied two more.[178]

Like the continental shelf claim, Malaysia's 'occupation' claim is on uncertain footing because its occupation and exploitation are relatively recent and have been vigorously contested by other nations. In order to claim land as "*res nullius*", a nation must not just discover it but must exercise effective control over it.[179] In addition, Malaysia has undercut its own potential claim to some extent because its nearby continental shelf boundary treaty with Indonesia gave Indonesia considerable shelf area beyond an equidistant line and because Malaysia' claim into the Spratly also stops short of the equidistant line at certain

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[171] Ning Lu, 1993, at p.22
[172] Cordner, 1994, at p.67, see also Valencia, Van Dyke and Ludwig, 1977, at p.36
[173] Haller-Trost(1994), at p.33
[174] Spokesman Dismisses Malaysian Claim to Spratlies, FBIS-CHI-95-1-3, May 30, 1995. Cited by Van Dyke and Ludwig, 1977at p.37
[175] Dyke and Ludwig, 1977,at p.37
[176] Ibid.
[177] Junathan I. Charney, "Central East Asia Maritime Boundaries and the Law of the Sea", 89 Am. *J. Int'l L.*, at p.729
[178] Cordner, 1994, at p.74
[179] Haller-Trost, at p.16

locations.[180]

3.6 Brunei's Claim and the Weakness

Brunei currently claims two reefs, Louisa Reef (which is also claimed by Malaysia) and Riflemen Bank, and a maritime zone based on the prolongation of its continental shelf.[181] The Rifleman Bank claim, which Brunei published in a 1988 map extending its continental shelf, apparently is based on a 350-nautical mile continental shelf claim.[182] Brunei claimed a 200 nm fishing zone in 1982 and a 200 nm EEZ in 1984.[183]

Though Brunei claims Louisa Reef, its right to an extended maritime zone based on this claim is weak because Louisa Reef has only two small rocks that are above water at high tide, which would not have the capacity to generate an exclusive economize zone or continental shelf under article 121 (3) of UNCLOS.[184] Its claim to an extended continental shelf does not appear to be consistent with the requirements of UNCLOS, because the East Palawan Trough interrupts the 'natural prolongation' of the continental shelf 60 to 100 miles off Brunei.[185] In addition, Brunei has not attempted to evict foreign fishing boats or vessels from the area it claims.[186]

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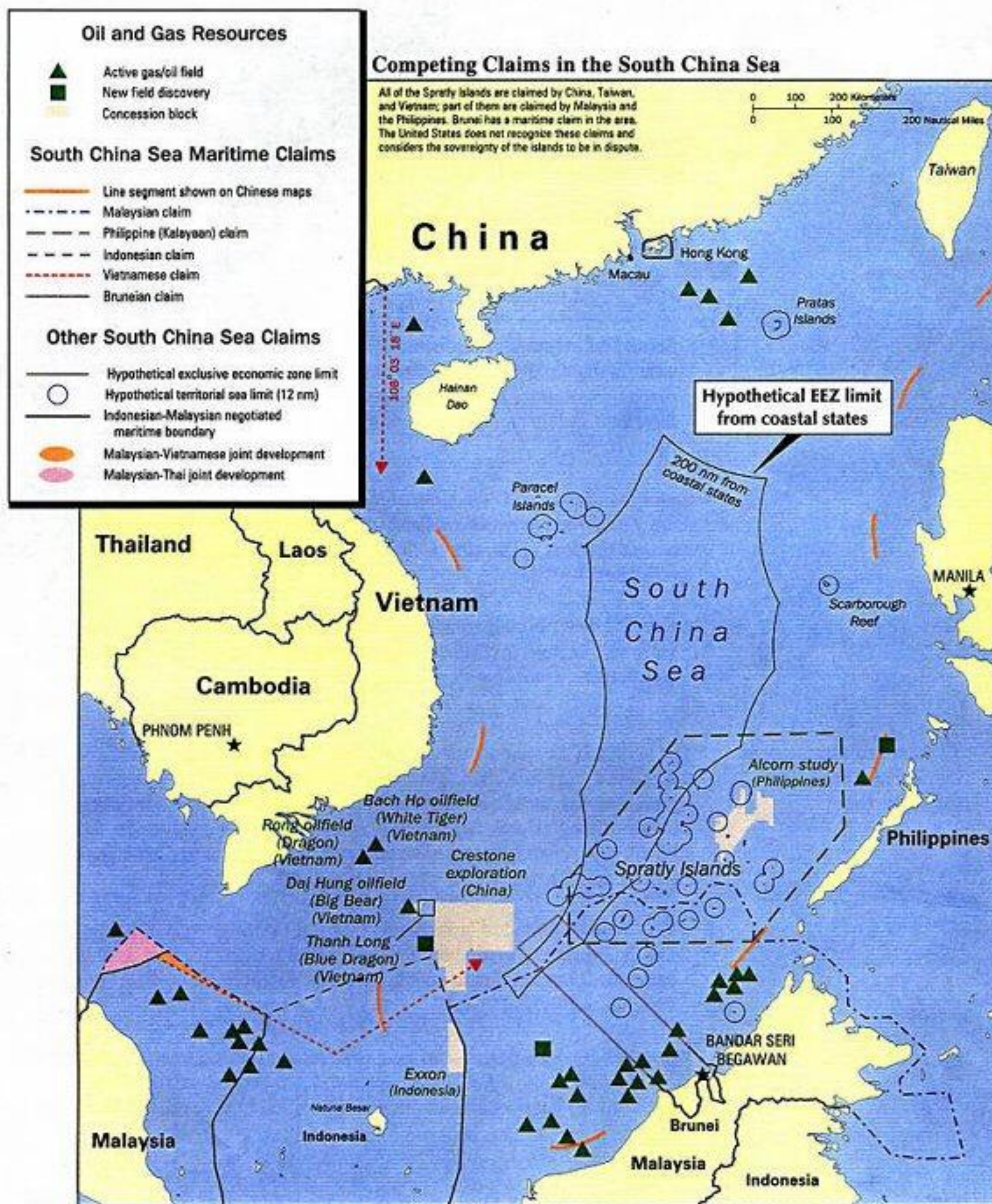
180 Brice M. Clagett, "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the SCS", 1995 *Oil & gas L. & Taxation Rev*. 375 and 419, at pp.430-32
181 Cordner, at p.61, 62
182 R. Haller-Trost, "The Brunei-Malaysia Dispute over Territorial and Maritime Claims in International Law", 1 *Maritime Briefing* No. 3, at p.55 (1994)
183 Ning Lu, at p.6, 76
184 Valencia, Van Dyke and Ludwig, Sharing the Resources of the SCS (the Hague: Kluwer Law International, 1997), at p.38
185 UNCLOS, article p.76.
186 Nign Lu, at p.76.

Map I.5: Competing Claims in the SCS



Source:http://www.southchinasea.org/maps/EEZ%20Claims,%20Oil%20and%20Gas%20Resources.jpg

4. Military Competition in the SCS Region

The SCS area is often portrayed as a theatre of military tension and dangerous conflict potential.[187] There have been a few military clashes over the islands, e.g. the sinking of Chinese fishing boats by the Philippine Navy in 1993,[188] China-Philippines conflict over the Mischief Reef in 1995 and 1998, the Fiery Cross Reef in 1988.[189] There are also disputes among its member states, e.g. between eh Philippines, Malaysia and Vietnam.[190] Ever since then military clashes seemed to cease. The following part will explore the military capacity which might be brought into play, should the conflict escalate.

4.1 China

Both to the West and to its neighbors, China remains something of an enigma, *inter alia* because of the closed nature of the PRC political culture, military planning etc.[191] It's impossible to determine with any certainty whether the offensive/assertive or the defensive/reactive interpretation of the PRC policy, including the defence policy is correct.[192] However, the PRC acquisitions of major weapons systems from aboard (especially from Russia) are known with some certainty from various sources, despite gaps in the reporting to the UN conventional arms transfer register.[193] Acquisitions from domestic sources are more uncertain, yet it appears implausible that any major changes would go undetected. China has adopted a new military doctrine in 2007, placing the main emphasis on the ability to fight minor wars in the PRC's immediate vicinity.[194] It has been striving moreover for some time to build a genuine ocean-going ('blue-water' navy). Upon completion of this project, the PRC may be in a position to exercise 'sea control' in the SCS and even possess a significant power projection capability. (See Map II.6)

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[187] Kivimaeki, *War or Peace in the SCS*, p.1

[188] "In Brief. Philippines Sink Chinese Fishing Boat", *Jane's Defence Weekly*, vol. 32, no.4 (28 July 1999).

[189] Mark J. Valencia, "China and the SCS Disputes", *Adelphi Paper*, no. 298, pp.30-39 (on Vietnam) and p.44-48 (on the Philippines)

[190] Trevor Hollingsbee, "Spratlys Rivalry as Philippines Faces Malaysia", *Jane's Intelligence Review*, vol. 11, no.10 (1 December 1999); Damon Bristow, "Between the Devil and the Deep Blue Sea: maritime Disputes between Association of South East Asian Nations (ASEAN) Member States", *RUSI Journal*, vol. 141, no.4 (August 1996), pp.31-37.

[191] Timo Kivimaeki (ed.) *War or Peace in the SCS, 2002* p.64

[192] Ibid.

[193] Bates Gill and Taeho Kim, "China's Arms Acquisitions from Abroad: A Quest for 'Superb and Secret Weapons'", *SIPRI Research Report*, no.11 (Oxford: Oxford University Press, 1995); Srikanth Kondapalli, "China's Naval Equipment Acquisition", *Strategic Analysis*, vol. 23, no.9 (New Delhi: IDSA, December 1999), pp.1509-1530.

[194] China's New War Concepts for 21st Century Battlefields

China issued a white paper entitled "China's National Defense in 2008," tracing shifts in its defense budget since the nation first implemented its open door policy in 1978.[195] The dramatic increase in defense spending over the past 30 years is striking. U.S. Department of Defense annual report on the military power of China was highly critical of Chinese military expansion. The report produced a strong response from China condemning the American analysis and the provocative message that China thought it sent.

Southeast Asia countries may feel less threatened by the expansion of China's military power than many Western commentators allege. This was demonstrated during the recent visit by senior ASEAN military officers to China.[196] Southeast Asians "recognize the inevitability of the rise of China while continuing to seek the involvement of the U.S. as a balancing force."[197] There have been several press reports in 2007 of Chinese proposals for joint military exercises with ASEAN and ASEAN's receptivity to these proposals. A newspaper article quoted the commander of the U.S. Marine forces in the Pacific, characterizing China's military bid as a "positive overture," leading one to conclude that these reports must be more than good copy or the exercise of journalistic license. But as one analyst pointed out, ASEAN is in a difficult position. China has very effectively engaged it since reaching a temporary political understanding on the SCS several years ago. The 'ASEAN-way' is consensus-based and accommodating. This works against rejecting an overture from an increasingly close partner like China. China's charm offensive in Southeast Asia has essentially put ASEAN in a box.[198]

China's naval position in the Spratlys has continued to be weak due to its limited power projection. The PRC has not extensively increased its ability to sustain naval operations away from its mainland bases. Shambaugh writes that the People's Liberation Army (PLA) "does not seem to have made much progress in enhancing its power projection capabilities, nor do these seem to be a priority."[18] China has no aircraft carrier battle group to project its power, though it has reported to build a submarine base in Hainan Island;[199] it

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[195] Information Office of the State Council of the People's Republic of China, "China's National Defense in 2008", at http://www.fas.org/programs/ssp/nukes/2008DefenseWhitePaper_Jan2009.pdf (accessed on July 22, 2009)
[196] Christopher Bodeen, "Southeast Asia military delegates tour China base", *Seattle Post-Intelligencer*, 31 March 2009, http://www.seattlepi.com/national/1104ap_as_china_southeast_asia.html (accessed 1 April 2009)
[197] Sam Bateman, "Commentary on *Energy and Geopolitics in the SCS* by Michael Richardson", at http://www.iseas.edu.sg/aseanstudiescentre/ascdf2c1.pdf (accessed on May 26, 2009)
[198] Walter Lohman, "The Trap of China-ASEAN Military Cooperation", at http://www.heritage.org/research/asiaandthepacific/wm1451.cfm
[199] Thomas Harding, "Chinese nuclear submarine base", May 1 2008, at http://www.telegraph.co.uk/news/worldnews/asia/china/1917167/Chinese-nuclear-submarine-base.html

has few destroyers and its submarines usually remain within its territorial waters.[200] Most features in the Spratly archipelago are also too small to offer bases for further naval activities. Hence, the PRC does not currently possess the necessary capabilities to control the Spratly group militarily. And it does not yet possess the technology, military capabilities and power projection to impose such a naval hegemony in Southeast Asia.[201] Furthermore, command over the maritime communication routes that cross the SCS can only result from a significant naval dominance and superiority in the region rather than the occupation of tiny features that may not offer a legitimate basis for claiming maritime jurisdiction.[202] It is important therefore to dissociate the military control of reefs that can only generate limited maritime zones from the control of Sea Lanes of Communication (SLOCs) and wider naval areas. The latter are obviously more significant strategically. PRC military theorists conceive of two island 'chains' (see Map I.6) as forming a geographic basis for China's maritime defensive perimeter. The precise boundaries of these chains have never been officially defined by the Chinese government, and so are subject to some speculation. By one account, China's 'green water' extends eastward in the Pacific Ocean out to the first island chain, which is formed by the Aleutians, the Kuriles, Japan's archipelago, the Ryukyus, Taiwan, the Philippines, and Borneo. Further eastward is 'blue water' extending to the second island chain running from the north at the Bonin Islands and moving southward through the Marianas, Guam, and the Caroline Islands.

[200] Jonathan Power, 'The So-called Rise of China', *International Herald Tribune*, 8 April 2005.
[201] See the International Institute for Strategic Studies, *The Military Balance 2004-2005* (Oxford: Oxford University Press, 2004), pp. 161-162, 170-173.
[202] Michael Leifer, 'The Maritime Regime and Regional Security in East Asia', *The Pacific Review*, vol. 4, no. 2, 1991, p. 130.

Map I.6: The First and Second Island Chains

Figure 3. The First and Second Island Chains. *PRC military theorists conceive of two island "chains" as forming a geographic basis for China's maritime defensive perimeter.*

Source:
http://www.lib.utexas.edu/maps/middle_east_and_asia/china_first_and_second_island_chains_2008.jpg

4.2 ASEAN

Because of the relative openness in military matters, which characterizes most of the ASEAN countries, it is possible to get a rather clear and reliable picture of the region's arms acquisitions and holdings as well as military expenditures.[203] Several member states of ASEAN, especially Malaysia, already possess significant 'green-water' naval capabilities as well as embryonic blue-water capabilities. Most of them have also been investing heavily in major warships as well as maritime aircraft— the primary rationale being the need to patrol expanded territorial waters and EEZs.

ASEAN states have made tremendous efforts to enhance its defense capability since 2007 domestically and amongst the ASEAN. Vietnamese PM Nugyen Tan Dung, during his visit to the Philippines in August 2007, agreed to have a bilateral joint patrol with the Pilipino Navy. Malaysia, establishing a frontier defense team, cooperated with the Thai military to maintain and enhance the Malaysia-Thailand border security. At the fifth informal meeting in July 2008, the heads of the ASEAN states armed forces agreed to strengthen the military cooperation through information sharing, intelligence cooperation, military exercise and workshops. At the 2nd ASEAN National Defense Minister meeting in November 2007, the 10 ASEAN states expressed the hope to establish by "ASEAB Security Community"2015. This goal seems to be accelerated by the signing of "ASEAN Constitution" at the 13th Meeting of the ASEAN leaders in the same month.[204]

Even the original impetus for the build-up many have had little or nothing to do with an arms race, states may gradually come to regard their neighbors' growing military strength as a threat calling for counteracting steps. It is also conceivable that some of the ASEAN states may gradually develop ambitions that go beyond their present one of national defence. The appetite may simply grow with the eating, and states may develop ambitions commensurate with their growing military strength, rather than the other way around.[205]

The well-known 'security dilemma' may thus become activated, leading states to pursue their quest for security at the expense of their respective neighbors.[206] One might

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[203] Malcolm Chalmers, *Confidence Building in South-East Asia* (Boulder, CO: Westview, 1996), pp. 61-119; Md Hussin Nayan, "Openness and Transparency in the ASEAN Countries", *Disarmament*, vol. 18, no.2 (1995), pp.135-144.

[204] The National Institute of the SCS Studies, *Annual Report of the SCS Status Quo*, 2008

[205] Bjoern Moeller, *"The Military Aspects of the Dispute*", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.71

[206] On the security dilemma, see John M.Herz, *Political Realism and Political Idealism*: A Study in theories and Realities (Chicago: Chicago

even envision a territorial manifestation thereof in the form of 'pre-emptive island grabs', where states claims for some of the Spratly Islands in order to preempt others from doing so first, and where they feel compelled to actually occupy and garrison that claimed islands (See Table I.2). Military clashes might well result from this, which might in turn escalate out of control. Of particular interest in this context are the three ASEAN contenders for the Spratlys Islands, Vietnam, the Philippines and Malaysia, as well as the regional great power, Indonesia.[207]

University Press, 1951).

[207] Bjoern Moeller, *"The Military Aspects of the Dispute*", p.72

Table I.2 Military Installation in the Spratly Islands

State	**Total islands claimed / Major garrisoned islands**	**Year occupied**	**Troops / Installations**
PRC	7 / Yongshu Jiao	1988	260 / helicopter pads
Taiwan	1 / Taiping	1956	100 / helicopter pad
Philippines	9 / Pagasa	1971	480 / 1300-m runway
Vietnam	24 / Truong Sa Dong, Nanwei Dao	1974	600 / 600-m runway
Malaysia	3 / Terumbu Layang Layang	1983	70 / 600- m runway

Source: Bjoern Moeller, "The Military Aspects of the Dispute", in Timo Kivimaeki (ed.) *War or Peace in the SCS*, p.64

4.2.1 Vietnam

Vietnam passed the 2020 Vietnam Ocean Strategy, the main focus of which is to develop maritime economy, building Vietnam into a maritime power, enhance ocean management and emphasize the navy building. Its ability of building military ships has been approved and started building 10 lightening missile speedboat in its domestic shipyards.[208] The navy forces stationed in its occupied islands are required to enhance training and to remain alerted for war status. Military expense is continuously increasing on armaments and equipments, and on the building of its armed forces in the occupied islands in the SCS. 3.8 billion USD is reported to be invested to build 30-40 400-ton warships. A large military harbor at Haiphong is being constructed as the 2nd largest naval base of Vietnam, after the Cam-Ranh Bay. When completed, this naval harbor will have the capacity of berthing 40,000-ton large warships and 40 to 60 naval vessels and submarines. Vietnam has also purchased a large number of armaments and equipments from Russia and India.

4.2.2 Malaysia

Malaysian Defense Minister Najib Razak is the driving force behind the modernization program. This program is actually the renewal of an effort begun in the early 1990s, also led by Najib, to shift the Malaysian military from an army-driven, counter-insurgency force to a structure with a more equal emphasis on all three services. That effort was derailed when Najib was moved from the defense ministry to another portfolio in 1995 and then placed on hold by the Asian economic crisis. The shopping list includes battle tanks from Poland, Russian and British surface-to-air missiles and mobile military bridges, Austrian Steyr assault rifles, and Pakistani anti-tank missiles.[209] Kuala Lumpur is also negotiating to buy several F/A-18s, three submarines from France, and an unspecified number of Russian Sukhoi Su-30 fighter aircraft. On January 27 2009, DCNS (*Direction des Constructions Navales Services*) delivered the Royal Malaysian Navy's first-ever submarine, which follows Malaysia's decision to set up a submarine force comprising two Scorpene-type conventional-propulsion boats.[210]

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208 National Institute for the South China Sea Studies, *2008 Report on the South China Sea Situation* (2008 Nian Nanhai Xingshi Pinggu Baogao)

209 John Gershman," U.S. and Malaysia Now Best Friends in War on Terrorism", at http://www.fpif.org/fpiftxt/420 (accessed on May 31, 2009)

210 "DCNS Delivers Royal Malaysian Navy's 1st Submarine", at http://www.asd-network.com/press_detail/19235/DCNS_Delivers_Royal_Malaysian_Navy_s_1st_Submarine.htm (accessed on July 24

On June 3 2009, the Royal Malaysian Navy's third Kedah-class MEKO A100-class corvette began to serve patrolling in the SCS waters.[211]

The decision to spread its orders around reflects Malaysia's use of arms purchases as part of its foreign policy, even though the range of equipment from so many different sources creates maintenance and logistics problems. The tanks, missiles, multiple-rocket-launcher systems, and submarines will give Malaysia an attack platform for the first time. The military modernization program is partially aimed at narrowing the gap with neighboring Singapore, which has an annual military budget roughly twice the size of Malaysia's.[212] There's also the mundane but important element of patronage. Many foreign arms manufacturers generally use well-connected Malaysians as their lobbyists for contracts. The commission paid to such representatives is estimated to range from 10-20%. Several other major concerns are also driving military spending in Malaysia, such as piracy and transnational crimes. Finally, Malaysia is concerned about an increase of Chinese influence in the SCS. There is also a growing concern regarding the organizational weakness of ASEAN. This has been interpreted by policymakers in individual ASEAN countries as dictating increases in military spending as a counter-weight to China's military modernization efforts.

4.2.3 The Philippines

Despite a modernization programme launched about a decade ago, and a sub-sequent parliamentary decision (following the Mischief Reef incident) to allocate further resources to an upgrade of the armed forces, very little progress has been made because of a shortage of funds.[213] Manila lacks both an ocean-going fleet worthy of that name and any long-range maritime aircraft that might allow it to lay hands on additional islands. Its warships are few and small as well as utterly obsolete.[214]

2009)

[211] "Meiguo jieru nanhai jiaqiang daolian zhujun qianzhi zhongguo haishang zhanlue"" (US intervened in the SCS by Enhancing its Garrison at its islands chain and Constraining china's Maritime Strategy),*The Globe*, June 3 2009, at http://mil.news.sina.com.cn/2009-06-03/0804553898_4.html

[212] National Institute for the South China Sea Studies, 2008 *Report on the South China Sea Situation* (2008 Nian Nanhai Xingshi Pinggu Baogao)

[213] Robert Karniol, "Briefing: Military Modernization in Asia", in *Jane's Defence Weekly*, vo.32, no.21 (24 Novermber 1999).

[214] Bjoern Moeller*, "The Military Aspects of the Dispute*", p.72

Besides accelerating their military modernization, trying to maintain the existing interests in the SCS, ASEAN always maintain the strategy of balancing the regional stability by pulling in the military power from outside the region (See Table I.3). Navies from the Philippines, Brunei, Indonesia, Malaysia, Singapore, Thailand, and the *U.S.* hold the sixth annual anti-terrorism Southeast Asia Cooperation against Terrorism (SEACAT) exercise in August 2007. India provides Indonesia with short-distant battlefield monitor radar. Japan provides aid to Indonesia to build three patrol vessels. Vietnam signed a national defense agreement with India, and the two navies conducted joint military exercises. Japan Maritime Self Defence Force joined for the first time with Malaysia and Thailand in the anti-piracy exercise in Malacca Strait. American training warship "Golden Bear" paid a visit to the north harbor of Vietnam (Hải Phòng) in 2007 after the normalization of US-Vietnam relations. U.S. also agreed to exchange nuclear science with Vietnam and share with Vietnam the newest security and non-proliferation measures in terms of non-military purpose nuclear energy plan.

Table I.3 Military exercise in the SCS from 2007 to 2009

Time	**Military exercises**	**States involved**
June 2009	CARAT Military Exercise	Malaysia, USA
January 2007	First ARF (ASEAN Region Forum) maritime security onshore exercise	22 member states of ARF
February 2007	Anti-Piracy Joint Exercise	Japan, Malaysia, Thailand
March 2007	"Shoulder by shoulder" Joint Exercise	America, the Philippines
	Bilateral Joint Exercise	Singapore, India
April 2007	First Maritime Joint Military Exercise	U.S., Japan and India
May 2007	India navy Joint Military Exercise	China, India, Japan, New Zealand, the Philippines, Russia, U.S.
	"Golden Cobra" 2007	U.S., Thailand, Singapore, Japan, Indonesia
	Bilateral Joint Military Exercise	Malaysia, the Philippines
	"The 2nd West Pacific navy Forum Multilateral maritime Exercise"	China, Singapore, India, Japan, U.S., South Korea, Australia, etc.
June 2007	The 3rd West Pacific Mine Sweeping and Diving Exercise	21 Pacific countries including U.S., Japan and Malaysia
July 2007	"CARAT 2007"	U.S., Singapore
	"Strike *2007*"	China, Thailand
August 2007	"Valiant *Shield 2007*"	U.S., Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand
September 2007	"*Marbella* 2007"	U.S., Japan, Australia, India, Singapore
October 2007	"'*Pacific* Shield 07"	Participants: U.S., UK, France, Australia, New Zealand Observer: Malaysia, India, Vietnam, etc
	"Talon Vision and Amphibious Landing Exercise" Joint Military Exercise	U.S., the Philippines

Source: Summarized by the author by December 18, 2008.

5. External Players

The United States remains not only a global, but also very much as regional player having lots of impact on the SCS. It maintains bases in Hawaii, Japan and the Republic of Korea (ROK), and previously also the Philippines, plus access rights in Thailand (U Tapao), Malaysia (Lumut), Indonesia (Surabaya) and Australia.[215] These are not merely designed for the defence of Hawaii and CONUS (Continental United States), but also for the defence of US allies, i.e. the ANZUS treaty members Australia and New Zealand and countries enjoying bilateral US security guarantees, i.e. Japan and the ROK and, more ambiguously, Taiwan, to the defense of which the US retains some commitment, as evidenced by its behavior during the 1996 Taiwan Straits crisis.[216]

By virtue of this strength and reputation, the United States would be in a unique position to play the traditional role of an 'external balancer' providing security guarantees to whatever state might be attacked by another, and thereby making regional balances-of-power much less significant.[217] Unfortunately for regional stability, however, this does not appear to be the rule that the US wants to play, apparently preferring that of the 'lone ranger' in pursuit of 'bad states', rather arbitrarily defined as such.

In early June 2009, a Chinese submarine was found to be shadowing a U.S. Navy ship — possibly undetected by sonar equipment being towed behind the American destroyer. The SCS, where the collision occurred and where the U.S. Navy operates amid a complex patchwork of competing territorial claims, is also a familiar backdrop for such incidents. According to a Malaysian military media,[218] that the frequent US military exercise in the Southeast Asia encourages its navy vessels become acquainted with the geography and war environment in the SCS, the objective obviously pointing to China. Chinese analysts hold that the U.S. warships' frequent presence in the SCS indicates its changing position from being neutral on the SCS dispute to maintaining the status quo with more claimant states being involved in the dispute.[219] While not every incident gets reported, analysts say evidence

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[215] Standly B, Weeks and Charles A. Meconis, *The Armed Forces of the USA in the Asia-Pacific Region* (London: I.B. Tauris, 1999), pp.82-98
[216] Ibid. pp.30-64
[217] Bjoern Moeller, *"The Military Aspects of the Dispute*", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.76
[218] "Kuala Lumpur Security Review", at http://mil.news.sina.com.cn/2009-06-20/1238556004.html
[219] Zhang Zuo, "Mei cheng yuzhou dun jian zao zhongguo qianting pengzhuang shi zhengzai dongnanya junyan" (US says that the US that US destroyer was joining a military exercise when it collided with Chinese submarine), at http://mil.news.sina.com.cn/2009-06-20/1238556004.html (last visited June 23, 2009)

suggests they're happening more frequently as Beijing flexes its improved naval capabilities and asserts its objections to U.S. Naval activity in disputed waters.[220] The Chinese however believe that U.S. military exercises in the Southeast Asia aims at blocking the passages for the Chinese submarines.[221]

Japan is either the world's third or fourth largest military spender, depending on the PRC estimate.[222] The revised 1997 US-Japan defence pact[223] envisaged Japan assuming an expanded role in support of US operations in East Asia, seemingly including the Taiwan Strait – a plan to which the PRC did not respond favorably at all.[224] Moreover, under pressure from the United States, Japan has accepted greater responsibility for the defence of its own sea lands of communications (SLOCs), some of which run through waters also claimed as vital by the PRC.

While what Japan is presently doing may well be entirely defensively motivated, it also operates under the auspices of the security dilemma; hence its defensive steps may be regarded by others as threatening. As far as the SCS disputes are concerned, Japan has (fortunately) no territorial aspirations that would place it on a direct collision course with the PRC. On the other hand, it is also dependent on the free passage through the area that it would surely be forced to react to any further Chinese 'island grabs' which might place its SLOCs in jeopardy.[225] In that eventuality, the stage would be set for a naval arms race between the two regional giants that would bode very ill for regional stability.

India has for some time been building a primitive blue-water capability, including aircraft carriers, and it has exhibited interest in extending its naval reach into the SCS, if only to contest the PRC hegemony. Some analysts view India as aiming for a role as a regional hegemon in the Indian Ocean region,[226] an interpretation that is at least compatible with recent arms programmes. These will, in due course, provide India with a true blue-water

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220 Christopher Bodeen, "China-US Naval Incident Part of a Rising Trend**",** http://abcnews.go.com/International/wireStory?id=7839078

221 "Mei haijun zai dongnanya jiji lianbing yitu fengsuo zonguo qianting tongdao" (US Navy's military exercise in the Southeast Asia amins at blocking the passage of Chinese submarines) http://mil.news.sina.com.cn/2009-06-16/1642555555.html

222 Bjoern Moeller*,* "The Military Aspects of the Dispute", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.74

223 Tokyo responds to repeated US admonitions that Japan ought to assume a greater part of the burden of upholding the world order from which it benefits so much, as well as make more of an effort with regard to its own national security, thereby producing a more equitable burden-sharing.(See Kenichiro Sasae, "Rethinking Japan-US Relations", Adelphi Paper, no. 202 (1994); Gerald L. Curtis (ed.), The United States, Japan and Asia. Challenges for U.S Policy (new York: W.W. Norton& Cp., 1994)

224 *The times*, 25 September 1997

225 Bjoern Moeller*, "The Military Aspects of the Dispute*", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.75.

226 Veena gill, "India as a Regional Grat Power: in Pursuit of Shakti", in Iver B. Neumann (ed.), *Regional Great Powers in International Politics* (New York: St Martin's Press, 1992), pp.49-69

navy as well as with longer striking range by means of missiles and aircraft.[227] In view of its long-standing rivalry with the PRC, India might feel compelled to respond, if only defensively, to its perception of a growing Chinese reaching into the SCS as well as Indochina (especially Myanmar, almost on its own doorstep)

Such defensive steps as a more substantial peacetime presence in the area might, in the fullness of time, make India a significant player in the SCS, as would an expansion of its incipient military collaboration with Vietnam, the future direction of which is difficult to predict.[228] On the other hand, it is also conceivable that India will remain so preoccupied with both the conflict with Pakistan and its domestic problems that it will (prudently) refrain from such a geopolitical contest with the PRC, remaining content with its recent acquisition of nuclear status.[229]

Russia is no longer a major player in the SCS, its recent attempts at regaining rights at the Cam Ranh base in Vietnam notwithstanding.[230] Because of the simultaneous absence of strong political interests in the region and the requisite military capabilities to exert any influence, it can safely be disregarded.[231] In conformity with its new focus on the 'near abroad', Russia retains an interest in Northeast Asia,[232] but both Southeast Asia and the SCS fall beyond its perimeters. While Russia thus regularly attends ARF meetings, it has exhibited little real interest in the region.[233]

Australia is urgently a potential relevant player in the SCS, if only because of its historical ties and remaining geopolitical links to Southeast Asia.[234] However, while Canberra is thus very much politically involved (albeit on the sidelines), e.g. in both the ARF and Asia-Pacific Economic Cooperation (APECs) as well as with unilateral initiatives, there are no indications that it will come to play any military role in the foreseeable future.

6. Summary

This chapter unfolds the comprehensive picture of the SCS dispute, from the origin of the dispute (historical evolution), strategic importance to both the coastal states and other states

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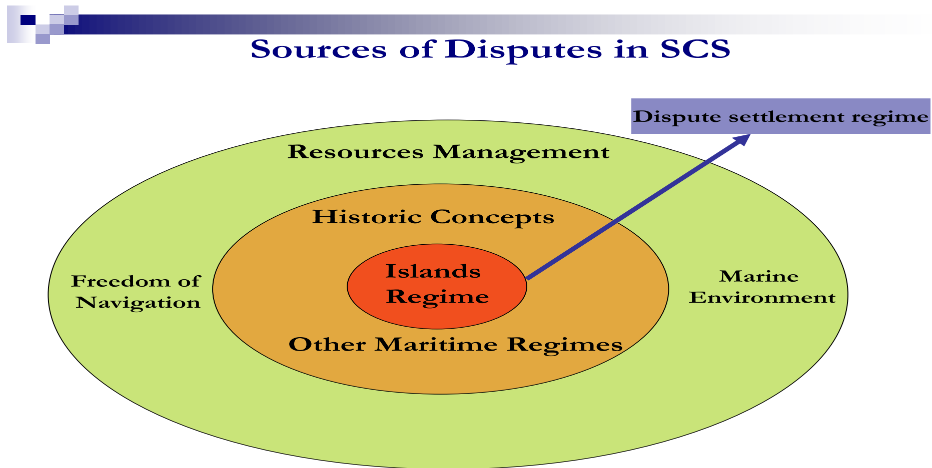
[227] Ghris Smith, *India's ad hoc Arsenal: Directions or Drift in Defence Policy?* (Oxford: Oxford University Press/SIPRI, 1994)
[228] Rahul Bedi, "India, Vietnam in Cooperation Pact", *Jane's Defence Weekly*, vol. 33, no.14 (April 5 2000)
[229] Jasjit Singh, "Future Directions of India's Defence Policy", *Strategic Digest* (New Delhi: Institute for Defence Studies and Analyses), vol. 26, no.5 (May 1996), pp.605-612
[230] Karniol Robert, "Deadlock Over naval Base Future", *Jane's Defence Weekly*, vo.31, no.16 (April 21, 1999)
[231] Bjoern Moeller, *"The Military Aspects of the Dispute*", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.76.
[232] Greg Austin and Alexey D. Muraviev, *the Armed Forces of the Russia in Asia* (London: I.B. Tauris, 2000), pp.96-129
[233] Bjoern Moeller, *"The Military Aspects of the Dispute*", in Timo Kivimaki (ed.)*War or Peace in the South China Sea*, p.77.
[234] On Australia's military involvement in the region, see Jeffrey Grey, *A Military History of Australia* (Cambridge: Cambridge University Press, 1999)

(geopolitical significance), economic potential (rich resources), the claims by the disputant states (strength and weakness), military expense competition (military and security), to roles by external players such as US, Japan, Russia, India and Australia. This chapter intends to lay down a foundation for the analysis in the following chapters on the applicability and implementation of UNCLOS in this region under such a framework which is intertwined by political, history, economic, and military elements. Chapter III categorizes the disputes in the SCS into three baskets, namely Islands regime, historic water regime, and other less sensitive issues, such as freedom of navigation, marine environment and resource management. It explores the coherence and applicability of the internal regimes of UNCLOS in three categories of disputes.

Chapter II Internal Regimes of UNCLOS in the SCS

This Chapter explores the internal regimes of UNCLOS and its applicability in the SCS. Section 1 reviews the dispute settlement regime and its state practice in the SCS, which sets an analytical foundation for the following sections. Figure II.1 presents the three categories of disputes analyzed in this chapter. Islands Regime discussed in section 2 is the core issue amongst the various disputes in the SCS. Section 3 touches upon another critical issue of the SCS dispute—the conflict between the historic concepts applied by China, Taiwan and Vietnam and the new regimes of UNCLOS, e.g. EEZ on which the Philippines, Malaysia, Indonesia and Brunei base their claim. The outer circle includes all other issues in the SCS into the same basket which will be addressed in Section 4, 5 and 6. The philosophy behind this is that, these issues, namely natural resources, freedom of navigation, marine environment protection, though playing a key role in the stage, are less sensitive than issues discussed in section 2 and 3. These sections unfold the essence of the SCS disputes, and the interaction of different regimes, e.g. Island, EEZ, and Continental Shelf in these three categories of disputes.

Figure II.1: Sources of Disputes in the SCS



1. Dispute Settlement Regime of UNCLOS

Compared to many other bodies of international law, UNCLOS has a very elaborate set of guidelines for dispute settlement. Proceeding from the broader UN-wide stipulation that states must resolve their disputes peacefully, the drafters of the Convention ensured that Pars XI and XV, which outline available dispute settlement mechanisms, would cover any conceivable, conflict that might arise. Part XV of UNCLOS established a comprehensive system for the settlement of disputes regarding the interpretation and application of the UNCLOS. It requires States Parties to settle their dispute by the peaceful means which is stated in the Charter of the United Nations. Section one of Part XV of UNCLOS sets out the fundamental principles concerning the dispute settlement.[235] However, if parties to a dispute fail to reach a settlement by peaceful means of their own choice, according to section 2 of Part XV, they are obliged to resort to the compulsory dispute settlement procedures entailing binding decision,[236] subject to certain limitations and exceptions.[237]

1.1 Obligation to Settlement Disputes by Peaceful Means

When a dispute concerning the interpretation or application of UNCLOS exists, pursuant to Article 279, States parties are obliged to settle the dispute by peaceful means in accordance with Article 2 (3) of the UN Charter.[238] To this end, States Parties must seek a solution by the means indicated in Article 33 (1) of the UN Charter. The inclusion of the customary law principle of peaceful dispute settlement in section 1 of Part XV establishes the obligation for States Parties to settle disputes by peaceful means of their own choice prior to resorting to the compulsory procedures entailing binding decisions.[239] Article 279 refers to the peaceful means indicated in Article 33 (1) of the UN Charter—"negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[240]

Parties to a dispute must first attempt to reach a settlement by recourse to section 1. Only where no settlement has been reached by recourse to section 1 can a party submit the

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[235] See United Nations Convention on the Law of the Sea (UNCLOS) Article 279, 280, 281
[236] See UNCLOS, Article 286
[237] See UNCLOS, Article 297, 298
[238] UNCLOS, article 279.
[239] Louis B. Sohn, "Settlement of Disputes Arising Out of the Law of the Sea Convention", (1975) 12 *San Diego Law Review*, p.495.
[240] See UNCLOS, article 279.

dispute to the court or tribunal having jurisdiction under section 2. This principle is emphasized again in Article 298 which provides that the rights of States Parties to exclude sea boundary delimitation disputes from the application of section 2 is without prejudice to the obligations arising under section 1.[241]

1.2 Compulsory Settlement Mechanism

As is discussed above, if no settlement is reached by recourse to Section 1, then, under Article 286, the dispute must be submitted, subject to the exceptions and limitations contained in section 3, at the request of any party to it, to the court of tribunal which has jurisdiction under Section 2.[242] Thus, it could be interpreted that the compulsory dispute procedures detailed in section 2 are of a subsidiary nature.[243] Article 287 provides States Parties with a choice from four alternative forums for the settlement of disputes:

1. *the International Tribunal for the Law of the Sea (ITLOS);*
2. *the ICJ;*
3. *an arbitration tribunal constituted in accordance with Annex VII to UNCLOS;*
4. *a special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS*.

A State Party is free to choose one or more of these means by a written declaration to be made when signing, ratifying or acceding to UNCLOS or at any time thereafter.[244] A State Party that does not make a declaration shall be deemed to have accepted arbitration in accordance with Annex VII.[245] 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 agree.[246] If the parties to a dispute have not accepted the same procedure, the dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. [247]

Some commentators deem the flexibility in Article 287 as the result of States' inability, during the Third United Nations Conference on the Law of the Sea (UNCLOS III) to "agree on a single third-party forum to which recourse should be had when informal

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241 See UNCLOS, article 298 (1)
242 See UNCLOS, Article 286
243 Anne Sheehan, "Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes", *University of Queensland Law Journal*; 2005; 24, 1; p167
244 UNCLOS. Article 287 (1)
245 UNCLOS. Article 287 (3)
246 UNCLOS, article 287 (4)
247 UNCLOS, article 287 (5)

mechanisms failed to resolve a dispute".[248] Others hold that Article 287 reflects the need to establish a balance between the freedom to choose settlement procedures and the need to reach a binding settlement of the subject of the dispute.

Compulsory dispute settlement also had an appeal to some States because of the impact the availability of these procedures would have on the political dynamic of a dispute.[249] There was a belief among the developing States that a binding regime would restrain more powerful States from using political, economic, and military pressures on the developing States to give up rights guaranteed under the Convention.[250] Equally, third-party dispute settlement was considered advantageous because of the alternative option to expending military, political or economic capital to protect maritime interests. Moreover, the binding nature of the regime was hoped to give less powerful States equal standing before the law.[251] This is probably the motivation of some Southeast Asia countries involved in the SCS dispute occasionally showing the intention to resort to the third-party mechanism with a worry that China will give them pressure with its military and economic advantages. This point will be further analyzed in the later chapter.

1.3 Limitation and Exception of Compulsory Settlement

Section 3 of Part XV includes three articles: Article 297 embodies general limitations to the applicability of Section 2 procedures, those limitations being 'general' in the sense that all State parties are automatically entitled to invoke opting-out clauses in relation to categories of dispute referred to in Article 297.[252] The lengthy text of article 297 provides a long list covering a wide range of limitation on the applicability of Section 2, ranging from freedom of navigation, protection and preservation of the marine environment, fishing to marine scientific research.[253]Article 298 embodies further optional exceptions to the applicability of Section 2 procedures, these exception being 'optional' in the sense that, if a State party wishes to exclude any of the specified categories of dispute from the application of Section

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[248] John E Xoyes, "The International Tribunal for the Law of the Sea", (1998) 32 *Cornell International Law Journal*, pp.109-119.
[249] Natalie Klein*, Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005), p. 52
[250] Andreas J. Jacovides, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Away?" in Thomas Buergenthal (ed.,) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohm* (Kehl, Germany: N. P. Engel, 1984.), pp.165-6.
[251] A. O. Adede, *The system for settlement of disputes under the United Nations convention on the law of the Sea: a drafting history and a commentary* (Boston: M. Nijhoff, 1987) p. 29, p.241.
[252] E.D. Brown, "Dispute Settlement and the Law of the Sea", in *Marine Policy,* vol. 21, no.1, (1997), pp.17-43, at p.21
[253] See Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* pp.125-221

2 procedures, it must make a written declaration to that effect.[254] Article 298, less complicated than article 297, basically excludes 3 categories of disputes from compulsory settlement, which are (1) disputes over sea boundary delimitations or historic bays or titles, (2) disputes over military activities and disputes over law enforcement activities concerning the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3, (3) disputes in respect of which to the Security Council of UN is exercising the functions.[255]

Compulsory dispute settlement under Section 2 of Part XV is available to States for disputes relating to the delimitation of the territorial sea, continental shelf, and EEZ, and to historic title unless States have opted to exclude these disputes by virtue of Article 298 (1) (a) (i). So far as 'sea boundary delimitations' are concerned, article 15, 74 and 83 expressly stipulate that States shall resort to Part XV procedures in the event that no agreement is reached within a reasonable period of time.[256] Article 298 1 (a) (i), however, provides the States a right to exclude the sea boundary disputes from the compulsory settlement mechanisms. Article 297 and 298 sets limitation and exception of compulsory settlement. There was support, however, for some form of dispute settlement entailing a binding decision because "boundary disputes were likely to be more frequent when the zones under the jurisdiction of the coastal states were more extensive, and …those zones would create a danger to peace if they were not definitely settled by a binding decision".[257] States also have an economic incentive to resolve maritime disputes in order to provide company interested in exploring for hydrocarbons with certainty and exclusivity of title. States could only grant fishing licenses over certain areas, and undertake the necessary conservation and management enforcement measures, when it could be clearly ascertained which State was responsible for, and entitled to, a particular maritime area. Dispute settlement procedures provide States with the chance to acquire their title to certain maritime areas, particularly in situations of overlapping entitlements. The importance of international marketability illustrates why maritime delimitation should bear a nature of compulsory settlement due to the fear that negotiation could last long than practical needs. To the extent that resources in maritime areas cannot be harvested and sold without recognized legal title, there is an

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[254] E.D. Brown, "Dispute Settlement and the Law of the Sea", in *Marine Policy,* vol. 21, no.1, (1997), pp.17-43, at p.21
[255] See UNCLOS, article 298.
[256] See UNCLOS, article 15, 74(2) and 82 (2)
[257] See *Untied Nations Convention on the Law of the Sea 1982: A Commentary* (Kluwer Academic Publishers, 1993), p. 117

incentive to submit to third-party dispute resolution. Such a procedure is necessary in order to show investors and their international market that a State has good title to the resources in a particular maritime area.[258] Moreover, States are much more likely to comply with a third-party decision on the allocation of maritime areas. Due to the centrality of marketable title, there is little value in continuing to claim maritime areas when a tribunal has declared that a particular State is not the owner of a certain area. Third-party opinion carries substantial weight because a State will not be able to market resources profitably after an adverse ruling.

Table II.1 summarizes those ocean related disputes subject to the compulsory settlement procedure and those which are not subject to. The relevance to the SCS regarding the categories listed in this table will be elaborated in the respective section in this chapter.

[258] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005)

Table II.1: Summary of Disputes Subject and Not Subject To Compulsory Settlement Procedure

Topic	Subject to the compulsory settlement procedures:	Not subject to the compulsory settlement procedures:
Exercise by a coastal state of its sovereign rights or jurisdiction provided in the LOS Convention	- Disputes with regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or other internationally lawful uses of the sea specified in Article 58 and Article 297, Para 1 (a) and (b). - Disputes relating to the alleged contravention by a coastal state of specified international rules and standards for the protection or preservation of the marine environment (Article 297, Para 1. c),	All other disputes
Marine scientific research:	All other dispute	- Disputes relating the exercise by the coastal state of a right or discretion in accordance with Article 264 (Article 297, Para 2 (a) (i)). - Disputes relating decision by the coastal state to order suspension or cessation of a research project in accordance with Article 253 (Article 297, Para 2 (a) (ii).
Fisheries	All other disputes	Disputes relating the sovereignty rights with respect to the living resources in the exclusive economic zone or their exercise (Article 297, Para 3 (a)).
Sea boundary delimitation or historic bays or titles		A state may declare not to accept the compulsory procedures (Article 298, Para. 1 (a)).
Military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction		A state may declare not to accept the compulsory procedures (Article 298, Para, 1 (b)).
In respect of which the United Nations Security Council exercises the functions assigned to it by the United Nations Charter		A state may declare not to accept the compulsory procedure (Article 298, Para, 1(c).

Source: Shigeru Oda, *Fifty years of the law of the sea: with a special section on the International Court of Justice: selected writings of Shigeru Oda* (The Hague; New York: Kluwer Law International, c2003.), pp. 18-22.

1.4 Compulsory Disputes Settlement Practice in the SCS

The States bordering the SCS area include China, Taiwan, Vietnam, the Philippines, Malaysia, Indonesia, Thailand, Singapore, Cambodia and Brunei. For the purpose of this dissertation, the focus will be put on the Spratly dispute which involves China, Vietnam, the Philippines, Malaysia, and Brunei which are all member states of UNCLOS and Taiwan.[259] Table II.2 and II.3 present a clear review of the status of the SCS States under UNCLOS.

[259] Taiwan is not a member of UNCLOS because it is not admitted as a member of the United Nations. Taiwan has promulgated many marine laws and regulations based on the UNCLOS.

Table II.2: Summary of Status of the SCS under UNCLOS

State	**Signature, Succession to signature(d)**	**Ratification, Formal confirmation(c), Accession(a), Succession(d)**
Philippines	10 Dec 1982	8 May 1984
Indonesia	10 Dec 1982	3 Feb 1986
Viet Nam	10 Dec 1982	25 Jul 1994
China	10 Dec 1982	7 June 1996
Malaysia	10 Dec 1982	14 Oct 1996
Brunei Darussalam	5 Dec 1984	5 Nov 1996

Source: This table is based on the data from UNDOLOS website at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (or http://www.un.org/Depts/los/reference_files/status2008.pdf)

Table II.3: The SCS States' choice of procedure under article 287 and optional exceptions to applicability of Part XV, Section 2, of the Convention under article 298 of the Convention

State	Choice of procedure Declarations under article 287 (numbers indicate the order of preference)	Optional exceptions to applicability of Part XV, Section 2, of the Convention (Declarations under article 298)
China	No choice under article 287 made (on 25 August 2006)	Disputes referred to in article 298, paragraph 1 (a), (b) and (c) of the Convention;[260]
Philippines	No choice under article 287 made	N/A
Indonesia	No choice under article 287 made	N/A
Viet Nam	No choice under article 287 made	N/A
Malaysia	No choice under article 287 made	N/A

Source: This table is based on the data from UNDOLAS website at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm

[260] Chinese government's Declaration under article 298:"The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention. "See http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&id=458&chapter=21&lang=en#Participants

The above tables show that none of the SCS claimant states have made a declaration under article 287 to choose a forum for compulsory settlement procedures, which means that any disputes occurring among these States, assuming none of them make declaration under article 298 when a case occurs, will be brought before the arbitration tribunal according to Annex VII, unless they make a declaration on the choice of the forums in the future. While China is the only state which makes the declaration under article 298 to exclude disputes referred in article 298 to be settled through compulsory settlement procedures, Malaysia, the Philippines, Vietnam made separate declaration when ratifying the UNCLOS (See Appendix 1). Worth mentioning is that Philippine's declaration [261] encountered objection from Australia, Belarus, Russia. The objection mainly focuses on three aspects. First, the mentioned states consider that the statement made by the Philippines upon signature, and then confirmed upon ratification of UNCLOS, in essence contains reservations and exceptions to the Convention, which is prohibited under article 309 of the Convention. [262] Second, the discrepancy between the Philippine statement and the Convention can be seen, *inter alia*, from the affirmation by the Philippines that "The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation".[263] Moreover, the Statement emphasizes more than once that, despite its ratification of the Convention, the Philippines will continue to be guided in matters relating to the sea, not by the Convention and the obligations under it, but by its domestic law and by agreements it has already concluded which are not in line with the Convention. Thus, according to these countries, the Philippines "not only is evading the harmonization of its legislation with the Convention but also is refusing to fulfill one of its most fundamental obligations under the Convention namely, to respect the régime of archipelagic waters, which provides that foreign ships enjoy the right of archipelagic passage through, and foreign aircraft the right of overflight over, such waters."[264]

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[261] For the declaration of the Philippines, please see http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Philippines%20Understanding%20made%20upon%20signature%20(10%20December%201982)%20and%20confirmed%20upon%20ratification

[262] Article 309 (Reservations and exceptions) provides "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."

[263] Ibid.

[264] Ibid.

In the following sections, the role of third party compulsory dispute mechanism provided by UNCLOS will be discussed in addressing the various disputes in the SCS.

2. Island Regime and the SCS

2.1 Regime of Island under UNCLOS

2.1.1 Definition of Islands

For decades the regime of islands has been an issue of great interest. This leads to the special attention being given during the UNCLOS III. After nine years of negotiations, the conference adopted a single provision concerning the islands: Article 121 of UNCLOS.[265]

> *Regime of Islands*
> *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.*

Article 121 (1) was adopted from the 1958 Convention on the Territorial Sea and the Contiguous Zones[266] without any change. The conditions were set for a feature to be classified as an island in the legal sense, the key term of which is "above water at high tide". This definition is subject to much controversy especially in regard to the high tide criterion; however, the major controversies have arisen in connection to the entitlement of maritime zones of islands, regulated by paragraphs 2 and 3 of Article 121.[267]

The message contained in Article 121 (2) of the LOS Convention is that islands can generate ocean space in the same manner as continental landmasses. Any island coming within "island definition" in Article 121 (1) is entitled to its own territorial sea stretching to a maximum of 12 nautical miles measured from the baseline and a contiguous zone stretching to a maximum of 24 nautical miles, 200 nm of EEZ and Continental Shelf measured from

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[265] U.N. Doc. A/CONF.62/122, (1982), United Nations, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index.
[266] The UN Convention on the Territorial Sea and the Contiguous Zone, Geneva 29 April 1958, 516, *U.N.T.S.* 205.
[267] Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?", *Ocean Development & International Law*, Apr2001, Vol. 32 Issue 2, pp.191-204.

that same baseline.[268] Since the maritime zones are measured from the baseline, the latter must be properly drawn before any maritime zone can be delineated. This leads to the definition of normal baseline which is in itself a contested issue. The normal baseline, according to Article 5 of the LOS Convention, is "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal states." Te normal baseline may, however, be subject to modifications due to certain geographical conditions which allow straight bases to be employed.[269] UNCLOS Article 7 establishes three main criteria for drawing these straight baselines. Firstly and crucially, they should only be used in localities where the coastline is deeply indented, or if there is a fringe of islands along the coast in its immediate vicinity. Secondly, "[t]he drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently linked to the land domain to be subject to the regime of internal waters." Thirdly, account may be taken of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage. Additionally, rules specific to deltas and similarly unstable coasts are provided. Some commentators claim that these seemingly strict criteria have been interpreted very flexibly, or even ignored in practice by countries in East Asia.[270] Almost all regional countries (i.e. Cambodia, China, Japan, North Korea, South Korea, Malaysia, Myanmar, the Philippines, Thailand and Vietnam) have used straight baselines for parts of their coasts which are neither deeply indented or with a 'fringe' of islands. The straight baseline claims have excited international protests, most notably from the USA.[271]

Ambiguity exists not only in Article 121 (1) and (2). Article 121 (3), by stipulating that a rock which cannot sustain human habitation or economic life of their own shall not have no EEZ or continental shelf, causes massive argument. It is generally acknowledged that Article 121 (3) raises a number of complicated interpretative questions, making it difficult to

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[268] UNCLOS, Articles 3 and 33. Note, however, that national jurisdiction in the contiguous zone is limited to exercising rights concerning customs, fiscal issues, and immigration or sanitary laws and regulations. See also Gjetnes, "The Spratlys: Are They Rocks or Islands?", p.192

[269] See UNCLOS, Articles 7 and 47. (Straight and Archipelagic Baselines).

[270] Sam Bateman and Clive Schofield, "State Practice regarding Straight Baselines in East Asia – Legal, Technical and Political Issues in a Changing Environment", at http://www.iho-ohi.net/mtg_docs/com_wg/ABLOS/ABLOS_Conf5/Abstracts/Session7-Paper1-Bateman.pdf

[271] Roach, J. Ashley Smith, Robert W., *United States Responses to Excessive Maritime Claims* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1994)

establish to which islands it is actually applicable.[272] First of all, 'rock' is not defined in UNCLOS. One argument is whether the term 'rock' should be given a purely geological definition.[273] However, such a strictly literal interpretation would limit the coverage of paragraph 3 to formations that are actually rocks without any accompanying land.[274] Other barren and uninhabitable insular formations, such as cays and atolls, would in this case be considered islands no matter how small they are and would generate an EEZ regardless of whether they can sustain habitation or economic life.[275] It would be unreasonable, and not in consonance with the intention of the parties to UNCLOS III, if one geological type of uninhabitable tiny insular formation should be excluded from rights to which other types of uninhabitable tiny insular formations are entitled.[276] Thus, the purely geological definition of rock must be rejected in the interpretation of Article 121(3).

Secondly, it is important to notice the fact that rocks must still comply with the requirements of the definition of an island found in Article 121(1). There is no difference between rocks and islands in respect of the requirement that they must be "naturally formed" and "surrounded by water and above water at high tide."[277] If, then, the difference between an island and a rock is to be based on the broader concept of 'land', is the difference then to be founded in size and the geological substance? A number of suggestions for how to define islands, islets, and rocks on the basis of size were submitted during the UNCLOS III, but none attained sufficient support for inclusion in the final text.[278]

Thirdly, Article 121(3) of the LOS Convention includes the phrase "sustain human habitation or have economic life of its own", which brings forward various questions of interpretation. It indicates that two categories of 'rocks' exist: (1) those that cannot sustain human habitation or economic life of their own; and (2) those that can sustain either or

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[272] Alex G. Oude Elferink, "The Islands in the SCS: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?", *Ocean Development & International Law,* 32:169–190, 2001, p.173, See also For a discussion of this provision, see J. I. Charney, "Rocks that Cannot Sustain Human Habitation," 93 *American Journal of International Law* 1999, pp. 863–877; R. Kolb, "L'Interprétation de l'Article 121, Paragraphe 3, de la Convention de Montego Bay sur le Droit de la Mer: Les <<Rochers qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre. . .>>," *40 Annuaire Français de Droit International* 1994, pp. 876–909; and B. Kwiatkowska and A. H. A. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own," 21 *Netherlands Yearbook of International Law* 1990, pp. 139–181.

[273] In geology, rock is a naturally occurring aggregate of minerals and/or mineraloids.

[274] Gjetnes, "The Spratlys: Are They Rocks or Islands?", p.193

[275] Robert D. Hodgson and Robert W. Smith, "The Informal Negotiating Text (Committee II): A Geographical Perspective," 3 *Ocean Development & International Law* 225 (1976). See also Gjetnes, "The Spratlys: Are They Rocks or Islands?", p.193

[276] Ibid.

[277] Gjetnes, "The Spratlys: Are They Rocks or Islands?" p.194

[278] Ibid.

both.[279] However, what does it take for a rock to sustain human habitation or have economic life of its own? This question remains unanswered despite the fact that a large amount of efforts have been done to seek for a solution.[280]

The present analysis does not purport to provide a final answer on rocks and islands. Further elaboration of Article 121 (3) is possible through state practice or judicial decisions.[281]

2.1.2 Maritime Zones Generated from an Island

Apart from territorial sea and contiguous zone, the entitlement to the more extensive zones, i.e., the 200-nautical-mile EEZ and the continental shelf, does not follow automatically from island status as defined in Article 121 (1). An exception is provided in Article 121 (3) which poses an important restriction on the capacity of islands to have an EEZ and continental shelf. A large number of publications have tried to deal with the two elements distinguished from a close reading of Article 121 (3),[282] the size of the island and its capacity to sustain human habitation or economic life of its own. Rather than reviewing the discussion and debate on these two issues, the author will raise the reasons for depriving small insular formation of a 200 nm EEZ. Symmons points out that a tiny isolated rock, permanently above waters, like 'Rockall',[283] might deprive a neighboring State of its potential EEZ. [284] Furthermore, if every islet were allowed to generate such a 200-mile zone, the high seas[285]

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[279] Jon M. Van Dyke and Dale Bennett, "Islands and the Delimitation of Ocean Space in the SCS," 10 *Ocean Yearbook*, at 78 (1993); see also Gjetnes, "The Spratlys: Are They Rocks or Islands?" p. 194,

[280] J. I. Charney, "Rocks that Cannot Sustain Human Habitation," 93 *American Journal of International Law* 1999, pp. 863–877; B. Kwiatkowska and A. H. A. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own," 21 *Netherlands Yearbook of International Law* 1990, pp.139–181; J. M. Van Dyke and R. A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources," 12 *Ocean Development and International Law* 1983, pp.265–300, at pp. 286–287.

[281] Alex G. Oude Elferink, "The Islands in the SCS: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?" *Ocean Development & International Law*, 32:169–190, 2001, at p.173 ; See further, A. G. Oude Elferink, "Is it Either Necessary or Possible to Clarify the Provision on Rocks of Article 121(3) of the Law of the Sea Convention?," *The Hydrographic Journal*, No. 92, April 1999, pp. 9–16.

[282] Alex G. Oude Elferink, "The Islands in the SCS: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?", p. 173 ;

[283] Rockall is a small, uninhabited, rocky islet in the North Atlantic Ocean. It could be, in James Fisher's words, "the smallest isolated rock, or the most isolated small rock (both ways will do), in the oceans of the world". (Fisher, James (1956). *Rockall*. London: Geoffrey Bles. pp. 12–13.) Rockall is within the Exclusive Economic Zone (EEZ) of the United Kingdom. In 1997, the UK ratified the United Nations Convention on the Law of the Sea and thus relinquished any claim to an extension of its EEZ beyond the islet.

[284] In this case, the problem caused by small islands is often more than one simply of delimitation, as was argued by France at Caracas: see Official Records, vol. II, p.286, see also, Symmons, 1979, p. 115

[285] It is noteworthy that the British Secretary of State for Foreign and Commonwealth declaring a 200-mile fishery limit from the distant British possessions of Ascension, St. Helena, the Falklands and South Georgia, stated that the question of a 200-mile fishery zone around the British Antarctic territory was "being considered", see Hansard, vol. 938, col.659. The motivation behind such move would seem to be that now that the British trawling fleet has lost its traditional fishing waters in Europe, particularly around Iceland, it may be compensated by rights in such distant insular-generated waters. See Symmons 1979, p.115

and the international area of the seabed would be drastically curtailed, and the oceans of the world would be dotted, as maps at the Third UNCLOS showed, with vast 'lakes' of EEZ surrounding each islet.[286](See Map II.1). Several delegations at the UNCLOS III stressed these factors and proposed for a re-appraisal of the EEZ in the way it might apply to islands, because the inequitable results in the small insular formations were obvious in this respect than in the case of the more limited zones conceded to islands under the existing 1958 Conventions.[287] Another problem have arisen because in so many cases of islands their notional right to a continental shelf and EEZ has caused an overlapping of zones with larger, often continental States.[288] Very few islands are so distantly located as not to be involved in such a situation of *prima facie* overlap of regimes.[289] In addition, attachment of 200 nm EEZ to mid-ocean miniscule islets can create serious problems both for existing high sea fishery practices and international fishery conservation regimes.[290]

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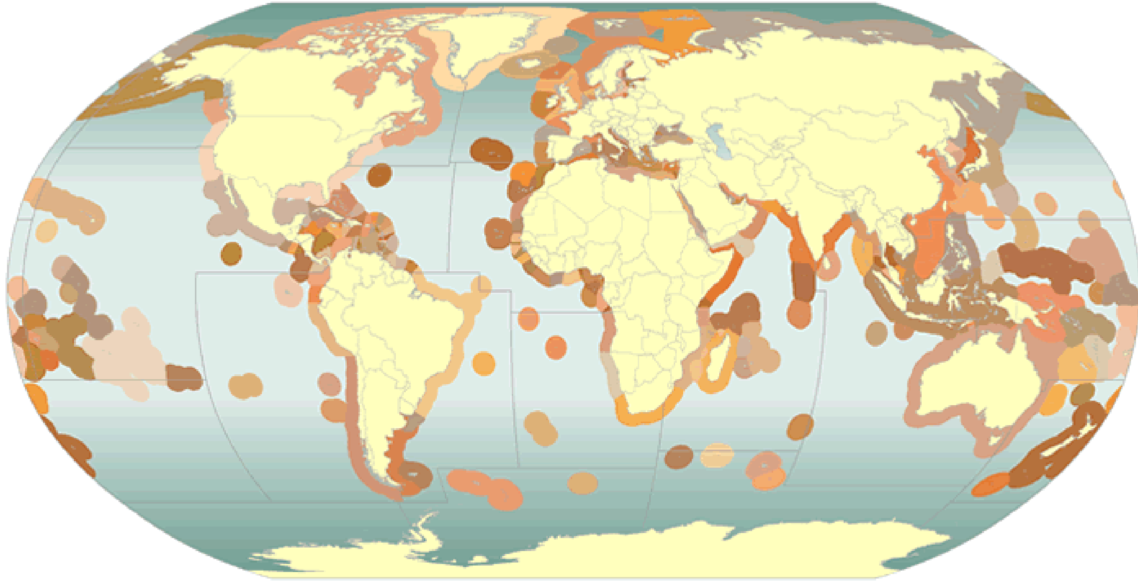
[286] Symmons, 1979, p.115
[287] Ibid. p.116
[288] Ibid. p.207
[289] Ibid. p.207
[290] The problem caused by small insular formations creating such large zones is well illustrated by the 1977 British designation in the area of Rockall to implement the concerted move by the E.E.C. countries at the end of 1976 to declare jointly a 200 nm exclusive fishery zone in the North Ea and Atlantic, and the current dispute between Argentina and Chile over possession of certain islets and rocks in the Beagle channel area following the arbitration award of 197.

Map II.1: EEZs in the World



Source: http://www.seaaroundus.org/eez/eez.aspx

2.1.3 Islands' Role in Maritime Delimitation

The problems of the delimitation of territorial sea and contiguous zones — 12 and 24 miles respectively, are relatively straightforward, except in the geographic circumstances where foreign islands cluster against the shoreline of another state to a marked degree.[291] But the delimitation of the CS and EEZ brings much greater zones of maritime jurisdiction into play, particularly considering that 'islands' are entitled to their own EEZ and continental shelves under Article 121 (2) of UNCLOS. In both kinds of maritime zone, two particularly difficult situations may arise.[292] Firstly, an insular formation may be situated away from State A and nearer State B, on a notionally continuous continental shelf, [293] or on the edge of, or beyond, its owners notional continentally-generated EEZ in relatively narrow seas.[294] Secondly, an island owned by State A may randomly situate far from State A's mainland continental shelf or EEZ, usually as a colonial possession, in a mid-ocean position or near the coast of State B.[295]

The inter-relationship of the capacity of an insular formation to generate the broader maritime zones, and its qualification for use as a basepoint for continental shelf or EEZ delimitation purposes, is very evident in some of the draft articles submitted at UNCLOS III.[296] Many delegations[297] at the UNCLOS III were struggling to address the two questions, whether (firstly) an island was capable of generating areas of EEZ and continental shelf, and (secondly) whether an island could be utilized as a basepoint in EEZ and continental shelf delimitations. These two questions were "separate but interrelated".[298]

Despite the many current unresolved disputes concerning the use of small and insignificant insular formations as basepoints for delimitation purposes, many bilateral

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[291] Symmons, 1979, p.159.

[292] A third possible difficult delimitation situation is where an "island State" abuts the coast of another State: see Hodgson, "Islands: Normal and Special Circumstances", in Gamble and Pontecorve (eds.), *Law of the Sea: the Emerging Regime of the Oceans* (U.S.A,. 1974) and accompanying text. See also Symmons, 1979, p.159)

[293] Hodgson, "Islands: Normal and Special Circumstances", in Gamble and Pontecorve (eds.), *Law of the Sea: the Emerging Regime of the Oceans* (U.S.A,. 1974), p.176. See also Symmon, 1979, p.159)

[294] Simmons, 1979, p.159

[295] Ibid. p.159.

[296] For example, although Rumania submitted at Caracas separate articles on the definition of, and regime applicable to, "islets" and "islands similar to islets" on the one hand, (n. 102), and on the delimitation of "marine and ocean space" between adjacent and opposite/neighboring States on the other, (n. 103) it utilized the same criteria as to the capacity of insular formations to generate maritime zones in their own rights (n. 104) an their capacity to act as basepoints for delimitation purposes. See also Symmon, 1979, p.164.

[297] E.g., Ireland, *Official Records*, vol. II, p.165; also Turkey, *U.N. Doc. A/CONF.62/c.2/L.18*, at p.214. The New Zealand proposals (UnN.A./CONF. 62/c.2/L.30) were intended to be "without prejudice" to the question of delimitation of island "ocean space". See also Symmons, 1979, p.164.

[298] Stated by the Irish delegate, *Official Records*, vol. II, p.165. See now the provisions of the ICNT, 1977. See also Symmons, 1979, p.164

agreements and arbitration settlement[299] now exist where the problem of the effect of such formations has been amicably solved. The existing solutions appear to comprehend two basic,[300] and four subsidiary, possibilities: The two basic possibilities are: (i) taking an insular formation as a basepoint;[301] (ii) ignoring, wholly or selectively, insular formations as basepoints.[302] The four subsidiary solutions following the ignoring of an insular formation as an equidistance basepoint are: (1) allowing it to generate a moderate maritime zone in its own right;[303] (2) allowing it a "trade-off" value in a part of the boundary;[304] (3) giving the insular formation reduced effect or "half-weight" for basepoint purposes;[305] (4) ignoring an

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[299] The Franco-British Arbitration Case on the Western Approaches, decided on June 3oth, 1977. See also Symmons, 1979, p.189

[300] Other solution of a more provisional nature may of course be possible, as in the case of the "reciprocal rights" agreement between France and Canada over St. Pierre and Miquelon (See Common Debates, vol. XIII, November 19th, 1976) and the joint development zone concept in the 1974 Agreement between Japan and South Korean (It is to remain in force for 50 years). Other joint development agreements are noted by Karl, "Islands and the Delimitation of the Continental Shelf: A Framework for Analysis", 1977*, A.J.I.L* at p.665, who observes that such a possibility was contemplated by the International Court in the North Sea Continental Shelf cases. (*ICJ Rep*., 1969, 3, 53). See Symmons, 1979,p.189

[301] Particularly where one State's island or islands is off-set by the other States' similarly-situated islands, so not distorting the median line, as in the Bahrain-Iran agreement (1974) where a Bahraini islet and an Iranian one (Naklilu) were both used. To show what an effect small islands can have on a median line position, see the example given by Boggs in respect of the Gulf of Venezuela where he contrasts the position between using mainland basepoints only and the use of the Monges islands. In the 1996 agreement between the republic of Estonia and the republic of Latvia the islands were taken into account in the delimitation process. Many islands are present in the area to be delimited and all of them belong to Estonia. Only the Ruhnu Island, which is bigger and populated, was granted a 12 nautical mile territorial sea. Also, on the Estonian side, the base points used were all islands, whereas on the Latvian side the mainland served this purpose. See Jonathan I. Charney and Robert W. Smith. *International Maritime Boundaries*. 2002. Vol. IV. P.3005.

[302] See generally Ely, "Seabed Boundaries between Coastal States: The effect to be given to Islets as Special Circumstances" (1972) 6 *International Lawyer*, at pp.227-230, also Karl, "Islands and the delimitation of the Continental Shelf: A Framework for Analysis", (1977) American Journal of International Law, p.652. In the India-Sri Lanka maritime boundary agreement, for example, the small Adams Bridge islands on both sides of the boundary were disregarded for delimitation purposes. A number of small islands were ignored in the delimitation of the Iran-Qatar boundary, and the somewhat larger island of Ven was ignored in the boundary settlement between Denmark and Sweden.

[303] Where a foreign-owned islet lies towards the coastline of an opposite or adjacent State, across the median line as measured from the respective mainland's, in other words on the "wrong side of the median line", there is now evidence of State and arbitral practice to the effect that although such an islet should be ignored as basepoint in the continental shelf delimitation to avoid undue deflection of such a line, nonetheless the formation should be embued with a moderate surrounding zone of its own, usually not more than 12 miles in width. One of the earliest continual shelf boundary agreements where this expedient was used was in that of Italy and Yugoslavia in respect of delimitation of the Adriatic seabed in 1968. (See Ely, "Seabed Boundaries between Coastal States: The effect to be given to Islets as Special Circumstances" (1972) 6 International Lawyer, at pp.227-228); See also Symmons, 1979, pp.193-200

[304] In its simplest application, this practical expedient simply entails as a reciprocal par of the conscious bargaining process that the ignoring of an awkwardly placed island (or islands) of State A in one part of the boundary will be effected in return for a similar ignoring of another (or other islands) similarly placed belonging to State B, in another part. The expedient has been described as operating as follows in the following way in the Italy-Yugoslavia continental shelf delimitation agreement of 1968. (Ely, "Seabed Boundaries between Coastal States: The effect to be given to Islets as Special Circumstances" (1972) 6 International Lawyer, at pp.227-228). See also Symmons, 1979, p.200

[305] Quite apart from "trade-off" solutions, another increasingly evident way of dealing with awkwardly placed islands-particularly those of some size and with some population - has been to given them "half-effect" only as basepoints, where the resulting boundary is approximately the division between the equidistance line respectively taking into account and then ignoring an insular basepoint on the island owner's side and the appropriate constant basepoints in each case on the neighboring State's side. This obviously equitable solution was one of the principal features of the 1968 Saudi Arabian-Iran agreement, where in the northern sector, the median line delimitation had been complicated by the largish Iran's islands of Kharg which lies about 17 miles from Iran and was then sparsely populated. (See Symmons, 1979, p.210202). The trend away from giving full weigh to islands against mainland coast began in the bilateral delimitation between Saudi Arabia and Iran, agreed in 1968. Although this is very much a pragmatic boundary, taking account of a producing oilfield belong to Iran, it is clear that less than full weight was given to the Iranian island of Kharg. Two islands that lay close to the mainland-to-mainland median line, one belong to each State, were semi-enclaved. (Rainer Lagoni and Daniel Vignes (eds.) *Maritime Delimitation* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) p.159). In the 1982 Tunisia/Libya case, the Court attributed a half-effect to the Kerkennah Islands because of "their size and position." Read 1982 Tunisia/Libya case. Par. 128; In the Italian-Greek maritime boundary delimitation, partial effect was given to the Greek islands. The trend away from giving full weigh to islands against

insular formation as a basepoint with consequent relinquishment of sovereign rights to the formation, or any maritime zone in respect thereof, by the erstwhile owing State.[306] Table II.4 summarizes the caselaw regarding island's effect in maritime delimitation.

These delimitation solutions concerning insular formations are not necessarily mutually exclusive, particularly in situations involving multiple islands, as the case of the SCS. It is noteworthy that in the North Sea Continental Shelf cases, the International Court of Justice (ICJ) opined generally that apart from the "equidistance" method, "other methods exist and may be employed alone or in combination, according to the areas involved".[307] Furthermore the ICJ added that there was "no legal limit to the considerations which States may take into account for the purposes of making sure that they apply equitable procedures."[308]

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[306] It has been pertinently suggested that the relative unimportance of an island to the State to which it belongs, coupled with the delimiting States' desire to reach an agreement over use of seabed resources, have made it not uncommon for a State to relinquish control over small, uninhabited islands which would in the maritime zone of another State on a mainland-oriented equidistance delimitation basis, i.e., on the "wrong side of the median line". One of the most obvious examples of this can be seen in the Abu Dhabi-Qatar delimitation agreement of 1969, where the disputed islet of Daiyina was confirmed to belong to Abu Dhabi, where two other islets, including Shura'awa, were confirmed to be part of Qatar's territory. See Symmons, 1979, p.203-204.

[307] ICJ Rep., 1969, 3, 46; see also Symmons, 1979p.189

[308] ICJ Rep., at [/50. cited by France in the Franco-British Arbitration Case: see the Judgment, paras. 84 and 245 ("plurality of methods". See also Symmons, 1979,p.189

Table II.4 Summary of Caselaw Regarding Island's effect in Maritime Delimitation

I. Taking an insular formation as a basepoint;	1. Indonesia-Malaysia Agreement (1996) 2. Finland-U.S.S.R Agreement 3. Norway-U.K. Agreement 4. Anglo-Icelandic Agreement (1976), etc.
II. Ignoring, wholly or selectively, insular formations as basepoints.	
1) allowing it to generate a moderate maritime zone in its own right	1. Italy-Yugoslavia in Adriatic Seabed (1968) 2. Saudi Arabia-Iran Agreement (1968) 3. France-Canada (St. Pierre and Miquelon Islands) 4. Franco-British Arbitration Case on the Western Approaches (1977), etc.
2) allowing it a "trade-off" value in a part of the boundary	1. Italy-Yugoslavia continental shelf delimitation, etc.
3)giving the insular formation reduced effect or "half-weight" for basepoint purposes	1. Saudi Arabian-Iran Agreement 1968 2. Indonesia-Malaysia Agreement over Continental shelf delimitation in the SCS (1969) 3. Franco-British Arbitration Case on the Western Approaches (1977), etc.
4) ignoring an insular formation as a basepoint	1. Abu Dhabi-Qatar delimitation agreement 1969

Source: Summarized by the author.

2.2 Settlement of Islands Sovereignty and Islands-related Delimitation

The LOS Convention, indeed, does not deal with disputes over the sovereignty of islands, nevertheless, and to some extent, it can be seen as one of the factors that led to the intensification of sovereignty claims over the islands. Article 298 1 (a) (i) provides that disputes concerning sea boundary delimitation can be excluded from compulsory settlement upon the declaration made by the States shall still accept submission of the matter to conciliation under Annex V, section 2 of Part XV of UNCLOS. However, it continues to provide that any dispute necessarily involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from submission to such conciliation.[309] In fact, during the negotiation at UNCLOS III, a drafted article concerning sovereignty disputes over islands was deleted from the draft of the LOS Convention.[310] The application of the LOS Convention is premised on the assumption that a particular State has undisputed title over the territory from which the maritime zone is claimed.[311] As one author has recognized, "indeed it would be beyond the substantive scope of the convention to determine the status of land territory".[312] Due to its capacity to generate a maritime space, the disputes involving an island can be classified into: dispute over the sovereignty of the island itself; and dispute over the effect that the island may have on the delimitation of the adjacent maritime space. In practice, when a question of sovereignty over an island is solved bilaterally or by a third party mechanism, the issue of maritime boundary of that island is usually solved as a part of the same resolution.[313] In other words, the resolution of a dispute over sovereignty of an island is prerequisite for the settlement of the maritime boundary of the island. Table II.5 shows the jurisprudence practice with regard to the settlement of islands' sovereignty before the various UNCLOS forums, such as ICJ and Arbitration.

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[309] UNCLOS, article 298, 1(a) (i)

[310] Robert W. Smith, "The Effect of Extended Maritime Jurisdictions" in Albert W. Koers and Bernard H. Oxman (eds), (1983), *The 1982 Convention on the Law of the Sea*, at p.69

[311] Robert W.Smith, "The Effect of Extended Maritime Jurisdictions" in Albert W. Koers and Bernard H. Oxman (eds.), (1983), The *1982 Convention on the Law of the Sea*, at p.69

[312] Ibid.

[313] In practice, the ICJ

Table II.5 Islands' Sovereignty Settlement through Litigation

Nature	I.C.J.	Arbitration
Island's sovereignty	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) 2003	The island of Palmas case (or Miangas) United States of America V. The Netherlands, 1928
	Frontier Dispute (Benin/Niger), 2002	
	Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), 1998	
	Kasikili/Sedudu Island (Botswana/Namibia), 1996	
Island-related maritime delimitation	Maritime Delimitation in the Black Sea (Romania *v.* Ukraine) 2004	
	Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*)(El Salvador *v.* Honduras) 2002	
Both	Territorial and Maritime Dispute (Nicaragua *v.* Colombia) 2001	
	Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v.* Honduras), 1999	
	Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria: Equatorial Guinea intervening), 1994	
	Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar *v.* Bahrain), 1991	

Source: summarized by the author

2.3 Sovereignty Competition of the SCS Islands

The SCS Sea is a semi-enclosed sea defined by UNCLOS article 122[314], with an area of 648,000 sq nm.[315] There are hundreds of small islands in the SCS, namely uninhabited islets, shoals, reefs, banks, banks, sands, cays and rocks.[316] They are distributed widely in the form of the four groups of islands and underwater features (See Map II.2), i.e. the Pratas Islands (Dongsha Qundao), the Paracel Islands (Xisha Qundao), the Maccelesfield Band (Zhongsha Qundao), and the Spratly Islands (Nansha Qundao).[317] The matter of maritime boundary delimitation in the SCS is especially problematic, primarily because the present situation is defined in terms of a configuration of overlapping unilateral claims to sovereignty over an assortment of various semi-submerged natural formations scattered throughout the region. Eight states claim title to these SCS islands. Singapore and Malaysia dispute claims over Pisang Island and Pulau Batu Puteh, strategically situated in the congested waters of Malacca and Singapore Straits.[318] China, Taiwan, and Vietnam contest each other's claims to sovereignty over the Paracel Islands, a group of fifteen islets and several reefs and shoals scattered over a 200-kilometer area in the middle of the Gulf of Tonkin.[319] Taiwan also contests China's claims to Pratas Islands and the Maccelesfield Bank. As for the Spratlys, six parties assert claims: China, Taiwan, and Vietnam claim the entire archipelago, while the Philippines, Malaysia and Brunei claim sovereignty over portions of the Spratlys. Except for Brunei, all the others have established a military presence in the Spratlys.[320]

The dispute around over the Spratly Islands is the most complicated since it has been ongoing for a long time and involves as many as five states. The Spratly Islands are situated in the southern reaches of the SCS (See Map II.2). It consists of some 170 low-lying features. The total land area of the tiny islands is not more than 2 to 3 square kilometers in an ocean area covering over 200,000 square kilometers. They have never sustained permanent population or any lasting economic activities, but are now the focus of intense competition

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314 UNCLOS, article 122.

315 J.R. V. Prescott, *The Maritime Political Boundaries of the World* (London: Methuen, 1985), p. 209

316 Hungdah Chiu, "SCS Islands: Implications for Delimitation the Seabed and Future Shipping Routes", *China Quarterly*, No. 72, 1977, p.756

317 Zou Keyuan, Law *of the Sea in East Asia: Issues and Prospects*. (Martinus Nijhoff, 2005). p47

318 See D. M. Johnston and M.J. Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (Boston: Martinus Nijhoff, 1991), 128-34

319 Christopher C. Joyner, "The Spratly Islands Dispute in the SCS: Problems, Policies, and Prospects for Diplomatic Accommodation", at www.southchinasea.org/docs/Joyner,%20Spratly%20Islands%20Dispute.pdf.

320 See Cheng-yi Lin, "Taiwan's SCS Policy", *Asian Survey* 37 (1997):324

and conflicting claims.[321] Six parties — China, Vietnam, the Philippines, Malaysia, Brunei and Taiwan claim all or some of the tiny Spratly islets and their surrounding maritime area. The regional conflicts over the SCS arise from competing national interests in exploiting some of the world's richest fishing waters, as well as the hopes of the littoral states that potentially large reserves of oil and natural gas exist within the SCS that can be economically exploited[322] The islets are of strategic significance for sea-lane defense, interdiction, and surveillance for both major and minor powers.[323] Military forces of the competing claimants occupy the features in a crazy-quilt pattern, and the territorial and jurisdictional disputes have resulted in overt conflict and could do so again, perhaps even encouraging new regional political divisions. What makes these disputes particularly sensitive and dangerous is that they are perceived by both internal and external polities as challenges to the integrity of the nation-states and to the strength and effectiveness of their government.[324]

A growing dispute over the political jurisdiction of the Spratly Islands has arisen over the past three decades. Five of the claimant parties (China, Vietnam, Malaysia, the Philippines and Taiwan) have established a continuous human presence on different small islands and at some of the key reefs in the Spartly Islands (See Map II.3). Their military outposts and other facilities serve to demonstrate the seriousness of their sovereignty claims[325]. This competitive occupation of key features has sporadically grown over the past five decades as one country and then another staked out its territorial and maritime claims to the Spratly Islands

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[321] Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the SCS* (Martinus Nijhoff Publishers, 1997),p. 7

[322] John C. Baker and David G. Wiencek (eds.), *Cooperative Monitoring in the SCS*, (Westport, Connecticut London, 2002), p.2

[323] Sermsuk Kasitipradit, Support for Navy's Plan to Purchase Submarines, *Bangkok Post*, Jan. 30, 1995, at 1. See also Valencia, Van Dyke and Ludwig, *Sharing the Resources of the SCS* (Martinus Nijhoff Publishers, 1997), p.7

[324] Ibid.

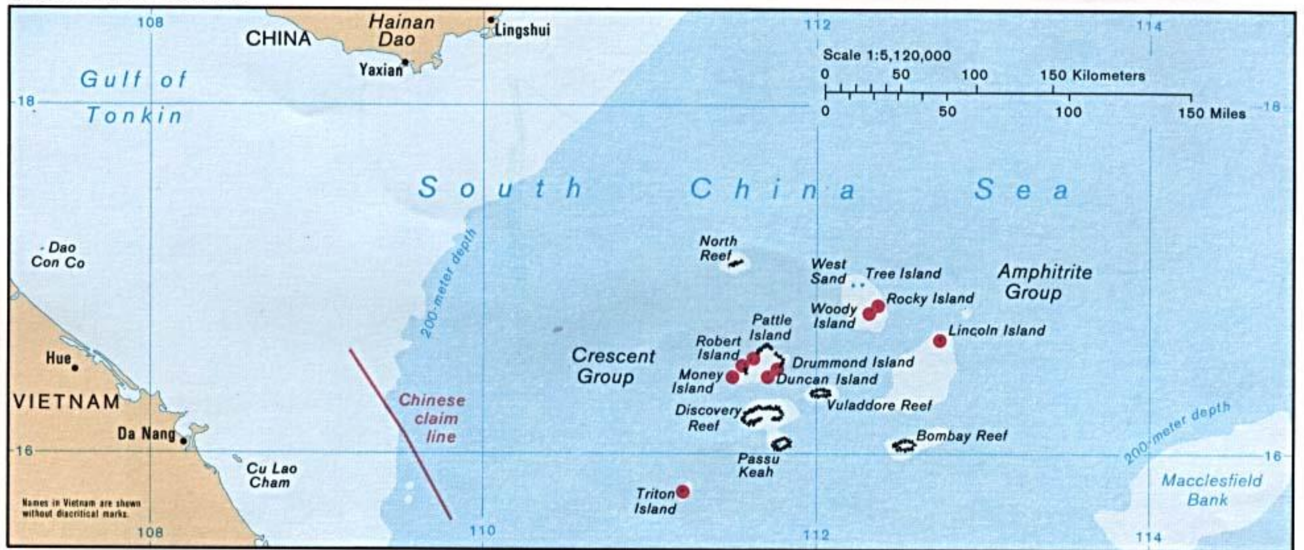
[325] Scott Snyder, *The SCS Disputes: Prospects for Preventive Diplomacy, A Special Report of the Untied States Institute of Pease* (Washington, D.C.: United States Institute of Peace, August 1996), 5

Map II.2: Location of Four Archipelagos in the SCS

Source: The South China Sea Virtual Library

Map II.3: Islands Occupation in the Paracels and Spratlys

The Paracel Islands



The Spratly Islands

800923 (A06014) 9-88

Source: http://www.spratlys.org/maps/1/paracel_spratly_88.jpg

Table II.6: Disputants in the SCS and their Claims

Disputant Parties	Grounds of Claims	Weakness of the claims
China	1. Historical usage. 2. U-shaped Line (further analyzed on the next section)	China's exercise of authority over the islands was only occasional and sporadic up through the end of World War II, and that China's claim to have exercised its authority continuously is weak.
Taiwan	Similar as China	
Vietnam	Vietnam claims sovereignty over the whole Spratly Islands based on the following aspects: 1. Historical base. 2. Preoccupation. 3. Effective occupation	1. Vietnam's historical evidence in support of its claim to sovereignty over the Spratly is sparse, anecdotal and inconclusive. 2. Another difficulty faced by Vietnam concerns statements made by North Vietnam's Second Foreign Minister Ung Van Khiew in 1956 and again by Prime Minister Van Dong in 1958 326 which seemed to acknowledge Chinese authority over the Spratlys.
The Philippines	1. Based on a theory that the islets are adjacent or contiguous to the main Philippine islands. 2. This region is vital to the country's security and economic survival 3. the islets were *res nullius* or "abandoned" after World War II, and that the recent Philippine occupation of some of the islets gives it title either through "discovery" or "prescriptive acquisition". 4. its continental shelf extension as a basis for its claim	1. The view that the islets had been abandoned is challenged by China and Vietnam. 2. The continental shelf claim is also weak.
Malaysia	1. Continental shelf extension. 2. discovery/occupation.	1. Malaysia's claims are difficult to justify under a continental shelf theory.[327] 2. Malaysia's "occupation" claim is on uncertain footing because its occupation and exploitation are relatively recent and have been vigorously contested by other nations.[328]
Brunei	1. based on a 350-nautical mile continental shelf claim.[329]	Its claims are contradictory to UNCLOS.

Source: summarized by the author.

[326] A formal note from Pham Van Dong to Chinese Premier Zhou Enlai stated: "The Government of the Democratic Republic of Viet Nam recognizes and supports the declaration of the Government of the People's Republic of China on china's territorial sea made on September 4, 1958". "…The Government of the Democratic Republic of Viet Nam respects this decision". Ning Lu, The Spratly Archipelago: The Origins of the Claims and Possible Solutions 55 (International Center, Washington, D.C., 1993)

[327] Although Malaysia may have asserted this claim only in order to protect its other maritime zones, neither UNCLOS nor Malaysia's own Continental Shelf Act of 1966 indicate that the continental shelf pertain to land or rocks that rise above sea level. Malaysian officials appear to have recognized the weaknesses in their claim of sovereignty over islands based on the natural prolongation of the continental shelf, and now tend to emphasize Malaysia's second basis for its claims, discovery and occupation of the islands.

[328] Malaysia has undercut its own potential claim to some extent because its nearby continental shelf boundary treaty with Indonesia gave Indonesia considerable shelf area beyond an equidistant line and because Malaysia' claim into the Spratly also stops short of the equidistant line at certain locations.

[329] Brunei currently claims two reefs-Louisa Reef (which is also claimed by Malaysia) and Riflemen Bank-and a maritime zone based on the prolongation of its continental shelf. The Rifleman Bank claim, which Brunei published in a 1988 map extending its continental shelf, apparently is based on a 350-nautical mile continental shelf claim. Brunei claimed a 200 nm fishing zone in 1982 and a 200 nm exclusive economic zone in 1984.

Three issues remain as the essence in the case of SCS islands— the sovereignty of islands, the island's granted maritime zones and delimitation of EEZ and Continental Shelf. As shown on the table above, all the sovereignty claims to the Spratly islands have weaknesses.[330] Each claimant state must therefore realize that its claim may not ultimately or completely prevail if the dispute were to be referred to arbitration. Thus, and because of widespread distrust of Western-dominated international law, some of the claimants may prefer the status quo, seek a military solution, or attempt to resolve the dispute through bilateral or multilateral negotiations. It is highly unlikely that they will be willing to risk all in a third-party tribunal ruling that may tend to create winners and losers. However, this does not rule out the possibility that a tribunal could be used in order to resolve some distinct questions. The question of whether or not any of the features has the capacity to generate extensive maritime zones certainly is one such question. If the ICJ or ITLOS were asked to resolve this question, its ruling would at the same time be likely to clarify one of the most ambiguous articles in the LOS Convention.

The second issue relates to the maritime zones granted to the islands or other features in the SCS. Applying article 121 (3) to the SCS islands sounds extremely difficult. Since the status of features may vary over time, so will the result of an application. Gjetnes notes that it is likely that the provision will excite controversy when applied to specific features.[331] Although there is a considerable amount of uncertainty concerning the interpretation and application of this provision, it seems that at least some of the islands in the SCS have an EEZ and continental shelf. Other insular formations can almost certainly be considered to fall under the sway of Article 121 (3).[332] In regard to the Spratly features, it seems that none of the features can at present be said to have been proven capable of sustaining human habitation or economic life of their own. It thus seems quite likely that if some of the claimant states should succeed in their quest for sovereignty, they would gain little from the victory in terms of recognized maritime zones. Elferink elaborates two sceneries.[333] If the islands in the SCS are excluded in establishing the extent of the EEZ,

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330 Gjenes, "The Spratlys: Are They Rocks or Islands?" 2001, p.201-2

331 Ibid.

332 Elferink, "The Islands in the SCS: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?", 2001, p.182

333 Ibid. p.171.

there remains a considerable area of high seas in the central part of the SCS.[334] It seems likely that at least part of this area might be claimed as part of the legal continental shelf of the mainland coasts under Article 76 of the LOS Convention.[335] If all the islands under consideration in the present analysis were to generate an EEZ, it would appear that no areas of high seas or Area would be left in the SCS. Moreover, the EEZs of the islands would, to a considerable extent, overlap with the EEZ of the mainland coasts surrounding the SCS. An EEZ of Pratas island, which is under the sovereignty of China/Taiwan, would overlap with the EEZ of the Philippines. The EEZ of the Paracel Islands, which are in dispute between China/Taiwan and Vietnam, would overlap with the EEZ of the Chinese islands of Hainan and the Vietnamese mainland coast. Scarborough Reef, which is claimed by China and the Philippines, is situated well within the EEZ of the Philippines. An EEZ for the entire Spratly Islands group would overlap with the EEZ of all the coastal states bordering the SCS except for that of China/Taiwan.[336] The fact that all of the coastal states of the SCS, except Indonesia, claim one or more of the Spratly islands make this the most complex dispute in terms of territorial sovereignty and claims to maritime zones.

The third issue is related to maritime delimitation of EEZ and continental shelf. The part of the maritime zones of the islands that do not overlap with those of the mainland coasts cannot be the subject of delimitation. In areas of overlap of the EEZ and continental shelf of the islands with those of the mainland coasts there is a need for delimitation. Elferink claims that delimitation between these zones of the islands and the mainland coasts should, in any case, not result in a boundary that coincides with the 200 nautical mile limit of the mainland cost, leaving the islands only the remaining maritime areas.[337] International law (i.e. state practice and international jurisprudence) is clear that where a maritime space is to be delimited between a mainland and an island, the island is unlikely to receive full effect, and the smaller and more insignificant the island, the less that effect will be — the treatment of the Channel Island and St. Pierre et Miquelon furnish ready and highly pertinent examples.

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[334] See M. J. Valencia, J. M. Van Dyke and N. A. Ludwig, *Sharing the Resources of the*, at p. 264, Plate 11, which indicates the 200 nautical mile limit in the SCS without taking into account the Paracel Islands, the Spratly Islands, and Scarborough Reef. See also Elferink, 2001, p. 171.

[335] On the implications of Article 76.

[336] For a detailed description of the Spratly Islands, see D. Hancox and V. Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst those Islands* (IBRU, Maritime Briefing, Vol. 1, No. 6 (1995)). See also Elferin, 2001, p.171.

[337] Elferink, 2001, p.182. This conclusion may be somewhat surprising in view of the considerable number of articles arguing against such an outcome. Part of an explanation may be that certain dicta and precedents of the case law have been transposed to the SCS without considering the implications of a different factual background.

If it is possible to claim a continental shelf beyond 200 nautical miles under Article 76 of the LOS Convention a number of complications would arise. The Rules of Procedure of the Commission on the Limits of the Continental Shelf (CLCS) seem to exclude any submission from being considered without the prior consent of all the states involved in the disputes concerning the SCS. The existence of a continental shelf beyond 200 nautical miles would not lead to substantially different outcomes of maritime delimitation between the islands and the mainland coasts. However, there could be a divergence between the EEZ ad continental shelf boundaries in certain areas, implying that one state may have jurisdiction over the water-column (EEZ) and another state may have jurisdiction over the seabed and its subsoil (continental shelf). On 16 June 2008, Indonesia submitted to the Commission on the Limits of the Continental Shelf information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured relating to the continental shelf of North West of Sumatra Island.[338] On 6 May 2009, Malaysia and Viet Nam submitted jointly to the Commission and the Philippines submitted to the Commission on 8 April 2009.

As discussed earlier, the LOS Convention is not intended to address disputes over sovereignty. Under Article 298 of Part XV of the convention, states may declare that they do not accept third party settlement for disputes concerning the interpretation or application of the articles concerning the delimitation of the territorial sea, the EEZ, or the continental shelf or those involving historic bays or historic title. However, such disputes can be submitted to conciliation if one party so wishes, except for those disputes involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over territory. China has made a declaration to exclude all disputes listed in Article 298. Hence, in any case, any disputes in the SCS concurrently involving a dispute concerning sovereignty or other rights over territory appear to be excluded from the reach of the compulsory dispute settlement provisions of the convention.

Klein argues that the third party settlement forums still have a role to play in disputes related to the island regime. To the extent that the status of islands is part of the overall settlement of territorial sea, EEZ and/or continental shelf boundaries, disputes over the qualification of certain landforms as islands will be subjected to the same procedures as specified in Article 298 (1)(a). A State may try to raise the specific question of whether a

[338] For details see http://www.un.org/Depts/los/clcs_new/submissions_files/submission_idn.htm.

particular feature is a rock or an island under Article 121 without asking a tribunal or court to be involved in the actual maritime delimitation. Such a decision could then be used by a State in influencing negotiations over the boundary. Article 298 does not *prima facie* exclude disputes over the interpretation or application of Article 121 from compulsory procedures entailing a binding decision if a State has otherwise so elected.[339] There may be an advantage in referring a question of interpretation of "human habitation or economic life of their own" to an international body as a means to the jurisdiction of the tribunal or court would certainly be warranted on the basis that the question is inherently related to maritime delimitation and should be excluded due to the optional exception of one (or both) of the disputant States. A consistently recognized principle of maritime delimitation has been affecting a boundary by agreement between the parties concerned. This principle has been affirmed in the Convention in the articles dealing with the substantive law of delimitation as well as the dispute settlement procedures.[340]

A desire to avoid compulsory procedures entailing binding decisions is obvious. The conciliation process in Article 298 (1)(a) returns States to negotiation. The inclusion of an optional exception for disputes relating to Articles 15, 74, 83, and historic bays and titles thus retains the emphasis on State decision-making and agreement. However, the legal regimes for straight baselines and for islands do require compulsory dispute settlement. Article 7 sets out the criteria for drawing straight baselines. While some external review is possible under Article 16 in the process of registering and publicizing baselines used for maritime delimitation (or perhaps through the work of the Continental Shelf Commission), States could well interpret the language of the Convention somewhat loosely in order to augment their exclusive maritime space. Where this action impacts on areas that would otherwise constitute high seas, all States have an interest in ensuring that the legal standards are maintained and upheld. Mandatory jurisdiction plays an essential role in this regard. Similarly, article 121 creates standards that impact on States' entitlement to maritime areas. Unlike Article 7, article 121 is an innovation in UNCLOS in that it expressly excludes rocks as generating rights to an EEZ and continental shelf. The standard for what constitutes a rock remains to be elucidated in the practice of States and in third-party decisions. Compulsory dispute settlement provides a check on the power of States through the

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[339] Klein, 2005, p.276

[340] See UNCLOS, articles 15, 74, 83, 298 and Part XV, Section 1 generally. This principle was also reaffirmed in the North Sea Continental Shelf cases.

interpretation and application of Article 121, paragraph 3 and thereby prevents the unlawful extension of exclusive rights into the high seas. Article 7 and 121 should color the characterization of a dispute that may otherwise be excluded from mandatory jurisdiction by means of another exception or limitation.[341]

3. Historic Concepts vs. other Maritime Regimes in the SCS

3.1 Historical Waters/Rights/Titles

The doctrine of historic waters as such has not received much academic attention in the past, claimed by Clive R. Symmons in his new book.[342] There are publications dealing with historic bays,[343] historic titles,[344] historic rights, or historic waters.[345] However, the lack of clearance of the definitions of these concepts with historic nature brings confusion to students of historic doctrine. Historic concept plays an important role in the SCS disputes; hence it is necessary to distinguish the difference of these terms.

3.1.1 Definition

Historic water

There are many definitions of 'historic waters'. As Symmons points out, among the best definitions of the concept of 'historic waters' is that of Bouchez.[346] He defines them as: "waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States". Gidel's (translated) definition – albeit essentially in the context of the narrower concept of 'historic bays' — is more concise: namely, "those areas of water the legal status of which differs— with the consent of other States — from what it ought to have been according to the generally recognized rules".[347] It is noteworthy that both statements refer to the generally recognized/applicable rules of international law.

[341] Klein, 2005, p.279
[342] Clive R. Symmons, *Historic Waters in the Law of the Sea: a Modern Re-appraisal* (Leiden/Boston: Martinus Nijhoff Publishers, 2008)
[343] Stroh, The International Law of Bays (1963), Bouchez, *The Regime of Bays in International Law* (1964)
[344] Blum*, Historic Titles in International Law (*1965)
[345] *Juridical Regime of Historic Waters, including Historic Bays* (A study prepared by UN Secretariat of March 9, 1962)
[346] L.J. Bouchez, The *Regime of Bays in International Law*, (Sythoff, Leyden, 1964), p.281, see also on Symmons 2008, p.1
[347] G. Gidel, *Le droit international public de la mer* (Paris, 1932-4), v. III, p. 623.

Historic right

There also exists the separable term of 'historic rights' — normally in high seas areas, but without any connotations as to sovereignty in the locale, such as historic fishing rights.[348] The 2006 Barbados/Trinidad and Tobago Arbitration entails the argument of historic rights of fishing.[349] The term 'historic rights' is broader than that of 'historic waters'. In its widest sense, it implies a State claiming to exercise certain jurisdictional rights in what usually basically satisfy the same, or at least similar, supposed requirements for establishing 'historic waters' claims *per se*, particularly those of continuous and long usage with the acquiescence of relevant other States.[350] For example, in the Tunisian pleadings in Tunisia/Libya, it was, in effect, argued that historic rights were claimable on a similar basis to that relation to historic waters, namely that they were established by exercise of peaceable and continued sovereignty, with prolonged toleration on the part of other States.[351]

Despite the close connection of rules, such claims of historic rights differ substantively from claims to historic waters.[352] Firstly, "these claimed rights only apply on a *quoad hunc* basis, not *erga omnes* as do, arguably at least, claims to historic waters; and they may not even have the word 'historic' attached to them."[353] Secondly, historic rights differ from 'historic waters' inasmuch as they do not, as stated above, amount to zonal claims of jurisdiction or sovereignty. As Judge De Castro said in the Fisheries Jurisdiction cases,[354] historic rights of States concerned with "high seas fishing" do not give them "acquisition over the sea by prescription": merely "respected" rights by "long usage". Similarly, for example, in Qatar/Bahrain, the ICJ held, in relation to Bahrain's alleged historic rights over pearling banks in an area of seabed in dispute, that these had never led to the recognition of a quasi-territorial right to the fishing grounds or the superjacent waters.[355] A third possible difference between the twin concepts of historic 'waters' and historic 'rights' is that claimed

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348 Respectively (1973) *ICJ Reports* 3; and (1982) *ICJ Reports* 18, at pp. 32, 63, and 71 (para. 97) referring to the Tunisian claim that it possessed well-established historic rights, including "fixed and sedentary fisheries" in certain sea areas (historic rights from "long-established fishing activities"). The courts concluded (at p.74, para. 100) that such rights continued to be "governed by general international law". Bouchez (at p.248) appropriately labels these rights as "non-exclusive historic rights" in the high seas. See also Symmons, 2008, p.4

349 See award at http://www.pca-cpa.org/showpage.asp?pag_id=1152

350 Y. Blum, "Historic Rights" in *Encyclopedias of Public International Law*, vol. 2 (Amsterdam, Elsevier), pp. 710-15, See also Symmons, 2008 p.4

351 See, e.g., "Les Droits historiques de la Tunisie" in its *Memorials (Pleadings*, vol. 1, para, 4.05); and J.M. Spinnato, "Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra" , 1983-84 13 *O.D.I.L.* 65, p.72. See also Symmons, 2008 p.4

352 Symmons, 2008, p.5

353 Ibid.

354 [1974] *ICJ Rep.*3, at p.99; Symmons, 2008, p.5

355 [2001] *ICJ Rep.*2001, at p.112, para. 235, Simmons, 2008, p. 6

historic waters must necessarily be adjacent to the claimant State. Bouchez, for example, has maintained that it is "impossible for a non-coastal State to be entitled over a [historic] sea areas situated near the coast of other States.[356] The adjacency requirement follows the general international legal requirement of States being allowed only to claim territorial waters immediately off and adjacent to their coastlines.[357] It appears that past confusion over the more limited notion of 'historic rights' has had a 'knock-on' effect which has led some States to claim sovereignty over historic bays on this basis alone—e.g., resulting from sedentary fishery rights outside territorial limits. Thus, for example, Australia seemingly recognized the historic bay concept "without sufficiently distinguishing it from the more limited 'historic right to sedentary fishing.'"[358]

Historic Title

UNCLOS III did not discuss the issue of historic rights or historic waters.[359] However, historic title is recognized in various contexts in UNCLOS — in relation to maritime delimitation, the status of bays as well as the rights of States in respect of archipelagic waters and limitations and exceptions in the settlement of disputes. Article 10 (6) provides that "the foregoing provisions [on bays] do not apply to so-called 'historic' bays". Article 15 does not allow the median line to apply to special circumstances such as "by reason of historic title" for the delimitation of the territorial seas of the two states. The last provision in the LOS Convention which mentions the historic bays or title is Article 298, which permits the contracting states to exclude the compulsory procedure provided for in the LOS Convention from applying to the disputes "involving historic bays or titles". It is obvious that the LOS Convention deliberately avoids the issue of historic rights or historic waters, leaving it to be governed by customary international law as reaffirmed in its preamble.[360] On the other hand, the Convention does have some bearing on the concept of historic waters in territorial seas or internal waters since it appears only in the sections on territorial sea regime

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[356] Bouchez, p.238 ; Symmons, 2008, p. 6

[357] See Tunisia/Libya, *Reply* of Lybya, *Pleadings,* vol.4 at p.114, para. 31, (areas "adjacent to the costal States"); Symmons, 2008, p.6.

[358] D.W. Nixon, "A Comparative Analysis of Historic Bay Claim", attached as a Technical Annex (II-3) to the *Reply* of Libya, *Pleadings*, vol. IV, at pp.321, 322; See also Symmons, 2008, p.6.

[359] During the conference, the proposal advanced in 1976 by Colombia regarding the standards of claiming historic waters was discarded. See UNCLOS III, *Official Records*, (1977), Vol. 5, at p.202. See also Zou Keyuan, "Historic Rights in International Law and in China's Practice" , *Ocean Development & International Law*, 32:149–168, 2001, in p.152

[360] The preamble of the LOS Convention affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." See also Zou Keyuan, "Historic Rights in International Law and in China's Practice", page 152.

and the settlement of disputes.[361]

The Convention further envisages claims of historic title being asserted with respect to bays. Article 10, paragraph 6 provides that the rules for drawing closing lines across the mouths of bays do not apply for "so-called 'historic' bays". At the First Conference, a proposal was submitted for a request to the General Assembly to study the regime of historic bays.[362] Although a study was prepared on the juridical regime of historic waters, including historic bays,[363] the issue was not addressed at any length at the Third Conference and Article 10 replicates the relevant provision of the Territorial Sea Convention. The classification of certain areas as historic bays has been controversial because of the potential to close off bodies of water and thereby push exclusive maritime zones further into high seas areas. A notable example of this situation has been the United States' military challenges to Libya's assertion that the Gulf of Sidra constitutes a historic bay and should be closed off as internal waters.[364]

3.1.2 Historic Concepts and Maritime Delimitation

The presence of historic concepts may affect the drawing of a maritime boundary.[365] The delimitation of the territorial sea specifically requires an adjustment of the median line where it is necessary to take account of "historic title or other special circumstances".[366] Historic rights were recognized in the determination of maritime boundaries by third parties in *Grisbadarna and Anglo-Norwegian Fisheries.*[367] In the delimitation between Sweden and Norway, the Permanent Court of Arbitration decided that the Grisbadarna area should be assigned to Sweden. One of the reasons for this delimitation was the "circumstance that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by much larger number of fishers by the subjects of Sweden than by

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361 Zou Keyuan, "Historic Rights in International Law and in China's Practice", page 152.

362 India and Panama submitted this proposal, which was adopted as Resolution VII, at the First Conference. See Resolutions Adopted by the Conference, UN Doc.A/CONF.13/L.56(1958), reprinted in *First Conference, Plenary Meetings*, at p.145. The General Assembly referred this request to the International Law Commission. The UN Secretariat undertook the study instead. See Klein, 2005, p.251.

363 Juridical Regime of Historic Waters, including Historic Bays, *UN Doc. A/CN.*4/143, reprinted in [1962] 2 *Y.B. Int'l L.* Comm'n 1, UN Doc.A/1962/Add.1, Un Sales No.62.V.5 (1962); see also Klein, 2005, p.251.

364 Libya's position has been strongly criticized by commentators. See, e.g., John M. Spinnato, "Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra," 13 *ocean Development and International Law* 65 (1983); Roger Cooling Haerr, "The Guld of Sidra," 24 *San Diego L., Rev*. 751 (1987); Yehuda Z. Blum, "The Gulf of Sidra Incident", 80 *American Journal of International Law*, p.668 (1986). See also Klein, 2005 p. 252)

365 Klein, 2005, p.250

366 UNCLOS, article 15.

367 See D. H. N. Johnson, "The Anglo-Norwegian Fisheries Case", in *International And Comparative Law Quarterly*, Vol.1, Part 2, April, 1952, pp.146-180.

the subjects of Norway".[368] The Court was willing to take this factor into account on the basis that, "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible".[369]

Both Art.12 of the TSC (1958) and Art.15 of UNCLOS make reference to 'historic title' as a reason for departing from the general rule for delimitation of a territorial sea between States, namely, failing agreement, a median line; but no mention is made of such a proviso in respects of either delimitation of overlapping EEZs or continental shelves. The matter, however, has, received some discussion in the latter contexts from the ICJ. For example, in Tunisia/Libya case, Tunisia pleaded it had historic rights from past sedentary fishing activities. The ICJ whilst referring to the fact that the matter of Tunisia's historic rights might "be relevant for the decision" in a "number of ways"[370], found it not necessary in its judgment to take the issue into account. However, in his separate Opinion on the case, Judge Arechaga opined that, by implication, the "historic factor could be relevant to continental shelf delimitation as a 'special circumstance'.[371]

The relevance of claimed historic rights to maritime delimitation of the expanded maritime zones such as EEZ and the continental shelf remains somewhat unclear in the light of the discussed cases, though State practice in recent times suggests that historic rights, even if considered irrelevant to delimitation issues, may still be independently taken into account by special agreement as to access.[372] In the Barbados/Trinidad & Tobago Arbitration, the Tribunal has decided that the pattern of fishing activity in the waters off Trinidad and Tobago was not of such a nature as to warrant the adjustment of the maritime boundary. This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences.[373] The Tribunal accordingly considers that it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flying fish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a).[374] Both Barbados and Trinidad and Tobago emphasized before the Tribunal their

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[368] Grisbadarna, p.233, see Klein, 2005, p.250
[369] Ibid.
[370] See Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Hart Publishing, Oxford and Portland, Oregon, 2006), p.299, see Symmons 2008, p.45
[371] [1982] *ICJ Reports* 18, at p.75, para. 102, see Symmons, 2008,p.45
[372] See Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* at p.306 for examples. See also Symmons, 2008, p. 47
[373] Award of Barbados / Trinidad & Tobago Arbitration, page 84, para. 272, at http://www.pca-cpa.org/upload/files/Final%20Award.pdf
[374] Award of Barbados / Trinidad & Tobago Arbitration, p.87, para. 283 at http://www.pca-cpa.org/upload/files/Final%20Award.pdf

willingness to find a reasonable solution to the dispute over access to flying fish stocks.[375] Undoubtedly, some past continental shelf delimitations have taken into account historic claims in negotiating a maritime boundary. For example, in the 1974 India/Sri Lanka continental shelf delimitation treaty, the preamble referred to 'historical evidence' having been taken into account, but with no mention of sedentary fisheries or any suggestion they affected a modified equidistance boundary.[376] Nonetheless, claimed Ceylonese pearl and chank fisheries in the Gulf of Manaar and Palk Bay — the latter being regarded by the UK as an area of historic waters – may have been taken into account in this delimitation treaty to recognize the traditional fishing rights. [377]

3.1.3 Historic Concepts Related Dispute Settlement under UNCLOS

Compulsory dispute settlement under Section 2 of Part XV is available of States for disputes relating to the delimitation of the territorial sea, EEZ, continental shelf, and to historic title unless States have opted to exclude these disputes by virtue of Article 298 (1) (a). Declarations permitted under Article 298 relate first, to maritime delimitation disputes in relation to the territorial sea, EEZ or continental shelf of States with opposite or adjacent coasts, as well as disputes involving historic bays or title.

Further impetus to resort to adjudication or arbitration for determination of maritime boundaries may be derived from the highly flexible legal formulae prescribed under the Convention. UNCLOS provides no clear rule for States to apply in maritime delimitation of the EEZ and continental shelf beyond the exhortation that any agreement be based on international law. Similarly, no criteria are stated for establishing historic title in relation to territorial sea delimitation, bays, and fishing in archipelagic waters. The indeterminate nature of the substantive principles set out with respect to delimitation of the continental shelf and the EEZ, as well as the large degree of discretion accorded to States in asserting historic title, meant that mandatory jurisdiction would provide States with a procedure to facilitate agreement. Certainly, western States strongly favored the inclusion of a procedure entailing

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[375] Award of Barbados / Trinidad & Tobago Arbitration , p.88, Para. 287, at http://www.pca-cpa.org/upload/files/Final%20Award.pdf

[376] Referred to by Dupuy in oral pleading for Tunisia (*Pleadings*, vol. 4 at p.476) who pointed out that the "modified" equidistance line there was so used to recognize the traditional fishing rights. See also Symmons, 2008, p.47

[377] See *Pleadings*, vol. 4 at p.211, Para. 160. Other delimitation agreements mentioned, such as the Indonesia/Australia delimitation agreement make no mention of sedentary fisheries (e.g., Queensland pearl fisheries; and the 1978 Australia/PNG delimitation agreement, which, even though setting up a special zone, allegedly makes no mention of 'historic rights' as such; see Symmons, 2008, p.47

binding jurisdiction if the substantive rules were insufficiently determinative.[378] Moreover, the delimitation of maritime zones has been subject to third-party dispute settlement in the past despite the highly discretionary nature of the applicable legal principles.[379] It is nonetheless noticeable that the arbitral and adjudicative procedures that have been undertaken for the determination of maritime boundaries have lacked the zero sum result that is characteristic of litigated dispute resolution. The typical tactic is for States to submit maximize claims to courts and tribunals and these bodies are left the task of devising a compromise position between these claims to achieve an 'equitable result'. This history could indicate that the subject of the dispute would be conducive to settlement under the compulsory procedures in Part XV of the Convention. It may be another contributory factor as to why governments negotiating at the Third Conference did not insist on the complete exclusion of maritime delimitation and historic title disputes from the compulsory dispute settlement regime.[380]

3.1.4 Historic Doctrine: Still Relevant in Contemporary International Law?

The rationale for recognizing historic doctrines is clearly grounded in notions of stability. One commentator has stated that: "Longstanding practice evidenced by a strong historic presence should not be disturbed. Judicial bodies are ill-advised to disregard a situation that has been peacefully accepted over a long period of time. To justify a division based on historic presence over the area, coupled with affirmative action toward that end, should be apparent."[381] One of the important reasons for asserting historic rights was to protect long-held economic interests in particular areas in the face of the *res communis* philosophy.[382] As such, it is arguable that historic rights should be admitted in a more restricted fashion now that coastal states have much broader entitlements to maritime jurisdiction.[383] States might be inclined to challenge declarations of historic title in certain areas if such a

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378 Dero J. Manner, "Settlement of Sea-Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention," in *Essays in International Law in Honor of Judge Manfred Lachs* (Jerzy Makarczyk ed., 1984), p.625, at pp.636-37. See also E.D.Brown, "Dispute Settlement and the Law of the Ea: the UN Convention Regime", 21 *Marine Policy* 17 (1997), at p.24 ; See also Klein, 2005 p. 254.

379 "In spite of this indeterminacy, if not because of it, coastal states have found that third-party disputes settlement procedures can effectively resolve maritime boundary delimitation disputes", Charney, "Progress in International Maritime Boundary Delimitation Law," *88 American Journal of International Law* (1994) p.227; see also Klein, 2005, p.254.

380 Klein, 2005, p.254

381 Marvin A. Fentress, "Maritime Boundary Dispute Settlement: The Nonemergence of Guiding Principles", 15 Ga. *J. Int'l & Comp. L.* (1985), p.592, 622-623. See also Klein, 2005, p. 249.

382 J. Ashley Roach, "Dispute Settlement in Specific Situations", 7 Geo. *International Environmental Law Review* (1995), p.777; also Klein, 2005 p. 252

383 Ibid. See also Klein, 2005 p. 253

declaration impinges on inclusive uses of that region. Alternatively, a challenge may arise in a bilateral delimitation where the historic claim has the effect of enlarging the entitlement of States with an adjacent or opposite coast. Competing claims over the existence and opposability of historic title cannot easily be resolved under the terms of the Convention in light of the scant elaboration of principles on this matter. Specificity on the standard to be applied in determining claims to historic title was avoided in the Convention for similar reasons as maritime delimitation: the circumstance of individual cases varied too extensively to permit the formulation of a uniform standard.

The doctrine of historic waters today may justifiably be seen as a temporary legitimizing mechanism[384] in an inter-temporal process taking in a broad range of situations. According to Symmons, it includes, at one extreme, "blatantly illegal original claims which would still be otherwise illegal today";[385] e.g., historic bay claims to areas with mouths well in excess of the present 24-mile rule distance or absurdly distant areas of the high sea (as in the short-lived Russian ukase featuring in Alaska v. US 92005).[386] At the other extreme, it also includes those claims which would now be valid in contemporary law.[387] It may perhaps be argued that historic claims in the no-legitimated categories are contemporarily redundant, at least since the 1958 and 1982 law of the sea treaty regimes came into being. As the result, many of such traditional claims may have lapsed *ipso jure* and automatically, or, at least, have been voluntarily replaced by a juridical claim.[388] On whether historic water is deemed as a doctrine, Blum noted: "it will thus be readily understood that, while the international community may still be willing to consider, in exceptional circumstances, the validity of existing claims of this kind, it has firmly rejected any attempts to establish any new maritime claims of an extravagant nature"; and that "the current law of the sea has frozen the existing situation in regard to 'historic bays' to prevent the emergence of new 'historic' claims." [389]

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[384] See e.g., Y. Blum, "The Gulf of Sidra Incident" (1986) 80 *American Journal of International Law*, p.668 where he vies (at p.676) the concept of historic bays (and historic waters in general) to be "originally intended to provide as smooth as possible a transfer from some vague and obsolete notions of the late Middle Ages to the more stringent requirements of the modern law of the sea"; and says that (at p.677) "new maritime zones" were intended to bring about a gradual phasing out and eventual elimination of the phenomenon of 'historic' claims *per se*, through their "*de facto* incorporation into the general international law of the sea"; see discussion of Symmons, 2008, p. 298).

[385] See Symmons, 2008, p.298

[386] Here, obviously, continue reliance on historic title will be necessary to maintain an internal waters claim: see e.g., W. Edeson, "The Validity of Australia's Possible Maritime Historic Claims in International Law", (1974) 48 *Australian Law Journal*., 295, p.297; see also Symmons, 2008, p.298

[387] Symmons, 2008, p.298

[388] See Symmons, 2008, chapter 17, pp.271-283.

[389] Y. Blum, "The Gulf of Sidra Incident" (1986) 80 *American Journal of International Law*, p.676. In any event, it seems clear that , even with sufficient passage of time etc. an internal waters claim once clearly and wholly based on juridical principles, may not alter evolve (or be manipulated into) into a historic claim - a matter of some relevance to the case of Alaska v. US (2005). M.W. Reed notes, though, that the

Blum stated that after the Gulf of Sirte incidents following Libya's attempted historic claim there,[390] a "claim to historic waters in general (and to historic bays in particular) are relics of an older and by now largely obsolete regime".[391]

What, then, is the best way to view past claims? Existing historic claims are, in reality, usually now viewed as an alternative means of establishing sovereignty over waters which also qualify as internal waters under 'juridical principles', though they may once have constituted sea areas which needed the historic doctrine to establish their legality.[392] Likewise, some early claimed maritime historic rights can be seen in retrospect as an example of exploiting seabed biological resources before the formation of broader customary law of the sea in the classical period and the later development of the continental shelf doctrine[393] or the EEZ regime (such as sedentary seabed fisheries and sponge exploitation in the case Tunisia in the Guld of Gabes). It is significant that the most excessive maritime claim of the nineteenth century failed, because of immediate protest by the major maritime powers of the time. Even in the a past 'pluristate' historic bay claim such as to the Gulf of Fonseca, the now 12-mile territorial sea may be seen as giving a satisfactory regime to each of the littoral States on the basis that this normal juridical rule now would totally absorb the waters of the Gulf.[394]

3.2 China's Historic Claim to the SCS

The most important and interesting area where China could claim historic rights is in the SCS. It seems that the prevailing basis for China's historic claims to the SCS is the U-shaped line officially drawn on the Chinese map in 1947 by the then–Chinese Nationalist Government.[395] The "U-shaped line" (see Map II.3) refers to the line with nine segments off

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issue of whether a long-standing "juridical bay status" may not support an historic bay claim has "yet to be litigated" in the US courts. See also discussion by Symmons, 2008, p. 298.

390 Y. Blum, "The Gulf of Sidra Incident" (1986) 80 *American Journal of International Law*, p.671; see also Symmons, 2008, p. 298

391 Ibid.

392 Indeed, some 'claims' categorized as being 'historic' today – such as the Sea of Azoz – were probably misnamed or at least loosely entitled as 'historic', because they were – even at the time of the inception of the 'claim' – in any case internal waters in the light of then-existent international law or at least constituted 'ancient rights'.(see the UN Memorandum on Historic Bays at p.3 para.12)

393 See the *Memorial* of Tunisia *in the Tunisia/Libya* case, vol. I, at paras.4.102,4.104; and oral pleadings by Dupuy, (*Pleadings*, vol. IV, at pp.475-479) on the relationship between (earlier) sedentary fisheries and the (later) continental shelf doctrine where the relationship between the regime of sedentary fisheries and the regime of exploitation of the resources of the continental shelf in respect of living resources was stressed. See also Symmons, 2008. p.299

394 See Judge Oda's Dissenting Opinion in El Salvador/Honduras, at p.758, para. 48. Symmons, 2008, p.299

395 At the beginning of the 1930s, most Chinese maps were reproductions or based upon older maps. New fieldwork had not been undertaken for many years. These maps contained errors and some, without analysis, were copies of foreign-produced maps. As a result, Chinese ocean and land boundaries were not consistently shown on the various maps. This was obviously problematic for China as regards its sovereignty in the SCS. To respond to this, in January 1930 the Chinese government promulgated Consultation between the Ministry of

the Chinese coast on the SCS, as displayed in the Chinese map. According to China, the line has been called a "traditional maritime boundary line."[396] The dotted line encloses the main island features of the SCS: the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands. The dotted line also captures James Shoal which is as far south as 4 degrees north latitude. It is not clear whether China has claimed all the islands, atolls, and even submerged banks within this line, or it has claimed the waters so enclosed. China's ambiguous position has given rise to the controversy of whether the waters within the line are intended to be historic waters.

The Taiwan authorities gave the status of historic water to the water areas within the U-shaped line in 1993 when it issued the SCS Policy Guidelines, which stated that "the SCS area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests."[397] This can be regarded as Taiwan's official position on the concept of historic waters, though this claim has not acquired unanimous support among Taiwanese scholars.[398]

In the SCS, the line provides a basis for a claim of historic waters. However, the exercise of authority in the area by either mainland China or Taiwan has been infrequent since the promulgation of the line. Even these occasional exercises focused on the islands within the line rather than on the water areas. The freedom of navigation and freedom of fishery seem to be unaffected by these exercises. Thus, the question of whether there is effective control over the area within the line so as to establish it as historic waters arises.

Internal Affairs, the Foreign Ministry, the Marine Ministry, the Ministry of Education, and the Committee of Mongolia and Tibet led to an extension and revision of the above regulations in September 1931 with *The Revised Inspection Regulations of Land and Water Maps* (*Xiuzheng shuilu ditu shencha tiaoli*). Following further consultations, a Land and Water Maps Inspection Committee, whose members were representatives sent by the relevant institutions and departments, was formed and started work on June 7, 1933. The Land and Water Maps Inspection Committee made significant contributions to the defense of China's sovereignty in the SCS. At the 25th meeting held on December 21, 1934, the Committee examined and approved both Chinese and English names for all of the Chinese islands and reefs in the SCS. In the first issue of the Committee's journal published in January 1935, they listed the names of 132 islands, reefs, and low tide elevations in the SCS, of which 28 were in the Paracel Islands archipelago and 96 in the Spratly Islands archipelago.1 At the 29th meeting held on March 12, 1935, based on the various questions raised by the Ya Xin Di Xueshe, the Committee stipulated that "except on the large-scale national administrative maps of China that should delineate the Pratas Islands, the Paracel Islands, the Macclesfield Bank and the Spratly Islands, other maps need not mark or note these islands if the locations of the islands were beyond the extent of the maps."

[396] For details on the line and its legal implications, see Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the SCS and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands," *International Journal of Marine and Coastal Law*, Vol. 14 (1), 1999, 27–55; see also Zou Keyuan, "Historic Rights in International Law and in China's Practice" p.160

[397] See Kuan-Ming Sun, "Policy of the Republic of China towards the SCS," *Marine Policy*, Vol. 19, 1995, at 408; see also Zou Keyuan, "Historic Rights in International Law and in China's Practice", p. 160

[398] In 1993 at a round-table discussion held at National Chengchi University, Taipei, the participants were divided into those who supported the idea of historic waters and asserted that the water areas within the line were Chinese historic waters, and those who were rather dubious and cautious, taking the view that it was difficult to establish such a claim in international law. (For details, see "Legal Regime of China's Historic Waters in the SCS," *Issues and Studies* (Chinese edition), Vol. 32, No. 8, 1993, 1–12.) Partly due to the differences reflected in the above discussion and partly due to Taiwan's domestic politics, recent developments have indicated that Taiwan's position may have retreated from the 1993 guidelines position. This can be seen from Taiwan's 1998 Law on the Territorial Sea and the Contiguous Zone, in which an original provision on historic waters was dropped before its promulgation.

It may be argued that the relative frequency of the exercise of authority should be considered *vis à vis* other claimant countries. Yet, there are still doubts on how China could establish its claim of historic waters in the SCS.

On the other hand, the nonexistence of historic waters in its traditional sense in the SCS does not necessarily mean that there exist no historic rights of any kind. It is clear from China's stance that it seeks to enjoy historic privileges of some kind in the SCS. What kind of historic rights or privileges would China insist upon in the relevant sea areas? The most convincing rights that China could enjoy are fishing rights, since from ancient times; Chinese fishers have been fishing in the SCS. As for other rights, it is up to China to make clearer statements to the public.[399]

The provision of China's EEZ law (see Appendix 2) on historical rights can be understood in a number of different ways. First, it can be interpreted to mean that the sea area in question should have the same legal status as areas under the UNCLOS III (EEZ and continental shelf) regimes. Second, it can be interpreted to mean that certain sea areas to which China's historical rights are claimed go beyond the 200 nautical mile limit. Third, it can be interpreted to mean that the sea areas to which China's historical rights apply fall within the 200 nautical mile limit but will come under an alternative national management regime different from the EEZ regime. In this third view, the claimed areas of historical rights can be treated as quasi-territorial sea, or as historical waters with some modifications, or as 'tempered historic waters.'

On the other hand, it may be questioned whether China's claimed historic rights could extend to cover the continental shelf area in the SCS, since the right to the latter is *ab initio and ipso facto*, as provided in the LOS Convention, and "the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation,"[400] in spite of the fact that the historic rights are included in China's EEZ/continental shelf law. The continental shelf doctrine of 'inherency' should be viewed

[399] Chinese literature mentions significant historical evidence of China's exploration of the SCS. See, for instance, Li Jinming, "Evidences of Exploration and Management of the Paracel and Spratly Islands by the Chinese People," *Southeast Asian Affairs: A Quarterly Journal* (in Chinese), No. 2, 1996, 82–89 and Teh-Kuang Chang, "China's Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal Perspective," *Case W. Res. J. Int'L L.*, Vol. 23, 1991, 399–420. A Taiwanese scholar has taken the view that since ancient times China has sent naval forces to patrol the SCS, arrested pirates, assisted in salvage, operated fishing activities such that China enjoys historic interests within the U-shaped line in regard to economic resources, navigational management, and security of national defence. See remarks of Fu Kuen-Chen at the Workshop on "Legal Regime of China's Historic Waters in the SCS," *Issues and Studies* (Chinese edition), Vol. 32, No. 8, 1993, 1–12. at p. See discussion of Zou Keyuan, "Historic Rights in International Law and in China's Practice", p.162

400 UNCLOS, Article 77 (3)

as deliberately aimed against the operation of any historic rights previously acquired.[401] The opposite view is that "a new legal concept, consisting in the notion introduced in 1958 that continental shelf rights are inherent or *'ab initio'*, cannot by itself have the effect of abolishing or denying acquired and existing rights."[402] China has to prove that its historic rights existed prior to the establishment of the customary rules on the continental shelf. Otherwise, China's claim is only relevant to the EEZ non-continental shelf area.

The provision on historic rights in China's 1998 EEZ law has been queried. A Vietnamese scholar has asked whether "this article tacitly refers to other interests that China has claimed, such as the traditional right of fishing in maritime zones of other countries and the nine broken lines claiming over 80 per cent of area of the East Sea."[403] He further stated that "[a] long time ago, regional countries pursued their normal activities in the East Sea without encountering any Chinese impediment and they have never recognized historical rights of China there."[404] Vietnam officially lodged a protest against China's historic rights in the SCS emphasizing that Vietnam will "not recognize any so-called 'historical interests' which are not consistent with international law and violate the sovereignty and sovereign rights of Vietnam and Vietnam's legitimate interests in its maritime zones and continental shelf in the East Sea.[405] It may be difficult for China to assert that there is a general acquiescence on the part of third states to its historic rights claim in the SCS given Vietnam's opposition. However, the proclamation in China's Law "may well serve to substantially stake out the declarant's legal position, expressing the State's belief that usage of waters has been sufficiently lengthy, continuous, and notorious to constitute a choate title."[406]

Historical demands and possessions can be questioned by international law, but the Chinese see the area as a natural part of China and are of the belief that they should not have to demand something that has been, under *de facto* and *de jura* Chinese rule since the 1300-century.[407] According to Chinese sources, Spratley and Paracel were 'discovered' by the Chinese, and there are Chinese texts that describe the area as Chinese since 300 AC. Harder

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[401] See D. P. O'Connell, *The International Law of the Sea*, Vol.2, (Oxford: Clarendon Press, 1982), at p.713. Zou Keyuan, "Historic Rights in International Law and in China's Practice", p.162

[402] See Separate Opinion of Judge ad hoc Jimenez de Arechage, *Continental Shelf (Tunisia v. Libya,* 1982 ICJ Reports, at pp.123–124.Zou Keyuan, "Historic Rights in International Law and in China's Practice", p.162

[403] Nguyen Hong Thao, "China's maritime moves raise neighbors' hackles," *Vietnam Law & Legal Forum*, July 1998, at p.21.

[404] Ibid. at pp.21-22.

[405] See "Vietnam: Dispute regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China which Was Passed on 26 June 1998," *Law of the Sea Bulletin*, No. 38, 1998, at 55. See also Zou Keyuan.p. 162

[406] Merrill Wesley Clark, Jr., *Historic Bays and Waters: A Regime of Recent Beginnings and Continued Usage* (New York: Oceana Publications, Inc., 1994), at p.168. See Zou Keyuan, "Historic Rights in International Law and in China's Practice", p.162

[407] Nayan Chanda, "The New Nationalism", *Far Eastern Economic Review*, November 9 1995, p. 22. Chen, 1994, p.893. Chanda, 1992, p. 15.

to prove is that the area has been under *de facto* Chinese rule. However, it is apparent that China sees itself as a victim of the aggression of the imperialists/superpowers/regional states and will probably continue see itself this way until all Chinese territory is once more under Chinese rule.[408]

3.3 Historic Concepts vs. New Maritime Regimes in the SCS

The parties in the conflict of the SCS base their claims on two different grounds: historical demands (China, Taiwan, and Vietnam) and modern demands (The Philippine, Indonesia, Malaysia and Brunei) such as sovereignty, and related to these demands there is an interest to use the islands and the archipelago in the area to further extend the territorial waters. China's claim to 'historical waters' in the SCS based on the 'U-shaped line' overlaps with the claims to EEZ and continental shelf areas of Vietnam, Indonesia, Malaysia, Brunei and the Philippines.[409]

The perceived excessive claims put forward by other SCS countries, such as the Philippines and Malaysia, who have claimed some islands in the SCS based upon the 200 nautical mile EEZ rights of the LOS Convention, may have encouraged China to insist that its SCS claim is based upon the U-shaped line. In China's view, a claim derived from historic rights may seem more forceful and valid in law than claims simply based upon the EEZ concept. While Chinese scholars tend to believe that the historic concept is still relevant in international law and lots of researches have been conducted on 'historic waters',[410] western scholars do not seem to be on the same page. Moore, a well-known American scholar on the law of the sea, when asked whether historic water is still relevant, noted that only the bays listed in UN 1957 Study on Historic Bays are regarded as legitimate.[411] Judge David Anderson and Gudmundur Eiriksson of ITLOS were reluctant to comment on the relevance of historic waters.[412]

Since there are no definitive rules in international law which govern the status of maritime historic rights, China's claim is not a violation of international law. Similarly, since there are no such rules, it is doubtful whether China's claim could be established in international law. What is more problematic is China's implementation of what it has

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408 Interviews and informal discussions with Chinese Scholars and diplomats from 1991-1998.
409 Timo Kivimäki (ed.) *War or peace in the SCS?* (Copenhagen, Denmark : NIAS Press, 2002) p.35
410 The National Institute for the South China Sea Studies, for example, published in 2006 a book titled as "Historic Waters".
411 The author interviewed Professor John Moore in Virginia in February 2009.
412 The author interview these former judges of ITLOS in September 2008 in Hamburg.

claimed in the SCS or elsewhere where China may assert historic rights and interests. As the ICJ once stated, general international law does not provide for a single 'regime' of historic waters or historic bays, but only for a particular regime for each of several specific, generally recognized cases of historic waters or historic bays.[413] From this point of view, China's claim can be regarded as one of these particular cases, which may stand up in international law as doctrine evolved over time.

Finally, we have to realize that the formulation of the concept of historic waters requires an adjustment of the generally accepted law of the sea regimes. Because of the peculiar circumstances of some maritime areas which fall within the national jurisdiction of coastal states, these areas are allowed to be part of the jurisdictional waters as an exception to the general rule. It is predicted that the concept of historic rights will survive and be used by states as a means of claiming and expanding jurisdictional areas not only in the maritime sector, but also in the land sector. As early as 1984 the question was asked whether the doctrine of historic bays and historic waters had become obsolete with the development of new, alternative concepts of national maritime expansion such as the EEZ and the continental shelf.[414] Judged by recent State practice, the answer to this question is no. Rather, there is a trend toward the application and assertion of historic claims whether to bays, waters or rights in spite of the establishment of new legal concepts such as the EEZ and continental shelf in the law of the sea.[415] Such a trend may eventually help to codify the rules of historic rights and/or historic waters in general international law.

The above two sections analyze two categories of disputes in the SCS. They, nevertheless, are not the only sources for existing or potential disputes in this region. The following sections explore other issues arising from the SCS, such as resources management, freedom of navigation and marine environment respectively.

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[413] Continental Shelf (Tunisia/Libya), *1982 ICJ Reports*, at p.74, quoted again in "Land, Island and Maritime Frontier Dispute", 1992, *ICJ Reports*, at p.589.

[414] L.F.E. Goldie, "Historic Bays in International Law—An Impressionistic Overview," *Syr. J. Int'l L. & Com.*, Vol. 11, 1984, at 271–272.

[415] As has been observed: "The number and frequency of coastal states' claims in this regard shows that the old concept of an historic bay is currently evolving into a more flexible notion whose crucial elements are the *bona fide* assertion of State interests and the recognition of and acquiescence of third states, rather that immemorial usage and the long passage of time." Francesco Francioni, "The Status of the Gulf of Sirte in International Law," *Syr. J. Int'l L. & Com.*, Vol. 11, 1984, at p.325.

4. Resource Management

This section focuses on the economic potential and importance of the SCS. We shall now briefly present the SCS's main economic assets. While there may be exploitable minerals under the sea-bed of the SCS, it is fair to say that the current economic potential of the area is mainly based on its fish, oil and gas.

4.1 Fishing

The SCS is one of the richest fishing areas in the world, and that the disputed coral reefs are vital breeding grounds for the fish stocks. There are large populations heavily dependent, directly and indirectly, on fishing, in one of the world's most biodiversity marine areas. The exploitation of its fisheries, both legal and illegal, by family boats and industrial deep sea trawlers now threatens to deplete fish stocks that millions of people rely on. There is an urgent need for an internationally recognized fishery regime, with a regional authority that has the power to enforce regulations. This section explores the development of rules governing fishing activities and then considers the interplay of dispute settlement provisions with these norms. In particular, the role of dispute settlement for conflicts relating to fishing in the EEZ, on the high seas, and between these zones will be examined.

4.1.1 Fishing Regime under UNCLOS

Fishing is regulated to varying degrees in UNCLOS depending on the maritime zone in question. States have full authority to regulate fishing in their territorial seas by virtue of their sovereignty in this zone.[416] This authority is reinforced by Article 19, which states that any fishing activities during the passage of a foreign ship is prejudicial to the peace, good order, or security of the coastal State and thus outside the retime of innocent passage.[417] Furthermore, the coastal State may adopt laws and regulations relating to innocent passage to prevent infringement of its fisheries laws.[418] Similar rights are granted to States bordering straits subject to the regime of transit passage.[419] In archipelagic waters, although

[416] Article 2 provides that the sovereignty of a coastal State extends beyond its land territory to an adjacent belt of sea. UNLCOS, art; on Klein, 2005, p.172

[417] UNCLOS, art. 19,

[418] UNCLOS, art.21

[419] UNCLOS, art.42

archipelagic States have sovereignty over archipelagic waters,[420] these States are required to recognize traditional fishing rights of the immediately adjacent neighboring States.[421]

The regulation of fishing under UNCLOS becomes more complex in areas not subject to the sovereignty of the coastal State. The new regime of EEZ recognized coastal States' rights over living resources in the law of the sea. The substantive articles relating to fishing in the EEZ are found in Articles 61 to 71 of Part V of the Convention. The EEZ is defined as an "area beyond and adjacent to the territorial sea, subject to the specific legal regime established" in the Convention.[422] The creation of the EEZ in the Convention grants to coastal States sovereign rights over natural resources in a zone extending 200 miles from a State's coast.[423] States parties to the Convention are accorded sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil.[424] The coastal State is responsible for both the conservation and the management of the living resources found in the EEZ.

4.1.2 Fishery Dispute Settlement under UNCLOS

It would be extremely difficult to implement the whole scheme requiring the coastal State to determine the allowable catch for the purpose of conservation and its capacity to harvest the fishery resource, and to give access to the surplus of the allowable catch to other States, in view of the fact that the ideas themselves are not always well defined in the Convention.[425] Disputes are bound to occur. Fishing disputes may be settled, if not by negotiation, then by recourse to any procedure agreed upon by the parties concerned or by their submission to the conciliation procedures.[426] However, it should be noted that the Conciliation Commission cannot substitute its discretion for that of the coastal State[427] and, at any rate, the report drawn up by the Commission cannot be binding.[428] In addition, the lack of any substantive law (as evidenced in the ambiguity of the concept of surplus of allowable catch and the lack of criteria for granting other States access to the surplus) will greatly hinder the

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420 UNCLOS, art. 49
421 UNCLOS, art. 51
422 UNCLOS, art. 55
423 UNCLOS, art. 57
424 UNCLOS, art. 56 (1)(a)
425 Shigeru Oda, *Fifty Years of the Law of the Sea* (The Hague/London/New York: Kluwer Law International, 2003), p.554
426 UNCLOS, art. 297 (3)(b)
427 UNLCOS, art. 297(3)(b)
428 UNCLOS, Annex V, art. 7 (2)

settlement of disputes of this nature.[429] Yet under UNCLOS, such disputes are exempted from compulsory settlement by the four different categories of tribunal. The coastal State is not obliged to submit to compulsory settlement.[430]

For the EEZ, virtually all disputes are excluded from compulsory procedures entailing binding decisions, especially if they concern the discretionary power of the coastal State. While not an optimal system, the role accorded to third-party review in the Convention acknowledges the predominate interest of the coastal States in the conservation and management of living resources in the EEZ as well as anticipating in some ways the political forces that impact on national decision-making processes.[431]

Coastal State interests have also been recognized in the Convention to varying degrees with respect to the fishing of stocks or species that are located in more than one zone or between the EEZ and the high seas.[432] In the high seas areas, State control is limited to its national vessels and the freedom of fishing is primarily curtailed by general obligations of cooperation relating to conservation and management.[433] The availability of compulsory dispute settlement allows courts and tribunals to perform a facilitative function in the implementation of these rules and this international process may fulfill the purpose of elaborating on the content of normal governing this activity. Alternatively, States may enter into implementation agreements to flesh out the high seas fishing obligations in UNCLOS. These agreements may have their own dispute settlement clauses that prevail over the mandatory jurisdiction of Part XV.

4.1.3 Fishing Conflict in the SCS

The fishing conflict in the SCS mostly occurs in the Tonkin Gulf (Bei Bu Gulf) and the Spratly Islands sea area. China and Vietnam are two major disputants on fishing in the Tonkin Gulf. Before the 1950s, the Tokin Gulf was the mutual fishing ground for both the Chinese and Vietnamese fishermen with lots of fishing disputes. Between 1957 and 1963, China and Vietnam signed three fishing agreements. When the fishing agreement was not longer effective after August 1969, the fishing conflict became more serious. The two countries, after several rounds of negotiation, signed a fishery agreement for the Gulf of

[429] Shigeru Oda, *Fifty Years of the Law of the Sea* (The Hague/London/New York: Kluwer Law International, 2003), p.554
[430] UNCLOS, art. 197 (3)(a)
[431] Klein, 2005, p.164
[432] Klein, 2005, p.164
[433] Ibid. p.165

Tonkin along with a maritime delimitation agreement which came into force in 2004. Through this agreement, China and Vietnam have jointly established a new regime to conserve, manage, and exploit the fishery resources in Gulf of Tonkin.

The fishing disputes in the Spratly Islands are also distinguished. China claims that its fishing men have long been fishing in the Spratly Islands area. After 1956, China once terminated its fishing activities in this area due to the sovereignty disputes of the Spratly Islands, and resumed the fishing again in 1985. ASEAN countries, such as Vietnam, the Philippines, Malaysia and Indonesia have conducted a large amount of fishing in the Spratly Islands and thus irritated the fishing disputes with China.

A closely related issue is the alleged illegal fishing activity. In recent years, many Chinese fishing vessels either from mainland China or Taiwan have been detained by neighbouring countries, such as the Philippines, Vietnam and Indonesia for alleged illegal fishing in their EEZs. On the other hand, fishing vessels from other countries have been detained by China for the same reason. What complicated the matter is that such detentions took place in the disputed SCS where unilaterally claimed national maritime boundaries are disputed. Between May and July 1999, Philippine naval vessels bumped against Chinese fishing boats in the disputed areas.[434] To name one from many, a group of Vietnamese boats fishing in waters near the Spratlys, 350km east of Ho Chi Minh City, came under fire from Chinese naval vessels on July 9 2007.[435] In 2008, four fishing vessels from Hainan got detained in China's claimed EEZ in the SCS by Vietnam, the Philippines, Malaysia and Indonesia. In the same year, 3 fishing vessels from Hainan Island were robbed in the SCS by vessels from Vietnam, the Philippines, Malaysia and Indonesia.[436] Unless there is a clear demarcation of the respective maritime boundaries, fishing incidents will continue to occur in the SCS.

4. 2 Oil and Gas

Long important as a major sea lane for international shipping, the SCS has acquired added significance in recent years because of expectations that it harbors large reserves of energy, though how extensive these reserves will prove to be is still a matter of some conjecture.[437]

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[434] See Ming Pao (in Chinese), 26 May 1999 and 21 July 1999. (n.32 on p. 98) Zou Keyuan, *China's Marine Legal System and the Law of the Sea* (Leiden/Bosten: Martinus Nijhoff Publishers, 2005), p.97

[435] 19 July 2007, BBC News

[436] The data was provided by Hainan Frontier Bureau on February 24, 2009.

[437] Nong Hong, "Chinese Perceptions of the SCS Dispute", *Geopolitics of Energy*, Volume 30, Number 6, June 2008

The following paragraphs discuss the provisions of UNCLOS governing the non-living resources.

4.2.1 Non-living Resource Management under UNCLOS

Article 56 (1) stipulates that in the EEZ, the costal State has sovereign rights for the exploring and exploiting, conserving and managing the natural resources, whether living or non-living.[438] Article 77 provides the coastal States with sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.[439] The natural resources consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species.[440] Article 137 stipulates the legal status of the Sea and its resources, the right over which are vested in mankind as a whole, on whose behalf the Authority shall act.[441] Section 3 of Part XI has a comprehensive regulation over the development of resources of the Area.[442]

Unlike living resources,[443] the dispute settlement mechanism of UNCLOS does not set limitation or exclusion relating to disputes on non-living resources, which means that disputes on non-living resources fall in to the category of section 2, Part XV of UNCLOS. So far as sea-bed mining is concerned, Section 5 of Part XI of UNCLOS makes provision for "settlement of disputes and advisory opinions".[444] The principle forum is the Sea-Bed Disputes Chamber of the ITLOS but certain types of dispute may, alternatively, be submitted to a special chamber of the ITLOS,[445] to an *ad hoc* chamber of the Sea-Bed Dispute Chamber,[446] or to binding commercial arbitration.

4.2.2 Oil and Gas Dispute in the SCS

According to decades of reconnaissance, there are 13 large and medium sediment basins in the disputed region, with a total area of 619.5 thousand km^2, among which 417 thousand km^2 is within China's U-shape line. Within this area are an estimated 23.5 billion tons of oil

438 UNCLOS, 56 (1)
439 UNCLOS, 77
440 UNCLOS, art. 77 (4)
441 UNCLOS, art. 137
442 UNCLOS, art. 150, 151,152,153,154,155
443 For limitation of compulsory settlement on fishing, see UNCLOS, art. 297 (3)
444 Under Art. 191 of UNCLOS, the Sea-Bed Dispute Chamber "shall give advisory opinions at the request of the Assembly or the Council [of the Authority] on legal question arising within the scope of their activities".
445 See Article 188 (1) (a) of UNCLOS.
446 See Article 188 (1) (b)

and 10,000 billion stere of natural gas.[447] Besides this, there is a large quantity of gas hydrates (also known as 'flammable ice') in the SCS area.

Exploitation by ASEAN States in the Disputed SCS Areas. The race for oil started in 1969-70, when an international report held out the prospect of finding huge reserves of oil and gas in the SCS. Both foreign and regional companies are today operating in the SCS, often through joint ventures. Most of the oil production is taking place in areas that are not contested, but commercial discoveries of gas have been made within the outer limits of the Chinese U-shaped line by companies operating under concessions from other governments: the Malaysians are already producing in the Central Luconia gas fields off the coast of Sarawak; the Philippines operate within the Camago and Malampaya fields, northwest of Palawan; the Indonesians have the Natuna gas field, with its pipeline to Singapore; the Vietnamese Lan Tay and Lan Do gas fields are being operated by BP in a joint venture with the Indian oil company ONGC and PetroVietnam.[448]

China's Energy Policy and Interests in the SCS. There are a number of conditions or trends within the Chinese energy sector which can be used to support the thought of a Chinese move into the disputed areas of the SCS.[449] In the early 1980s, China started an oil survey in the Spratly Islands, though only engaging in physical geography reconnaissance. In 1992, the China National Offshore Oil Corporation signed a contract with Creston Energy Corporation of America on joint development of gas and oil at Wan'an Tan. However, this could not be implemented due to objections from Vietnam. Table II.7 shows the disputes over drilling and exploration in the SCS since 1990s. More discussion on energy related conflict and cooperation will be analyzed in Chapter V on the joint development regime.

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[447] Shicun Wu, Nong Hong, "Energy Security of China & the Oil and Gas Exploitation In the South China Sea", in Myron H. Nordquist, John Norton Moore and Kuen-chen Fu (eds.), *Recent Developments in the Law of the Sea and China*, (Martinus Nijhoff Publishers, 2006), pp.145-155.

[448] Nong Hong, "Chinese Perceptions of the SCS Dispute", *Geopolitics of Energy*, Volume 30, Number 6 June 2008

[449] Ibid.

Table II.7 Disputes over Drilling and Exploration in the SCS[450]

Date	Countries	Disputes
1992	China, Vietnam	In May, China signed a contract with U.S. firm Crestone to explore for oil near the Spratly Islands in an area that Vietnam says is located on its continental shelf, over 600 miles south of China's Hainan Island. In September, Vietnam accused China of drilling for oil in Vietnamese waters in the Gulf of Tonkin.
1993	China, Vietnam	In May, Vietnam accused a Chinese seismic survey ship of interfering with British Petroleum's exploration work in Vietnamese waters. The Chinese ship left Vietnamese block 06 following the appearance of 2 Vietnamese naval ships.
1993	China, Vietnam	In December, Vietnam demanded that Crestone cancel offshore oil development in nearby waters.
1994	China, Vietnam	Crestone joined with a Chinese partner to explore China's Wan' Bei-21 (WAB-21 block. Vietnam protested that the exploration was in Vietnamese waters in their blocks 133, 134, and 135. China offered to split Wan' Bei production with Vietnam, as long as China retained all sovereignty.
1994	China, Vietnam	In August, Vietnamese gunboats forced a Chinese exploration ship to leave an oilfield in a region claimed by the Vietnamese.
1996	China, Vietnam	In April, Vietnam leased exploration blocks to U.S. firm Conoco, and ruled out cooperation with U.S. oil firms that signed Chinese exploration contracts in disputed waters. Vietnamese blocks 133 and 134 cover half the zone leased to Crestone by China. China protested, and reaffirmed a national law claiming the SCS as its own in May.
1997	China, Vietnam	In March, Vietnamese issued a protest after the Chinese Kantan-3 oil rig drills near Spratly Islands in March. The drilling occurred offshore Da Nang, in an area Vietnam calls Block 113. The block is located 64 nautical miles off Chan May cape in Vietnam, and 71 nautical miles off China's Hainan Island. The diplomatic protests were followed by the departure of the Chinese rig.
1997	China, Vietnam	In December, Vietnamese protested after the Exploration Ship No. 8 and two supply ships entered the Wan' Bei exploration block. All 3 vessels were escorted away by the Vietnamese navy.
1998	China, Vietnam	In September, Vietnamese protested after a Chinese report stated that Crestone and China were continuing their survey of the Spratly Islands and the Tu Chinh region (Wan' Bei in Chinese). (The dispute over this area was resolved by an agreement between China and Vietnam concluded in December 2000.)
2003	Malaysia, Brunei	In May 2003, a patrol boat from Brunei acted to prevent from undertaking exploration activities in an area offshore from Northern Borneo disputed by the two countries.

Source: EIA.

[450] This table shows the disputes over Drilling and Exploration in the SCS. Disputes, however, started to decrease since 2003. Since 2005, China (via China National Offshore Oil Corporation, CNOOC), the Philippines (via The Philippine National Oil Company), and Vietnam (via PetroVietnam) have worked together to conduct seismic surveys in a 55,000 square mile area including the Spratly Islands. The $15 million project cost has been shared by the three companies and an "unprecedented" level of information sharing has occurred amongst the national companies. In April of 2007, China National Petroleum Corporation, China Petroleum & Chemical Corporation, and CNOOC announced plans to begin drilling exploratory wells in the waters surrounding the Spratlys in early 2008.

5. Freedom of Navigation

The freedom of navigation existed across huge expanses of ocean space until the middle of the 20th century. At this time, States began to claim a greater number of rights over extended maritime zones in pursuit of their economic interests, which resulted in the creation of the EEZ in UNCLOS.[451] The accumulation of coastal State rights over extended maritime areas had to be countered by the preexisting interests of third States to retain the freedoms of the high seas. A number of rules were adopted to balance the freedoms of navigation with the newly acquired rights of the coastal States. The means to resolve conflicts over these competing interests was an essential part of the overall regulation of these freedoms of the high seas in the EEZ and on the continental shelf.

A number of questions arise from the interpretation of the scope of freedom of navigation, especially under the EEZ regimes. Does a state enjoy the same right of freedom of navigation in the EEZ of a coastal State as it does in the high sea? What kind of activities falls within the scope of freedom of navigation in the EEZ of a coastal State?

5.1 Military Activities in EEZ = Freedom of Navigation?

Military activities in the EEZ were a controversial issue during the negotiations of the text of the 1982 UNCLOS and continue to be so in state practice.[452] Some coastal states such as Bangladesh, Brazil, Cape Verde, Malaysia, Pakistan and Uruguay contend that other states cannot carry out military exercises or maneuvers in or over their EEZ without their consent. Their concern is that such uninvited military activates could threaten their national security or undermine their resource sovereignty.[453] Many developing coastal countries consider that those activities are prejudicial to their national security and therefore are not within the meaning of peaceful uses of the sea also stipulated by the 1982 UNCLOS. They argue that those activities clearly intended for military purposes are already non-peaceful and cannot be undertaken. Some States, including those in the Asia-Pacific region, have formulated unilateral legislation prohibiting or restricting intelligence gathering and military activities,

[451] Klein, 2005, p.126

[452] Valencia , Mark J. and Kazumine Akimoto, "Guidelines for Navigation and Overflight in the Exclusive Economic zone", in *Marine Policy* 30 (2006), pp.704-711, p. 705, p. 704

[453] Hasjim Djalal, Alexander Yankov and Anthony Bergin, "Draft Gudelands for Military and Intelligence Gathering Activities in the EEZ and Their Means and Manner of Implementation and Enforcement", in *Marine Policy* 29 (2005), pp.175-183, p. 175

including military exercises, of foreign naval and air forces in and above their EEZ. On the other hand, other States specifically state the opposite. Indeed, maritime powers, such as the United States, insist on the freedom of military activities in the EEZ out of concern that their naval and air access and mobility could be severely restricted by the global EEZ enclosure movement. Those activities are within the meaning and the exercise of the freedom of the sea, particularly the freedom of navigation and overflight, which are clearly recognized in the 1982 UNCLOS.

As technology advances, misunderstandings regarding military activities, such as intelligence gathering in foreign EEZs are bound to increase. Military activities by foreign nations in or over others' EEZs are becoming more frequent due to the rise in the size and quality of the navies of many nations, and technological advances that allow navies to better utilize oceanic areas. At the same time, coastal States are placing increasing importance on control of their EEZs. Of the 1700 warships expected to be built during the next few years, a majority will be smaller, coastal patrol vessels and corvettes, suggesting even further coastal State emphasis on control of their EEZs.

The following subsection elaborates various activities with military nature and review the controversy regarding the legitimacy of these activities in a foreign country's EEZ.

5.1.1 Intelligence Gathering Activities in EEZs

Traditionally, intelligence gathering activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58 (1), lawful in the EEZ as well. All major maritime powers have been routinely conducting such activities without protest from the coastal State concerned, unless they became excessively provocative. The US Navy expressly takes the view that such activities are part of high seas freedoms.[454] However, this position appears to be facing increasingly serious challenges as new, highly intrusive intelligence gathering systems are being developed and used by several military powers. Of particular concern are the increasing Electronic Weapons (EW) capabilities and the widespread moves to develop information warfare (IW) capabilities.[455] Airborne Signals Intelligence (SIGINT) missions are often provocative as visible efforts to penetrate the

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[454] Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, 1995, Sections 2.4.2 and 2.4.3, quoted by Moritaka Hayashi, "Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms", in *Marine Policy*, 29 (2005), pp. 123-137, p. 130

[455] D. Ball, "Intelligence Collection Operations and EEZs: the Implications of New Technology", *Marine Policy*, Vol. 28, No.1, January 2004, pp.67-82, pp.28 and 30

electronic secrets of the targeted country. Indeed, important aspects of regional SIGINT and EW capabilities may invite attack, and thus encourage pre-emption.

Intelligence gathering activities in EEZs are likely to become more controversial and more dangerous.[456] In Asia, this disturbing prospect reflects the increasing and changing demands for technical intelligence; the robust weapons acquisition programs, especially increasing electronic warfare capabilities; and the widespread development of information warfare capabilities. Further, the scale and scope of maritime and airborne intelligence collection activities are likely to expand rapidly over the next decade, involving levels and sorts of activities quite unprecedented in peacetime.[457] They will not only become more intensive; they will generally be more intrusive. They will generate tensions and more frequent crises; they will produce defensive reactions and escalatory dynamics; and they will lead to less stability in the most affected regions, especially in Asia.[458]

There also continues to be disagreement whether some military intelligence gathering are scientific research and should be under a consent regime.[459] The United States and other maritime powers argue that hydrographic and 'military' surveys are distinct from marine scientific research and are, therefore, not restricted by the consent provisions of the 1982 UNCLOS. Other states argue that such surveys are a form of scientific research, or that they threaten the security of the state and should not be allowed in the EEZ without the coastal state's consent. Indeed, some states have enacted national laws to this effect.[460] Also, some argue that because of the peaceful purposes provisions of the Convention, at least some other military activities may not be permitted in the EEZ, such as the implanting of devices which are capable of rendering ineffective the defense of the costal state.

Can these new activities be categorized "other internationally lawful uses of the sea" related to the freedom of navigation and overflight? It appears that provisions of the 1982 UNCLSO are not adequate to regulate the use of these new EW and IW technologies by military vessels and aircraft. Thus, as Hayashi contends, it would be highly desirable for the question to be studied in depth with a view to working out a common understanding or agreement before serious incidents occur.[461]

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456 Mark J. Valencia and Kazumine Akimoto, "Guidelines for Navigation and Overflight in the Exclusive Economic zone", p.705
457 Ibid.
458 ibid.
459 Ibid. p. 706
460 Ibid.
461 Moritaka Hayashi, "Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms", in *Marine Policy,* 29 (2005), pp. 123-137, p. 130

5.1.2 Hydrographic Survey/Marine Scientific Research/Military Survey

Marine scientific research, hydrographic surveying and military surveys all overlap to some extent. Some so-called military surveys, particularly military oceanographic research, are virtually the same as marine scientific research but a lot of military surveying is not, particularly that which constitutes intelligence collection and has no economic value. Some forms of military acoustic research may also have no commercial or economic value. Hydrographic surveying may be conducted both for civil and military purposes but the nature of the activity will be essentially the same regardless of the actual purpose of the surveys.

Sam Bateman tries to make a distinction between hydrographic surveying and marine scientific research, particularly whether another State might undertake hydrographic surveys without the prior authorization of the coastal State.[462] The controversy regarding the conduct of hydrographic surveys in an EEZ (and other types of "surveys" that are not resource related such as "military surveys") was succinctly summed up in memorandum No. 6 issued by the Council for Security cooperation in the Asia Pacific (CSCAP) on the Practice of the Law of the Sea in the Asia Pacific as follows:

> *"Different opinions exist as to whether coastal State jurisdiction extends to activities in the EEZ such as hydrographic surveying and collection of other marine environmental data that is not resource-related or is not done for scientific purposes. While UNCLOS has established a clear regime for marine scientific research, there is no specific provision in UNCLOS for hydrographic surveying. Some coastal States require consent with respect to hydrographic surveys conducted in their EEZ by other States while it is the opinion of other States that hydrographic surveys can be conducted freely in the EEZ".*

Hydrographic data now has much wider application than just for the safety of navigation. It has many uses associated with the rights and duties of a coastal Stat in its EEZ. Trends over the years with technology and the greater need for hydrographic data have brought hydrographic surveying and marine scientific research closer together and similar considerations would now seem to apply to the conduct of hydrographic surveying in the EEZ as apply to the conduct of marine scientific research in that zone.

The United States regards military surveying as similar to hydrographic surveying and thus part of the high seas freedoms of navigation and overflight and other international lawful uses of the sea related to those freedoms, and conducted with due regard to the rights

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[462] Sam Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research", in *Marine Policy,* 29 (2005), pp. 163-174, p. 172

and duties of the coastal State.[463] The position of the United States is that while coastal State consent must be obtained in order to conduct marine, scientific research in its EEZ, the coastal State cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities[464]. Similarly, the United Kingdom regards military data gathering (MDG) as a fundamental high seas freedom available in the EEZ.[465] Other States, including China, have specifically claimed that hydrographic surveys might only be conducted in their EEZs with their consent.[466] The US takes the position that the conduct of surveys in the EEZ of a foreign coastal State is an exercise of the freedom of navigation and other internationally lawful uses of the sea under Article 58 (1), and therefore not subject to coastal State regulation. The US has responded along these lines to other States which have questioned such survey activities in their EEZs.[467] The US Department of the Navy also states that coastal nations cannot regulate hydrographic surveys or military surveys conducted beyond their territorial sea, nor can they require notification of such activities.[468]

A most serious challenge to the exemption of hydrographic and military surveys came from China, which reportedly enacted in December 2002 a law, elaborating on its 1998 law on the EEZ, stating that any "survey or mapping activities" cannot involve State secrets or hurt the State, and that all such surveys must have prior permission.[469] Earlier, in September 2002, China reportedly lodged protest with the US Government charging that the USNS Bowditch had conducted monitoring and reconnaissance activities without its approval in its EEZ. The vessel, according to press reports, was engaged in hydrographic surveys some 60 miles off the Chinese coast, and was buzzed by Chinese patrol planes and received threats to leave the area.[470] China appears to believe that "military hydrographic survey" activities in the EEZ are, in a military sense, a type of battlefield preparation and thus a threat of force

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[463] UNCLOS, art. 56 (1)

[464] Thomas AR, Duncan JC (eds.) *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies. Vol.73. (Newport, Rhode Island: Naval War College: 1999), p.130; see also Bateman, p.164

[465] Bateman, "Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research", p.164

[466] Ship and Ocean Foundation (SOF) and East-West Center (EWC), *the Regime of Exclusive Economic Zone: Issues and Responses,* A Report of the Tokyo Meeting (19-20 February, Honolulu, East-West Center, 2003), p.7; see also Bateman, 2005.

[467] J.A. Roach and R.W. Smith, *Excessive Maritime Claims*, International Law Studies, vol.66 (Naval War College, Newport, Rhodes Islands, 1994), p.248; This does not mean, however, that all similar activities of navies are "military surveys". They do conduct or sponsor a great deal of oceanographic research that would be covered by MSR articles of UNCLOS. See B. Oxman, "The Regime of Warships under the United Nations Convention on the Law of the Sea", *Virginia Journal of International Law*, vol. 24, 1984, p.847; Hayashi, 2005, p.131

[468] Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, 1995, section 2.4.2.2.; also Hayashi, 2005, p.131

[469] "*The Regime of Exclusive Economic Zone: Issues and Responses",* A Report of the Tokyo Meeting (19-20 February, Honolulu, East-West Center, 2003),p.13; Hayashi, 2005, p.131

[470] "*The Regime of Exclusive Economic Zone: Issues and Responses",* A Report of the Tokyo Meeting (19-20 February, Honolulu, East-West Center, 2003), pp.2-12

against the coastal State, thus violating the principle of peaceful use of the sea.[471] Further clarification is needed as to the exact contents of the law and the intention of related pronouncements before making any judgment. But if the law requires all hydrographic surveys in its EEZ to obtain prior permission, it is clearly contrary to the strongly held position of the US, and could become a source of serious tension in the future.

5.1.3 Military Maneuvers

Traditionally the freedom of the high seas included the use of the high seas for military maneuvers or exercises, including the use of weapons. This freedom has been incorporated in the 1982 UNCLOS, and it has been generally believed, particularly by maritime States, that this applies also to the EEZ. However, upon signing or ratifying the Convention, several States, including Bangladesh, Brazil, Cape Verde, Pakistan, Malaysia and Uruguay, declared that such kind of military activities are not permitted in the EEZ without the consent of the coastal State.[472] Sharply opposing declarations have been filed by Germany, Italy, the Netherlands and the United Kingdom.[473] The US has also taken the position that "military activities, such as… launching and landing of aircraft, …exercises, operations…[in the EEZ] are recognized historic high seas uses that are preserved by Article 58 ".[474] The US takes the view that the high seas freedoms include "task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities and ordnance testing and firing," and that "existence of the EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander".[475]

Vukas says that the problem of the legality of military maneuvers and ballistic exercises which temporarily prevent other States from using a vast area of the high seas remains unresolved.[476] While a simple naval maneuver can be considered to be associated with the freedom of navigation, Scovazzi argues that it would be more difficult to sustain

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[471] Ibid. p.52-3

[472] G.Galdorisi and A. Kaufman, "Military Activities in the Exclusive Economic Zone: Preventing Uncertainly and Defusing Conflicts", *California Western International Law Journal*. Vol. 32, 2002, p.272; Hayashi, 2005 p.128

[473] UN Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Declarations and Statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (United Nations, 1997), pp.29 (Germany), 31 (Italy), and 35 (Netherlands). *Law of the Sea Bulletin*, no.35, p.14 (United Kingdom)

[474] Message from the President of the United States transmitting United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea. Senate 103ed Congress, 2nd session, Treaty doc. 103-39, p.24, quoted by Hayashi, 2005, p.129

[475] Department of the Navy, "The Commander's Handbook on the Law of Naval Operations", 1995, sections 2.4.2 and 2.4.3; Hayashi, 2005, p. 129

[476] B. Bukas, "Peaceful Uses of the Sea, Denuclearization and disarmament", in R>J. Dupuy and D. Vignes (eds.) *A Handbook on the New Law of the Sea* (Dordrecht: M.Nijhoff, 1991), p.1253

that an extended test of weapons, such as launching to torpedoes extended test of weapons, such as launching torpedoes and firing artillery or the covert laying of arms within an EEZ, are to be included among the uses associated with the operation of ships, aircraft and submarine cable.[477] Churchill and Lowe point out that it is not clear whether such activities as naval exercises involving weapons testing are included within the freedom of navigation and overflight and other internationally lawful uses of the sea related to them.[478] Lowe has also contended that there are plausible arguments for the reference of a dispute over the legality of naval maneuvers and exercise to Article 59 on residual rights.[479]

It must be concluded from the foregoing that State practice and commentators are divided on whether military maneuvers, and particularly those involving use of weapons, in the EEZ of a foreign State without its consent are internationally lawful uses of the sea. Commentators tend to argue that naval exercises of reasonable scale without the use of weapons are permitted.

5.2 Dispute Settlement on Military Activities under UNCLOS

Klein argues that the want of precision as to what military activities are permissible on the high seas and in the EEZ may give the third-party dispute settlement a role to play.[480] However, the highly political nature of naval activities on the high seas has typically meant that the role of courts and tribunals has been marginal in the legal regulation of military uses of the ocean.[481] Article 298 1 (b) provides the States the right to exclude 'military activities' from compulsory dispute settlement. The minimal substantive regulations along with an optional exclusion covering military activities on the high seas and in the EEZ are indicative of a preference on the part of States not to use compulsory third-party procedures for resolving disputes about military activities. The optional exclusion is beneficial to naval powers not wishing to have their military activities questioned through an international process. The exclusion satisfies "the preoccupation of the naval advisors…that activities by naval vessels should not be subject to judicial proceedings in which some military secrets

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[477] T. Scovazzi, "The Evolution of International Law of the Sea: New Issues, New Challenges", *Hague Academy Recueil des Cours*, vol. 286, 2000, p.167

[478] R. Chruchill, A.V. Lowe, *The Law of the Sea,* 3rd edition (Manchester University Press, 1999), p.427, Hayashi, p.129

[479] A.V. Lowe, "Rejoinder , Marine Policy", vol.11, 1987, p.250

[480] Klein, 2005, p. 290

[481] The constrained judgments in the Nuclear Tests cases are exemplary in this regard. See Nuclear Tests (Australia v. France; New Zealand v. France), *1974 ICJ* 253, 457 (December 20); see Klein, 2005, p.291

might have to be disclosed."[482] An optional exclusion is also beneficial to coastal States that could use the exception to prevent review of any of their interference with naval exercises in their EEZ.

Article 246 of Part XIII provides that disputes concerning the interpretation or application of the Convention with regard to marine scientific research shall be settled in accordance with Part XV, Section 2 and 3.[483] Instead, disputes concerning marine scientific research were subject to compulsory dispute settlement entailing binding decisions "when the coastal state had allegedly acted in contravention of specified international standards or criteria for the conduct of marine scientific research which were applicable to the coastal state".[484] This article was subsequently reformulated to provide that the compulsory dispute settlement procedure applies, with two exceptions, to the interpretation and application of the provisions relating to marine scientific research.[485]

As it stands, Article 297 more accurately reflects the compromise achieved in the substantive provisions. The majority of marine scientific research disputes will be referred to mandatory dispute settlement as a means of controlling coastal State authority over this inclusive use of the oceans. The potential utility of compulsory proceedings entailing a binding decision for the majority of marine scientific research disputes may be lessened because of the minor nature of the violation versus the costs of international judicial or arbitral proceedings and because of the scope of the exceptions to mandatory jurisdiction. Compulsory dispute settlement entailing binding decisions is not available with respect to research in the coastal State's EEZ or continental shelf in accordance with Article 246 or for decisions by a coastal State to order suspension or cessation of a research project. The scope of these exceptions has a considerable impact on the conduct of marine scientific research in a large expanse of water and favors the coastal States over those States and international organizations conducting marine research. The substantive rules that would require the coastal State to grant consent in normal circumstances for marine scientific research projects in the EEZ delayed or denied unreasonably provide the researching State with some leverage

[482] United Nations Convention on the Law of the Sea 1982: A Commentary, 5, at p. 135l, see also Noyes, "Compulsory Adjudication", at p.685 (noting that an exception was required for military activities because naval advisers were concerned about exposing military secrets in the course of judicial proceedings); see also, Klein, 2005, p.291

[483] Although Article 246 does not refer specifically to Section 1of Part XV, Article 186 incorporates recourse to Section 1 for the applicability of the procedures available in Section 2 of Part XV; see also Klein. 2005, p.212

[484] See Gurdip Singh, *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms* (1985) p.135

[485] UNCLOS, Art. 197 (2)(a)

over the coastal State.[486] However, this leverage is effectively undermined in the dispute settlement provisions of Part XV.

A court or a tribunal could set out the appropriate legal standards based on UNCLOS provisions and specify what conduct is or is not acceptable under the convention. In addition, the inclusion of military activities within the scope of mandatory jurisdiction is also necessary as a consequence of the doctrine of sovereign immunity of warships.[487] Articles 95 and 96 provide for the complete immunity of warships as well as ships owned or operated by a State and used only on government non-commercial service on the high seas. Immunity is also accorded to these vessels in the territorial sea of a State, subject to certain rules relating to innocent passage.[488] Any claims brought before the national courts of States, other than the relevant flag State, can be excluded from national jurisdiction on the basis of sovereign immunity. Reference to sovereign immunity was not included in Article 298, as it was considered inappropriate — and would be anomalous — for international courts and tribunals that hear disputes between sovereign States.[489] The continued exemption of military vessels or aircraft from national jurisdiction was a strong reason not to exclude their activities entirely from the scope of international jurisdiction.[490]

When considering the range of difficulties that researching States and organizations may face in their research efforts, it may well seem that mandatory dispute settlement has a vital role to play in ensuring the proper interpretation and application of the substantive rules of UNCLOS. Compulsory dispute settlement could be used to keep in check coastal State power over research activities to maintain a consistent international standard. Birnie argues that third-party interpretation is also necessary since many of the terms used are either ambiguous or opaque as a result of the political compromises necessary to achieve consensus.[491] The existence of possible third-party intervention may persuade coastal State to adhere to the standards in the Convention. Certainly without external avenues of review, coastal States have less impetus to adhere to the conditions of the Convention when violations may enable them to acquire additional knowledge from the research projects.

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[486] Roach, p. 787, Klein p.213

[487] See Mark W. Janis, "Dispute Settlement in the Law of the Sea Convention: The Military activities Exception", *4 Ocean Development and International Law*. 51 (1977,)p.56; Klein, p.290

[488] See UNCLOS, art. 32; Klein, 2005, p.290

[489] Klein, 2005, p. 291.

[490] Gurdip Singh, *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms* (1985), p.168; and *United Nations Convention on the Law of the Sea 1982: A Commentary*, 5, p.136 (referring to the views of the New Zealand delegate); See also Klein, p.291.

[491] Patricia Birnie, " Law of the Sea and Ocean Resource : Implications for Marine Scientific Research", *10 International Marine & Coastal Law* (1995), p.248

5.3 Clash of Freedom of Navigation and Coastal States' Interests in the SCS

U.S. has strong interest in and is actively involved in East Asia — specifically in the SCS dispute. Skeptics have traditionally asked an important question: Why should the United States care about a dispute among Asian countries in a region so far from the United States when there are far more pressing U.S. foreign policy considerations? There are many elements to address this concern, one of which is freedom of navigation. The United States' Freedom of Navigation Program challenges territorial claims on the world's oceans and airspace that are considered excessive by the United States, using diplomatic protests and/or by interference.[492]

The United States government has repeatedly defined freedom of international navigation as one key aspect of its security concerns. For the U.S. government, such freedom also includes that for the warships of the U.S. navy. Given the history of U.S. military involvement in East Asia, U.S. demands for innocent passage (i.e. without having to inform the governments of countries immediately bordering the ocean) of its warships is usually used as an assurance that none of the Asian governments can have the right to demand it.[493] As such, the geography of the SCS area means that its legal ownership and the right to use it are open for contention not just for the countries that directly border the water areas alone. Outside powers such as the U.S. and Japanese governments are equally important actors in the dispute due to their identification of possible threats to commercial and military interests. China is the dominant power in Southeast Asia and has maintained its claim to the historical water in the SCS and sovereignty of the Spratly Islands contained therein. U.S. therefore holds that China's excessive maritime claims in the SCS are adversely affecting freedom of navigation regional stability in Southeast Asia.[494] The following case shows the trend of clash of interest of maritime power and coastal States regarding the freedom of navigation.

On Sunday 1 April 2001, a United States Navy EP-3 surveillance plane collided with a

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[492] For U.S. protest on excessive claims over maritime space, read Roach, Ashley, , J., and Smith, Robert W., *United States Responses to Excessive Maritime Claims* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1994)

[493] Daojiong Zha, "Writing Security in the SCS", working paper at International Studies Association Conference, Los Angeles, California, March 2000, at www.ciaonet.org/isa/zhd01/ (accessed on February 20, 2007)

[494] Brent E. Smith, "China's maritime Claims in the SCS: The Threat to Regional Stability and U.S.", at http://www.stormingmedia.us/73/7369/A736983.html (accessed on February 26 2007).

Chinese F-8 fighter jet in the airspace above China's claimed 200 mile Exclusive EEZ. The accident resurrected arguments concerning, *inter alia*, state interpretation of article 58 of UNCLOS, and more specifically, whether the distinct legal regime created by the establishment of an EEZ has imposed limitations on 'pre-existing rights' on the high seas.

It is almost impossible to draw any conclusion from the widely differing accounts of the collision.[495] Both states alleged that the accident resulted from the dangerous maneuvers of the other states pilot. The only fact on which both states agreed was that the collision occurred over the SCS, approximately 70 nautical miles from Hainan, in the airspace over China's EEZ. Whilst US have officially complained to China, prior to this collision, about the 'aggressive actions' of Chinese jets when intercepting US surveillance planes,[496] the Chinese have also complained to the US about the presence, and increased frequency, of US surveillance flights over China's EEZ.[497]

Chinese view: First, the US military surveillance plane violated the principle of 'free over-flight' according to international law,[498] because the collision occurred in airspace near China's coastal waters, and with China's EEZ. According to article 58 (1) of UNCLOS all states enjoy freedom of over-flight within this zone. However, at the same time, article 58 (3) stipulates that 'States shall have due regard to the rights and duties of the coastal States'. The Chinese view was that the flight 'posed a threat to the national security of China', and that such flights went far beyond the scope of 'over-flight' and abused the principle of over-flight freedom.[499] Secondly, it was illegal for the US military plane to enter China's territorial airspace and land at a Chinese airport without approval. The US plane's action constituted an infringement upon China's sovereignty and territorial space. Thirdly, according to Chinese domestic laws and international laws, China had the right to investigate the root cause of the incident, and the plane itself. Due to the complexity of this enquiry, the investigation could take as long as necessary.[500]

US view: First, the US was engaging in traditional military activities over international seas, which are legally permissible, and was conducted with due regard to China's rights and

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[495] Eric Donnelly, "The United States–China EP-3 incident: legality and realpolitik", *Journal of Conflict and Security Law* 2004 9(1):25-42; doi:10.1093/jcsl/9.1.25 (http://jcsl.oxfordjournals.org/cgi/content/abstract/9/1/25)

[496] "Who Caused the Crash?", BBC News, at www.news.bbc.co.uk/hi/english/world/asia~pacific/>

[497] See D. Rumsfeld, "Transcript: Defence Department April 13 Special Briefing", United States Embassy, available at http://usembassy.state.gov/toyko/wwwhse0115.html.

[498] See Z.Bangzao, "Spokesman Zhu Bangzao Gives Full Account of the Collision Between US: Chinese Military Planes", Embassy of the Peoples Republic of China in the US, available at http://www.china-embassy.org/eng/9585.html

[499] Ibid.

[500] Ibid.

duties as a coastal state. Secondly, the EP-3 made an emergency landing following the collision and was the sovereign property of the US. It should therefore not have been boarded or examined in any way. The plane should have been returned to the US immediately. Thirdly, maritime law dating back hundreds of years had established a precedent of 'safe harbor' for military vessels and their crews, in distress. Therefore, entering into Chinese airspace was not illegal,[501] and the crew should have been returned to the US without any delay.

The validity of the legal arguments forwarded by both the US and China rest in part on their different interpretations of article 58 UNCLOS. Article 58 provides that within the EEZ:

> *Article 58*
> *Rights and duties of other States in the exclusive economic zone*
> *1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.*
> *2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.*
> *3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.*

The phrase 'other internationally lawful uses', and the incorporation of High Sea 'rights' contained in articles 88-115, were considered by the major maritime powers, including the US, to safeguard 'pre-existing rights' on the High Seas with regard to military operations involving ships and aircraft within the EEZ.[502]

However, the 'freedoms referred to in Article 87 which regulate the freedom of the high seas, are subject to the restriction of 'being compatible with other parts of this convention'.[503] Thus article 87 rights of 'freedom of over-flight' and 'freedom of navigation' are subject to 'being compatible' with article 88 which limits the use of the high seas to 'peaceful purposes', and article 301 which reads:

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501 Indira A.R. Lakshmanan, "Some see Double Standard in China Flap", *Boston Globe* 18 April 2001, at http://www.fas.org/sgp/news/2001/04/bg041801.html
502 Eric Donnelly, "The United States–China EP-3 incident: legality and realpolitik", *Journal of Conflict and Security Law* 2004 9(1):25-42; doi:10.1093/jcsl/9.1.25 (http://jcsl.oxfordjournals.org/cgi/content/abstract/9/1/25)
503 See O. Vicuna, *The Exclusive Economic Zone* (1989), p.110

Article 310 Peaceful uses of the seas

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

The issue is further complicated by the lack of definitions as to what constitutes 'peaceful purposes.'[504] The Chinese argument is that US surveillance activities are not considered as a peaceful purpose. Such activities do not accord 'due regard to the rights and duties of the coastal State' in that they threaten the security of China. Their argument is supported, in part, by declarations made by a number of states to the effect that provisions of the Convention do not authorize other states to conduct military exercises or maneuvers with the EEZ, without the consent of the coastal state.[505] Churchill and Lowe have stated that the effect of these declarations, if adopted, would be to 'close off enormous areas of the seas for such routine military activities'.[506]

Article 58 (3) of LOS Convention provides that in exercising their rights and performing their duties in the EEZ, "states shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State" in accordance with the convention provisions and other rules of international law, in so far as they are not incompatible with Part V (on the EEZ). In turn, under Article 56 (2), the coastal state is required to have due regard to the rights and duties of other states in exercising its rights and performing its duties in the EEZ.

This attempt to balance rights and interests of states is restated in the 1982 UNLCOS Article 59.[507]

"In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interest of the costal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole".

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504 For academic opinions see W. Tetley, "The Chinese/US Incident at Hainan – A Confrontation of Super Powers and Civilizations", pp.1-3, available at http://tetley.law.mcgill.ca/spy.htm>; R. Wolfrum, "Military Activities on the High Seas: What Are the Impacts of the Un Convention on the Law of the Sea?", in M. Schmitt and L. Green (eds.), *The Law of Armed Conflict: Into the Next Millennium: US Naval War College*, *International Law Studies*, vol.71 (1998), ch.xix.

505 Declarations to this effect have been made by Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan and Uruguay, but wee declarations of Germany, Italy, the Netherlands, and the United Kingdom, available at http://www.un.org/Depts/los/convention-agreeemtns/convention-declarations.htm

506 See R. Churchill and A. Lowe, *The law of the sea* (Manchester: Manchester University Press, 1988), p.427

507 Valencia and Akimoto, "Guidelines for Navigation and Overflight in the Exclusive Economic zone", p.705

But the convention gives no clear guidance either as to the meaning of 'due regard' or what constitutes 'equity', other than 'relevant circumstances', and the respective importance of the interests involved to the parties as well as the international community as a whole. Thus, there are no specific criteria except, perhaps, that the activity should not interfere with the 'rights and interest' of the states concerned. There is no agreement on what constitutes such rights and interests, nor is there agreement as to whether the interference must be unreasonable or not, and whether it could be or must be actual or potential.

The different views have already resulted in several incidents in the EEZs of the Asia-Pacific region. Major incidents include the March 2001 confrontation between the US Navy survey vessel Bowditch and a Chinese frigate in China's EEZ; the April 2001 collision between a US EP3 surveillance plane and a Chinese jet fighter over China's EEZ; the December 2001 Japanese Coast Guard pursuit of and firing at a North Korean spy vessel in its and China's EEZ; and Vietnam's protest against Chinese live fire exercises in Vietnam's claimed EEZ. The most recent case with similar nature is the clash on 8 March 2009 between Chinese vessels and a U.S. ocean surveillance ship in China's EEZ, which is similar area to the 2001 EP3 event.

During the workshop on "EEZ: challenges and issues",[508] there was agreement that the exercise of the freedom of navigation and over flight in and above EEZs should not interfere with or undermine the rights or ability of the coastal State to protect and manage its own resources and its environment.[509] There was also agreement that it should not be for the purpose of marine scientific research without the consent of the coastal state. However, there is still disagreement regarding the different interpretations of the relevant Law of the Sea provisions, the means of attempting to resolve the disagreements, and even whether or not there is a need to resolve such disagreements.

The disagreements relating to the interpretations of 1982 UNCLOS provisions generally relate to the exact presumed meaning of the terms in the convention, as well as the meaning of specific articles. For example, there are specific differences with regard to the meaning of 'freedom' of navigation and overflight in and above the EEZ, i.e., whether such freedoms can be limited by certain regulations — national, regional or international — or whether such freedoms are absolute.

508 The workshop was held in Honolulu in December 2003 at the East-West Center (EWC) sponsored by the Institute for Ocean Policy of the Ship and Ocean Foundation (SOF) and supported by a grant from the Nippon Foundation.

509 Valencia and Akimoto, "Guidelines for Navigation and Overflight in the Exclusive Economic zone", p.705

There are also different interpretations regarding the precise meaning of the convention's phrase allowing 'other internationally lawful uses' of the sea in the EEZ. For example, some argue that it clearly does not include warfare in the EEZ of a non-belligerent, while others would insist that under certain circumstances such as the right of self defense, such activities are allowed. The interpretation of this phrase will in turn be affected by the interpretation of such terms as 'due regard', non-abuse of rights, 'peaceful use', 'peaceful purpose', and the obligation not to threaten or use force against other countries. In this context, questions arise as to whether some military and intelligence gathering activities are a lawful exercise of the freedom of navigation and overflight, whether they are a non-abuse of rights, whether they pay 'due regard' to the interests of the coastal countries, and whether they are a threat to peace and security as well as the interests of the coastal countries.

What is clear is that it is no longer accurate to say that the freedom of navigation exists in the EEZs of other countries to the same extent that it exists on the high seas.[510] Coastal states have acted to control such navigation to protect their coastal living resources, to guard against marine pollution, and to protect the security of coastal populations, and it can be anticipated that such assertions of coastal state control will continue. In many cases, these claims have been approved by the IMO and by other regional and global organizations. As Van Dyke claims, the balance between navigation and other national interests continues to develop, and navigational freedoms appear to be disappearing during this evolutionary process,[511] at least in the EEZ.

The author had interviewed a few scholars and government officials from China and USA on the question whether the third party forum of UNCLOS plays an important role in addressing the clash of freedom of navigation and coastal states' interests. Chinese scholar on the SCS Wu Shicun denies the role of third party mechanism would help solve the Sino-US conflict in China's EEZ, such as the cases discussed above.[512] Likewise, Ramses Amer points out that major powers, in particular the US do not want any third party to interfere its security policies. The US wants the freedom to go everywhere with its military fleet while China is very keen to uphold its claims in the SCS.[513] Wu Jilu, an official from the State Ocean Administration of China says that, China insists that any military activities

510 J.M. Van Dyke, "The disappearing right to navigational freedom in the exclusive economic zone", *Marine Policy*, Volume 29, Issue 2, March 2005, p.121

511 Ibid.

512 Wu Shicun is the president of the National Institute for the South China Sea Studies. He is one well-known Chinese expert on the South China Sea.

513 Dr. Ramses Amer is an associate professor and coordinator of the Southeast Asia Programe (AEAP) at Uppsala University.

relating to military investigation, military survey, and military information gathering fall into the category of ocean scientific research which requires prior persimmon from the coastal states. However, he also points out that China should also consider the necessity in the future of conducting surveys in foreign states' EEZ in the future. He suggests that the government and armed forces from China and USA should learn from the US-Russia Agreement and enhance exchange and cooperation. Consequently, incidents do occur between the two actors. John Moore, likewise also points out the fact the China is growing into a maritime power in the future and will encounter the same dilemma as USA, such as how to balance freedom of navigational and its interest as a coastal state.[514]

In 2009, China and US senior military leaders exchanged visits. In August 2009, PLA Chief of General Staff Chen Bingde met with the visiting U.S. Army chief of staff General George Casey and exchanged views on bilateral military relations. Chen pointed out that the United States should respect China's core interests and properly handle differences and sensitive issues to create conditions for deepening military cooperation. Casey noted that the strong ties between U.S.-China militaries were not only in the fundamental interests of the two countries, but also conducive to the regional and world peace and security. The U.S. side hopes to make joint efforts with the Chinese side to keep on pushing forward the development of the bilateral military ties.[515] In October, General Xu Caihou, vice chairman of the Central Military Commission (CMC) of PRC paid an official visit to the U.S. and met with Robert Gates, U.S. Secretary of Defense. Xu Caihou put forward specific suggestions of the Chinese side on advancing the Sino-American military relations and exchange views with U.S. Secretary of Defense Robert Gates on strengthening the exchanges and co-operation between the two militaries. The Chinese side expects that this visit will effectively boost the development of the relations between the two militaries. While hopeful of the prospects for China-U.S. military ties, Xu also expressed China's concerns about several major obstacles that may harm the relationship. For instance, as Xu pointed out, U.S. military aircraft and ships' intrusions into China's maritime exclusive economic zone should

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514 Professor John Moore is the Walter L. Brown Professor of Law at the University of Virginia School of Law, Director of the Center for Oceans Law and Policy, and Director of the Center for National Security Law.
515 "PLA Chief of General Staff Chen Bingde meets U.S. Army chief of staff", China Military News cited from Chinamil.com, at http://www.china-defense-mashup.com/?p=3846

be terminated. China hopes the U.S. military can observe UNCLOS and Chinese maritime legislation, and stop such acts which would threaten China's security and interests.[516]

6. Marine Environnent

6.1 Marine Environnent Regime Under UNCLOS

UNCLOS sets out a regime for environmental protection and preservation that applies throughout the marine environment and covers all sources of pollution. Part XII of UNCLOS consists of articles dealing with general provisions[517], global and regional cooperation[518] technical assistance,[519] monitoring and environmental assessment,[520] international rules, and national legislation to prevent, reduce and control pollution of the marine environment from various sources,[521] and enforcement of those provisions (including safeguards). The range of environmental issues covered in UNCLOS led Charney to proclaim, "the Convention probably contains the most comprehensive and progressive international environmental law of any modern international agreement".[522] The provisions on the protection and preservation of the marine environment have been described as "the most complex regime" regulating the coastal State's rights in the EEZ.[523]

Part XII reflects the tension between the protection of coastal State interests and the protection of the freedom of navigation that is prevalent throughout the Convention. Another characteristic of the Convention found in Part XII is the inclusion of a series of obligations ranging in determinacy — from soft law to duties of cooperation to rules with more definite normative content. Further, the recognition of the special interests of developing States is reaffirmed through flexible standards concomitant with State resources as well as specific assistance in defined areas. Finally, in crafting this system, certain reliance was placed on the prospect of diplomatic conferences that could later elaborate on the general obligations included in UNCLOS.[524]

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516 "Xu Caihou's visit to promote Sino-U.S. military relationship", at http://eng.mod.gov.cn/SpecialReports/2009-10/28/content_4098913.htm
517 UNCLOS, arts. 192-196
518 UNCLOS, arts. 197-201
519 UNCLOS, arts. 202 and 203
520 UNCLOS, arts. 204-206
521 UNCLOS, arts 207-212
522 Junathan I. Charney, "The Marine Environment and the 1982 United Nations Convention on the law of the Sea", 28 *International Law*, pp.879,882 (1994), Klein, p.145
523 Orrego Vicuna, *Exclusive Economic zone Regime*, p.84; Klein, 2005,p.145
524 Junathan I. Charney, "The Marine Environment and the 1982 United Nations Convention on the law of the Sea", 28 *International Law*(1994), p.884; Klein, p.146

6.2 Marine Environment-Related Disputes Settlement under UNCLOS

Article 297 of UNCLOS refers to limitations on the applicability of the compulsory dispute settlement mechanism for a certain category of disputes related to the protection and preservation of the marine environment with regard to the exercise of a coastal State's sovereign rights or jurisdiction.[525] The language in the chapeau to Article 297 (1) indicates that these limitations apply only to the EEZ and the continental shelf, rather than including the territorial sea and high seas areas as well. In maritime spaces where the coastal State has sovereign rights or jurisdiction, disputes may be referred to mandatory and binding procedures:

> *"when it is alleged that a coastal state has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention."*[526]

In other words, the applicability of Section 2 of Part XV to marine environment disputes arising in the EEZ and on the continental shelf depends on a demonstration that certain international standards exist and that these standards can be applied to the coastal State.

Dispute settlement procedures available for controversies arising over the interpretation and application of the provisions on the protection and preservation of the marine environment perform an important lawmaking function.[527] Charney is very positive about the value of mandatory dispute settlement for conflicts over the environment:

> *"The LOS Conventions' articles on dispute settlement are the strongest of any environmental treaty to date. It is the only international agreement to establish a broad compulsory dispute settlement system for environmental issues…The compulsory dispute settlement system is the best guarantee possible that states parties will fulfill their LOS Convention-based obligations with regard to the environment. Not only will states that are parties to those procedures be compelled to do so, but states parties will be encouraged to abide by their LOS Convention-base obligations since failure to perform those obligations exposes them to compulsory dispute settlement procedures."*[528]

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[525] Klein, 2005, p.146
[526] UNCLOS, art. 197 (1)(c)
[527] Klein, 2005, p. 162
[528] Jonathan Charney, "The Marine Environment and the 1982 United Nations Convention on the Law of the Sea," 28 *International Law* (1994), at pp.894-95. See also Oxman, "Complementary Agreements & Compulsory Jurisdiction" 95 *American Journal of Internal law*, (2001), at p.287 (stating that "compulsory jurisdiction is central both to realizing and to accommodating" the protection of the marine environment); Klein, p.163

The importance of compulsory dispute settlement, however, is not so much the 'guarantee' that States will fulfill their obligations under UNCLOS with respect to the protection and preservation of the marine environment. Rather, it is the case that without the availability of third-party procedures, many of the environmental obligations imposed on States are far from determinate and to this extent lack clarity of content.[529] Part XII contains a number of soft law obligations, or permits flexible standards to be applied and so the availability of the dispute settlement proceedings is an essential complement to the regime in reinforcing the importance of the soft law or setting relevant standards. Any international process under Part XV of UNCLOS must ultimately take into account the policies at stake in the Convention in order to balance challenged rights, such as the freedom of navigation, with the protection and preservation of the marine environment.

Through the dispute settlement procedures, UNCLOS could also collaterally strengthen the obligations found in other international environmental treaties. The norms set out in other international treaties must be applied through Part XV proceedings in light of the references to international standards and rules as the benchmarks for conduct in accordance with UNCLOS. A potential side-effect from this system is that States parties to these other environmental treaties could use the compulsory proceedings under the Convention as a means to seek reparations for violations of these other treaties through reliance on the broad provisions in UNCLOS. Consideration would have to be given to the interplay between UNCLOS and other international conventions dealing with specific questions: can Part XV serve as a dispute settlement mechanism for these treaties as well? Such a tactic could well be viewed as an abuse of process — but how clearly could the motives of the applicant State be discerned before a court or tribunal constituted under UNCLOS? The indication from Southern Bluefin Tuna case is that these cases must be resolved under the dispute settlement clauses of those other treaties if the requirements of Article 281 are met.[530] Challenging violations of general environmental law obligations in UNCLOS would thus be limited in favor of non-binding, non-compulsory dispute settlement for specific provisions in other multilateral treaties. Arguably, however, the express reference to international rules and standards in Article 297 (1)(c)creates a different

[529] Klein, 2005, p. 163

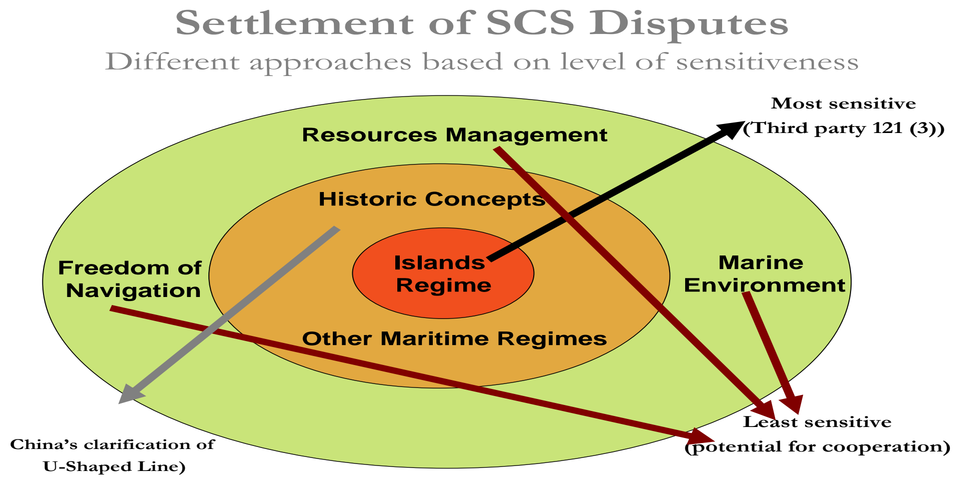
[530] Australia and New Zealand filed their Requests for provisional measures with the Tribunal on 30 July 1999. The Requests are for the prescription of provisional measures (an interim injunction) by the Tribunal that Japan immediately ceases the unilateral experimental fishing of Southern Bluefin Tuna, which commenced at the beginning of June 1999. For more details see ITLOS website, http://www.itlos.org/start2_en.html

situation to that existing in Southern Bluefin Tuna. A court or tribunal must go beyond UNCLOS in its decision-making on the international rules and standards relevant to the protection and preservation of the marine environment. On this basis, the existence of other international agreements and their relevance to any given dispute would not necessarily deprive the court or tribunal of mandatory jurisdiction. The specific grant of authority to refer to external sources should promote dispute settlement under the Convention's procedures.

6.3 The Current Status of the SCS Marine Environment

The SCS is not just a potential scene of military conflict; it is also a rich marine environment. The sea produces fish, seagrass and other living and non-living resources for one of the most populous regions in the world. The total population of the entire Asia Pacific region is close to 2 billion people, and embraces seven of the world's 14 largest cities. In the Southeast Asian region alone more than 70 % of the population live in coastal areas, and their dependency on the sea for resources and a means of transportation is rather high. The SCS — the busiest shipping lane and surrounded by some of the most rapidly industrializing countries in the world — is becoming a sink for regional environmental pollution rapid economic growth, frequently coupled with depletion of natural resources, intensifies conflicts like those in the SCS. Countries bordering the SCS have usually been more concerned with maximizing national economic growth and ensuring adequate energy supplies than in preserving their regional maritime environment. The environmental security aspect of this area is therefore pertinent. In chapter 5 on "the external regimes in the SCS", the author will further elaborate the environmental cooperation in the SCS.

Figure II.2 Settlement of SCS Dispute – Legal Perspective



7. Summary

This chapter approaches the LOS Convention as an international regime and seeks to assess its effectiveness as a mechanism to address the disputes in the SCS. The SCS dispute is complex and the settlement is challenging. Can the disputes settlement regime under Part XV of UNCLOS play a critical role in this game? Figure II.2 presents the three categories of disputes analyzed in this chapter and the possible legal solution. Islands Regime in Section 2 is the core issue amongst the various disputes in the SCS. It involves three elements in essence, the sovereignty of the islands (or features since whether many of the so-called islands meet the requirement of Article 121 still needs to be determined.), zones generated by these features, and the maritime delimitation affected by the existence of these features. All these three main issues related to island regime involve multiple parties including China, Taiwan, Vietnam, the Philippines, Malaysia, Indonesia and Brunei. The competition over these features' sovereignty seems to be quiet for a while since the parties signed the "Declaration on the Conduct of Parties in The SCS" in 2002. The Philippine Baseline Bill in February 2009 stirs a new round of tension among these parties. It seems very unlikely that the parties involved would resort to the third-party forum for the sovereignty issues since article 298 1 (a) (1) excludes dispute concerning sovereignty from the compulsory procedures, and in the case of the SCS, China has made a declaration according to this provision. The dilemma then exists. Disputes regarding the zone that can be generated from the features and maritime delimitation could not be solved before the sovereignty is addressed. However, Article 121 (3) of UNCLOS does give the court or tribunal a role to play in this whole picture. A State may try to raise the specific question of whether a particular feature is a rock or an island under Article 121 without asking a tribunal or court to be involved in the actual maritime delimitation. Such a decision could then be used by a State in influencing negotiations over the boundary. Neither article 297 nor 298 excludes the disputes related to the definition and determination of a feature to be an island or a rock from the compulsory dispute settlement mechanism.

Section 3 touches upon another critical conflicting point of the SCS dispute—the historic concepts played by China and Taiwan, by Vietnam to a certain extent contradicts with the new regimes set by the LOS Convention, e.g. EEZ on which the Philippines,

Malaysia, Indonesia and Brunei base their claim. The possibility for the third-party forum to be engaged in this scenario seems pale. Article 298 1 (a) (i) excludes historic bays or titles from compulsory procedures. The U-shaped Line map issued by China is a strong evidence for China; however, China needs to address its formal position and clarification of this map.

Sections 4 to 6 include all other issues in the SCS into the same basket. The philosophy behind this is these issues, namely resources management, freedom of navigation and environmental protection, though playing a key role in the stage, are less sensitive than issues discussed in section 2 and 3. By the same token, these areas embody the most promising prospects for cooperation involving all the disputant states, rather than through a third-party forum. This is not to say that, the compulsory procedure is not applicable in these fields. In fact, by reading closely the provisions of the LOS Convention, it is fair to claim that the court or tribunal has a role to play in many issues, such as prompt release, environment. The political culture in East Asia sets an impediment for the states to resort the disputes to a third party forum. With the enhancing economic interests and ties between China and Southeast Asia, cooperation is witnessed in such fields as maritime security, environmental protection, fishing and energy development in some certain area. The LOS Convention, rather as a compulsory channel to settle the disputes with soft features like those discussed in this section, sees itself more as a framework within which ocean governance seems to be an approach to address issues the SCS.

Through the discussion on the three groups of core issues in the SCS and the applicability of Part XV in these respective issues, one might conclude that although the LOS Convention may be perceived to have certain shortcomings, it is comparatively effective in the SCS in terms of its internal coherence. The next two chapters will review the state practices of the internal regime in the SCS and look at the external relationship of the LOS Convention regime and other regimes and institutions in the SCS, such as maritime security regime, joint development regime, marine environmental protection regime and 'ASEAN+China' regime.

Chapter III State Practice of UNCLOS in the SCS

State practice is a broad and flexible term. It includes such matters as legislation enacted by national parliaments, instances on the practical enforcement of such legislation by national authorities, decisions of domestic courts, statements made by Government ministers and their legal advisers as to what they believe international law on a particular question to be, diplomatic correspondence between States, protest by States against the acts of other States that are considered to infringe international law, and so on.[531] State practice may also be considered to have a broader sense and includes treaties and collective State actions within international organization.[532]

State practice in ocean affairs over more than 4 decades, which was accelerated by the UNCLOS III process, has complicated relations among Southeast Asian states considerably, and between China and the ASEAN states. The semi-enclosed SCS is now covered by actual claims by littoral states to EEZ or CS, creating or exacerbating disputes over boundaries and resources. The approaches which the SCS claimants take to jurisdictional and functional issues with which the law of the sea process is concerned — sovereignty, sovereign rights or jurisdiction in the TS, EEZ and CS; navigation rights in the TS and EEZ and through international straits; access to fisheries, petroleum exploration and exploitation, and marine research; pollution control; access to deep seabed resources — have implications both within and beyond the region for cooperation or conflict.

This chapter will address both the legal and political impact of State practice. There are various ways in which State practice could have a legal impact on the LOS Convention. First, it could be used as an element in interpreting the Convention. Secondly, State practice could give rise to a new rule of customary international law modifying or supplementing the Convention. Thirdly, inconsistent State practice may have various possible legal consequences not falling into either of the previous two categories.[533] In this chapter, the concept of international law, participation in the UNCLOS negotiation, maritime legislation, and dispute settlement practice of relevant States will be considered in turn in the practice

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[531] See further M. Akehurst, "Custom as a Source of International Law" (1974-75) 47 *BYIL*, pp. 1-53 at pp.1-11; M.E. Villiger, *Customary International Law and Treaties* 2nd (The Hague: Kluwer Law International, 1997), pp.16-28

[532] Robin R. Churchill, "the Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention", in Alex G. Oude Elferink (eds.) *Stability and Change in the Law of the Sea: The Role of The LOS Convention* (Leiden: Nartinus Nijhoff Publishers, 2004), p.92

[533] Ibid. p.93

of relevant States.

1. Attitude towards International Law

This section will explore the Asian attitude towards international law, in particular that of China and other Southeast States involved in the SCS dispute. It is important to examine how the concept of international law is interpreted in different political culture, and to what extent how international law is considered important in the practice of dispute settlement, if we wish to find the answer whether UNCLOS plays a positive role in SCS dispute resolution.

1.1 China

Modern international law has its origin in Christian civilization. It emerged from the natural law tradition of Western-Europe and was confined originally to those states. After the 19th century, China gradually accepted the norm of international law[534] and utilized it for protecting her national interests in international relations.[535] However, after the founding of the PRC, her attitude towards traditional international law has been changed.[536] In accordance with the orthodox Marxist point of view, international law is the instrument of bourgeois nations to perpetuate their favored position in the world.[537]

"All States attempt to utilize international law to cloak their foreign policy with the mantle of legality".[538] The PRC is not an exception. Writers in PRC spoke more frankly on this point than Western scholars.[539] The purpose of international law education in political science and law departments is to train incumbent political-legal cadres and teachers in the way of Marxism-Leninism.[540]

The PRC's foreign policy has been influenced by a mixture of traditional culture, political reality, nationalism, and Marxist-Leninism, among which nationalism has been the most important element.[541] It is the common feeling of the Chinese that their country was

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[534] Byron N. Tzou, "China and international law: the boundary disputes", at http://books.google.ca/books?id=BdONvHZaXc4C&dq=China+and+International+Law&printsec=frontcover&source=bl&ots=KfiWfFlXAq&sig=Ay3WKa-kC7ho1y1bt_i7E0fFqxQ&hl=en&ei=RjVvSsnSB4qusgPMr8TtAg&sa=X&oi=book_result&ct=result&resnum=8, at p.7

[535] Ibid.

[536] Ibid.

[537] Ibid.

[538] Text in White Paper 1, pp.98-107.

[539] See "China's note to India of July 10 1958", *White Paper* 1, pp.60-62.

[540] Peter Cheng, A *Chronology of the People's Republic of China: from October 1 1949* (Totowa: Rowman and Littlefield, 1972), p.34

[541] Byron N. Tzou, "China and international law: the boundary disputes", p.7

reduced to the status of a semi-colony after the middle of 19th century.[542] China was forced to cease and lease territories, to give up maritime customs, salt tax, and other economic and industrial privileges, to grant extraterritorial jurisdiction, and to accept foreign troops in her territory.[543] It is understandable that both the Republic and Communist China's basic foreign policy have been striving for political independence, territorial integrity, and equity with other nations.[544]

To achieve these goals, the PRC urged that the proletarian science of international law based on "the principles of peace and democracy" should be established to serve her national interests.[545] The PRC believes that international law possesses a strong character of class. Bourgeois international law serves the interests of bourgeoisie only. Thus, PRC as a socialist country should develop a new science of international law to server her own foreign policy, and refuse to accept certain norms of Western international law. The Chinese proposed a new definition of international law. They offered a new theory of territorial changes and put into practice while concluding the Sino-Burmese Boundary Treaty.[546] They suggested that nations in the process of forming states should be subjects of international law.

Although there are differences among socialist theoreticians, essentially contemporary international law is law for the historical period of coexistence. It consists of rules and norms created by various means of agreements among the clashing wills of socialist and capitalist states and has "a general democratic character".[547] Initially, in the 1950s, Chinese scholars also followed the Soviet definition. The Sino-Soviet split, the decline of the study of international law in China from the late 1950s until the late 1970s, and the absence of scholarly publication in the field from 1965 to 1979 meant that there was uncertainty concerning the position taken by Chinese scholars and that they had nothing to contribute during that period.[548]

PRC proposed the Five Principles of Peaceful Coexistence[549] as a basic border policy.

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542 Ibid.
543 Ibid.
544 Ibid.
545 Ibid.
546 Ibid, p.16
547 Ibid. p.29
548 Ibid. p.30
549 The Five Principles of Peaceful Coexistence were first put forth by Premier Zhou Enlai of China at the start of negotiations that took place in Beijing from December 1953 to April 1954 between the Delegation of the Chinese Government and the Delegation of the Indian Government on the relations between the two countries with respect to disputed territory. Later, the Five Principles were formally written into the preface to the "Agreement Between the People's Republic of China and the Republic of India on Trade and Intercourse Between the Tibet Region of China and India" concluded between the two sides. Since June 1954, the Five Principles were contained in the joint

Of the five principles, the principle of sovereignty ranks first for China. According to China, sovereignty can be interpreted as independence and includes the internal powers of independence (such as legislation, establishment of national system, etc) as well as its external powers (such as freedom to deal with international affairs, participation in international conferences and signing treaties).[550] Strict adherence to the principle of inviolability of sovereignty has become a distinctive feature of foreign policy of the PRC and is treated as the basis of international relations and the cornerstone of the whole system of international law.[551] Thus, China's external powers are inherent in its principle of sovereignty; therefore, China does not allow any violation or infringement of its sovereignty and independence, which is justifiable if we look back at the bitter Chinese history when the weak China was bullied by the Western powers in the 19th and the early 20th century. Sovereignty guarantees complete independence in political, economic and other areas. When a state is independent, it can exercise jurisdiction over its controlled territory as well as over its citizens. Based on these essential elements of sovereignty, aggression and intervention are illegal in China's view.[552] Chinese scholars are of the opinion that although some forms of intervention were allowed in traditional international law, such as intervention by rights and humanitarian intervention, modern international has prohibited all forms of intervention.[553] In practice, China strongly opposes any intervention from other countries. This is well illustrated by its stand in opposing any intervention from external players on the SCS dispute. And this is why China insists its position in the SCS which she regards as her jurisdictional waters.

Other than the above analysis on China's attitude toward international law, one should never neglect the very strong realist view of IR in China which has a strong influence on PRC security analysts. Realists are the great skeptics about international law. E. H. Carr argued that law within states was a reflection of the "policy and interests of the dominant group in a given state at a given period".[554] Consequently, law could not "be understood

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communique issued by Zhou Enlai and Prime Minister Jawaharlal Nehru of India, and have been adopted in many other international documents. As norms of relations between nations, they have become widely recognized and accepted throughout the region.

[550] Bai Guimei, "Basic Rights and Obligations of the State", in Wang Tieya (ed.) *International Law* (Beijing: Law Press, 1995) (in Chinese), pp.107-108

[551] J.A. Cohen, "Attitudes toward International Law", in J.A. Cohen (ed.), *Contemporary Chinese Law: Research Problems and Perspectives* (Cambridge: Harvard University Press, 1970), p.287

[552] Zou Keyuan, 2009, p.27

[553] Bai Guimei, "Basic Rights and Obligations of the State", in Wang Tieya (ed.) *International Law* (Beijing: Law Press, 1995) (in Chinese), p.113

[554] E. H. Carr, *The Twenty Years' crisis, 1919-1939: An Introduction to the Study of International Relations*, 2nd edn (London: Macmillan, 1946), p.176

independently of the political foundation on which it rests and of the political interests which it serves".[555] By implication law is fundamentally political and the content of international law is determined by dominant states and will not be upheld when it conflicts with their perceived political interests. It is deployed by these states for their ends, against subordinate or weaker entities and in this respect cannot be uncoupled from politics. International law is thus not enforceable independently of the will of powerful states, and cannot be regarded as binding.

And on the historical side, it is necessary to look closely at the very hierarchical thinking of world order and power structure, which have had, and will have influence on Chinese thinking on international law as it is emerging as global power. With China's involvement as mediator in many international issues in recent years, international law has become a more and more important tool and concept for Chinese government in dealing with many global problems. China faces a dilemma in the study of international law: on the one hand, it realizes that international law is developing with the globalization of the world community and new branches have emerged, such as law relating to human rights and environmental protection. On the other hand, it seems that China is not ready fully to respond to such new developments, particularly in the field of human rights law.[556]

1.2 ASEAN

In this subsection, I will focus on two countries of ASEAN—Vietnam and Indonesia which are two interesting representing countries of this regional organization. Indonesia has been playing a leadership role within ASEAN from ASEAN's formation and its functional operation, while Vietnam is a later comer after being excluded by other Southeast States due to its invasion of Cambodia. Another reason for selecting two countries is based on the nature of their claims in the SCS. Indonesia is the only one State, among other disputants, that did not occupy any islands or other features of the Spratly Islands. Vietnam, on the other hand, has occupied the majority of the Spratlys features, thus being considered as the major ASEAN competitor with China.

555 Ibid, p.179

556 Zou Keyuan, *China's Legal Reform: Towards the Rule of Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), p.248

1.2.1 Vietnam

Historically, the Vietnamese legal tradition is derived from that of the Chinese and French, to which since the Second Indochina War the DRV/SRV has added an emphasis on Soviet scholarship. In their approach to the issues addressed here, the Vietnamese use the ideologically-based socialist concept of a contemporary international law which developed as a result of fundament changes wrought by the 1917 Russian Revolution.[557]

The socialist concept of contemporary international law emphasizes state sovereignty, the equality of states and self-determination of peoples, all of which Vietnam particularly insists upon as both a socialist and newly-independent developing state. Further, it emphasizes the peaceful settlement of disputes, non-interference in internal affairs, and prohibition of the threat and use of force.[558] Vietnam shares the preference of other socialist and developing states for normative development of international law without compliance mechanism,[559] an approach which is reflected in the SRV's positions on law of the sea issues.

It is not surprising that as the unified country emerged to participate in the international community, the leaders of the SRV would perceive international law as fitting into the ideological framework of the three revolutionary currents.[560] As one Vietnamese analyst put it, contemporary international law was developing in an increasingly positive fashion under the impetus provided by the socialist states and, with the historic world-wide success of the national liberation movement, by the nonaligned states.[561]

In the Vietnamese law journal *Luat Hoc*, UNCLOS III was described as a struggle between aggressive, exploitative capitalist states, in particular the imperialist U.S., on one hand, and socialist and developing countries and the "progressive forces" in the world, on the other. The signing of the Convention was judged a "big victory", primarily for newly "independent and socialist countries."[562]

International law is perceived by the Vietnamese as having political and ideological

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[557] Luu Van Loi, "Le Sud Est asiatique: un point chaud du globe au cours de l'histoire de ces quarante dernieres annees," *Bulletin de droit* (Hanoi), no.1 (1985):21.

[558] Tunkin, "Contemporary International Law", pp.277-87

[559] Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), pp.114-115 and p.121

[560] Epsey Cooke Farrel, "The Solialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime.", PhD dissertation, p.46

[561] Luu Van Loi, "Le Sud Est asiatique", p.21

[562] Le Quoc Hung, "Luat Bien Va van De Bao Ve Moi Truong Bien" [The Law of the Sea and the Problem of the Protection of the Marine Environment], *Laut Hoc* (Hanoi), no. 3 (1979), pp.38-43 and p.51; and Pham Giang, "Cong Uoc Moic Ve Luat Bien Nam 1982", [The New 1982 Convention on the Law of the sea], *Luat Hoc*, no.1 (1983), pp.20-31

utility, as having public relations and symbolic value, and as providing a mechanism for the attainment of foreign policy goals.[563] At one level, they have used international law in a pragmatic fashion to further and support external policies. At another, the SRV has dealt in moralistic generalities aimed at embarrassing Western capitalist states and at helping to move the world in the desired direction. Because they feel so ambivalent toward the U.N., the Vietnamese use it as a forum for their views while continuing to excoriate the organization for not living up to the Charter's principles in general or toward the Indochinese states in particular.[564] In their writing, the Vietnamese have emphasized the broad principles contained in the U.N. Charter and expressed in certain U.N. resolutions as well as in the 1975 Helsinki final Act, regardless of whether they have political rather than legal effect, as providing a basis for future relationships and for the settlement of disputes in Southeast Asia[565] Because they perceive themselves as the victims of so many wars of aggression and as so in need of security, the Vietnamese have envisioned multiple political or legal acts within this framework, even though their significance may be only symbolic. In particular, the Vietnamese have advocated coexistence through bilateral nonaggression pacts or pacts between the Indochinese states and ASEAN. They blamed Chinese sabotage and "possible mistrust among some parties" for the unwillingness of other Southeast Asian states to sign nonaggression pacts which embodied mutual respect for independence, sovereignty, and territorial integrity and for noninterference in the internal affairs of the other.[566]

The Vietnamese, however, remain skeptical concerning the utility of international law in controlling aggression. Experience tells them, according to analyst Luu Van Loi, that the role of international law in interstate relations should not be overestimated.[567] In principle, any state which has accepted the principles and norms of contemporary international law must follow them. In practice, however, this is not always the case for all states or for any given state in a particular case. This statement would appear to include socialist states.

[563] Epsey Cooke Farrel, "The Solialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime.p.46

[564] In his initial address to the General Assembly following the SRV's admission to the U.N. in 1977, Foreign Minister Nguyen Duy Trinh made it clear that Vietnam viewed its U.N. role as advancing the three revolutionary currents. See United Nations General Assembly, *Official Records*, *32 d session* (1977), vo.1, pp.41-43. The Vietnamese attitude toward the U.N. has been expressed in numerous addresses at the auunal opening of the General Assembly, and elsewhere. See, for example, the 1983 address by Foreign Minister Nguyen Co Thach in United Nations General Assembly, *Official Records*, *38th session* (1983), vo.1, pp.404-409. See also Nhan Dan, on the fortieth anniversary of the signing of the U.N. Charter, in *FBIS-APA*, 28 June 1985, K5-K6.

[565] See Nhu Ngoc, "Some Essential Notions About Border Law", *Laut Hoc*, no.3 (1978), in *JPRS 72542*, 2 January 1979, pp.11-19; and Luu Van Loi, "Le Sud Est asiatique", pp.24-26

[566] Epsey Cooke Farrel, "The Solialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime, p.49

[567] "Le Sud Est asiatique", pp.26-27.

Ultimately, only the struggle of the forces of peace, democracy and progress among the peoples of the countries concerned can guarantee independence, pace and détente. Legal means are supported by the struggle of the people of Southeast Asia, who in turn are supported by progressive forces worldwide.

Because of their insistence upon state sovereignty and lack of experience in international affairs, the Vietnamese both have created some confusion concerning the status of obligations undertaken by the former South Vietnamese government and have been cautious in undertaking substantive international obligations through multilateral conventions and membership in intergovernmental organizations (IGOs). When acceding to the International Maritime Organization's (IMO) Convention in 1984, the SRV made a declaration that its consideration of activities under the organization would be based on state sovereignty.[568] The SRV's 1980 accession to the Seabed Treaty[569]contained a reservation that no treaty provision should be interpreted as contradicting the rights of coastal states with regard to their continental shelves, including the right to take security measures.[570]

The same as its Socialist counterpart — China, Vietnam is very conservative on the role of the third party compulsory dispute settlement mechanism under Part XV of UNCLOS, though it has not made declaration in accordance with article 298 of UNCLOS to exclude relevant disputes from compulsory procedures.

1.2.2 Indonesia

While International treaties functions as catalyst for legal and administrative development in Indonesia, Indonesia law, or Indonesia legal philosophy, has in one way or another also found its way to international fora and international documents. A number of very basic international principles of government, laid down in the preamble of the 1945 Constitution, are recognized in the Ten Principles (Dasasile) of the 1955 Asian-Africa Conference at Bandung.[571] They must be respected in the course of International Cooperation between (at least the Asian-African) States.

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568 United Nations Legislative Series (hereinafter U.N. Leg. Ser.), *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1988*, (ST/LEG./SER.E/7), 1989, p.539

569 "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof."

570 Stockholm International Peace Institute, *SIPRI Yearbook 1988: World Armaments and Disarmament* (Oxford: Oxford Univeristy Press, 1988), p.575.

571 Sunaryati Hatono, "the Interrelation between National Law and International Law in Indonesia", p.43 at http://books.google.ca/books?id=Er760ECzZiIC&pg=PA35&lpg=PA35&dq=international+law+in+Indonesia&source=bl&ots=Eyxef_NgWx&sig=VTMfkxw1uI4k0fkOZL0ub5lJo7Q&hl=en&ei=CppXSpr0BZC3lAfWlpzjBA&sa=X&oi=book_result&ct=result&resnum=10

While international law has very much influenced Indonesia's political history in the past, and continued influencing Indonesia's law after the Proclamation of Independence in 1945, it seems to have a particular effect on the development of new bureaucratic legislation and administration law, as well as international business law and the development of private international law in principle.[572] One feature of the effect of international law on Indonesian law is the fact that domestic law tends to be superseded by international law for instance in the case of the Investment Guaranteed Agreement vis-à-vis the Foreign Investment Law (no.1 of 1967), or the GATT will cause the regulations on export credits to be repealed.[573]

Although the interaction of national law and international law is still lopsided, it is hoped that in future a more balance situation may be achieved, when developing countries strengthen their position through the increase of South-South cooperation, and so gain not only self-esteem, but also respect from the 'old' industrialized countries, which will be more ready to accept the transformation of the old colonies from being merely an object of international law to becoming full-fledged subject of international law.[574]

As other ASIAN States, Indonesia has long adhered to the principle of non-interference and non-intervention as core values of the so-called ASEAN way of dealing with their matters. Some Asian countries accept compulsory jurisdiction of the ICJ, while others do not. However, despite their diverse legal and cultural backgrounds, these countries share identical viewpoint on the dispute settlement mechanisms under the LOS Convention.

2. Participation in the UNCLOS Process

All the States in the SCS, except for Cambodia and Thailand, are party to UNCLOS. The following table summarizes the status of relevant Convention in the SCS region.

572 Ibid.
573 Ibid.
574 Ibid.

a. United Nations Convention on the Law of the Sea, 1982

b. Convention on the Territorial Sea and the Contiguous Zone - 1958

c. Convention of the High Seas - 1958

d. Convention on the Continental Shelf - 1958

Table III.1 Status of relevant Convention in the SCS region

.	Brunei	Cambodia	China	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
a	5 November 1996	Signature	7 June 1996)	3 February 1986	14 October 1996	8 May 1984)	17 November 1994)	Signature	25 July 1994)
b		10-Sep-64			10-Sep-64			10-Aug-68	
c		3-Sep-62		3-Sep-62	3-Sep-62			1-Aug-68	
d		1-Jun-64		S	10-Jun-64				

Source: summary from DOALOS website, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea

2.1 China

China ratified UNCLOS on 15 May 1996. The adoption of the Convention was considered by the PRC as "a victory of the long-term struggle of the third world countries for equal maritime right and against the superpowers' maritime hegemony."[575] The PRC also viewed UNCLOS as part of the establishment of a new international economic order and an important step toward the establishment of the new legal order for the oceans.[576] This helps to explain why the PRC was one of the 119 states that signed UNCLOS the first day the Convention was opened for signature in 1982. However, two major reasons have been given to account for why it took more than 13 years for the PRC to ratify UNCLOS. First, the PRC was not certain about the financial obligations of ratification. Second, the PRC was not entirely satisfied with some of the provisions contained in UNCLOS, in particular, those dealing with innocent passage in the territorial sea (Articles 17–26).[577]

In the early 1990s it was also believed that UNCLOS would receive nearly universal acceptance once Part XI of UNCLOS was revised in accordance with the developed states' demands.[578]As a result of these developments, the PRC had to consider whether or not to ratify UNCLOS. In 1996, Li Zhaoxing, Vice Minister of Foreign Affairs, presented an explanation before the Standing Committee of the Eighth National People's Congress of the PRC why UNCLOS as a whole was consistent with the PRC position and therefore why it would be beneficial to the PRC if it were ratified. Li listed four principal reasons why the PRC should ratify UNCLOS. First, UNCLOS was conducive to preserving and protecting the PRC maritime rights and interests and to enlarging the PRC's maritime jurisdiction. Second, it was helpful to maintain the substantive status of the PRC as a "pioneer investor" in deep seabed resource development activities and thus fulfilling PRC's long-term interests. Third, it would benefit the PRC's participation in those institutions established under

[575] *People's Daily*, May 4, 1982, as quoted in Zhiguo Gao, "China and the LOS Convention," *Marine Policy*, 15 (3): 213 (1991)

[576](See Shen Weiliang and Xu Guangjian, "The Third UN Conference on the Law of the Sea and the Convention on the Law of the Sea," *Chinese Yearbook of International Law* (in Chinese), 433 (1983).)

[577] In addition to those provisions dealing with innocent passage in the territorial sea, reportedly the PRC was not satisfied with the definition of the continental shelf (Article 76), the delimitation of the EEZ and the continental shelf (Articles 74 and 83), and the deep seabed regime (Part XI). See generally Shen Weiliang and Xu Guangjian, "The Third UN Conference on the Law of the Sea and the Convention on the Law of the Sea,"; see also YANN-HUEI SONG and Zou Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States" , *Ocean Development & International Law,* 31:303–345, 2000 p.309

[578] Song and Zou, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", p.308

UNCLOS[579] and bring the PRC's role in global maritime affairs into full play. Finally, it was useful in shaping a good image for the PRC.[580]

On the other hand, Li also noted four concerns that required consideration.[581] First, there was a discrepancy between the PRC's domestic laws and regulations (namely, the 1958 Declaration,[582] the 1984 Law on Safety of Maritime Transportation,[583] and the 1992 Territorial Sea Law[584] and UNCLOS[585] concerning the right of innocent passage for warships.)[586] Second, the settlement of maritime boundary problems in the East China Sea between the PRC and Japan could be affected by the provisions in UNCLOS concerning the delimitation of the EEZ and the continental shelf. Third, the SCS issues needed to be taken into account. Although UNCLOS does not apply to the settlement of territorial disputes, its provisions concerning historic waters[587] could be used to strengthen PRC rights and interests in the waters adjacent to the Spratly Islands in the SCS. Finally, there were concerns about the dispute settlement processes of UNCLOS. However, Beijing was not required to accept the compulsory procedures provided in the Convention for settling disputes involving sovereign rights over the living resources within the EEZ, disputes involving boundary delimitation for the territorial sea, EEZ, and continental shelf; disputes involving historic bays; or disputes involving ownership over land or islands. On all these issues, Mr. Li recommended that further measures and actions be taken when and after the PRC ratified UNCLOS. On May 15, 1996, the Standing Committee of the Eighth National People's Congress of the People's Republic of China at its 19th session decided to ratify UNCLOS, and at the same time made a declaration.[588]

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579 The institutions referred to include the International Seabed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf.

580 The PRC official document is on file with the authors.

581 Article 11 of the 1984 Law, states that "foreign vessels for military uses shall not enter into the territorial sea of the People's Republic of China without the permission of the Government of the People's Republic of China." See also Office of Laws and Regulations, State Oceanic Administration, ed., *Collection of the Sea Laws and Regulations of the People's Republic of China* (Beijing: Ocean Press, 1991), 283–302.

582 Paragraph 3 of the 1958 Declaration, supra note 21, provides that "[n]o foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China."

583 Article 6 of the 1992 Law, provides that "[f]oreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China."

584 Ibid.

585 Song and Zou, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", p.309

586 Ibid.

587 Article 17 of the UNCLOS states that "[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

588 1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf; 2. The People's Republic of China will effect, through consultations, the delimitation of maritime jurisdiction boundaries with the states with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the equitable principle; 3. The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone which was promulgated on 25 February 1992; 4. The People's Republic of China reaffirms

China has committed itself to develop its domestic laws and regulations on marine affairs in line with the LOS Convention and to establish its marine legal system to meet the demands and changed circumstances in the use of oceans.[589] On the other hand the entry into force of the LOS Convention and China's ratification of it also pose a new challenge to be copied with by the Chinese in the resolution of both domestic and international issues regarding the SCS. One Chinese expert on the SCS, for instance, claims that China's ratification of UNCLOS plays a limited role in the settlement of the SCS dispute; instead, it is the main and direct source causing the conflict among the SCS countries.[590]

Amid rising tensions in the seas surrounding China, on May 11, 2009, the Chinese Government submitted to the Commission on the Limits of the Continental Shelf China's Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles. The submission deals only with China's claims to the continental shelf in the East China Sea. But the Government reserves the right to submit claims in other areas and challenged the submissions from Vietnam and Malaysia on the continental shelf in the SCS.

2.2 Vietnam

The Democratic Republic of Vietnam (DRV) perspective on UNCLOS III was political and ideological and reflected Vietnamese concern with state sovereignty and equality. In substantive terms, its strong interest lay in the maritime boundary issue area. In a subsequently controversial October 1974 interview with a Thai journalist, the editor of *Hnan Dan* stated that at the Caracas UNCLOS session 'big' states wanted to draw big lines and "small" states small lines for the limits of "territorial waters".[591] Limits must be based on equality between large and small states, and "if the U.S. wants to have 200 miles of territorial water, we also will have that. If she has 20 miles of territorial water, this, too, must be applied to all".[592] Essentially, what mattered was equal status with the United States and

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that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.

589 Zou Keyuan, China's *Marine Legal System and the Law of the Sea* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 3

590 Interview with Dr. Wu Shicun, President of the National Institute for the SCS Studies in June 2009.

591 Epsey Cooke Farrell, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.60

592 Interview by Thai journalist Phansak Winyarat with Nhan Dan editor Hoang Tung in Hanoi carried in the Nation (Bangkok), 23 October 1974, and reported in *FBIS-APA*, 23 October 1974, J3.

other "big" states. Apparently it did not occur to the Vietnamese that it was developing African and Latin American states, regardless of size, which so strongly advocated expansive maritime boundaries. The statement also has been a veiled reference to exaggerate Chinese claims.

At UNCLOS I and II the South Vietnamese generally supported positions congenial to the United States.[593] In addition to security, which was tied to the United States, South Vietnam had a strong interest in protection of coastal fisheries and a growing interest in the continental shelf and offshore petroleum, as indicated by national legislation and activities. At UNCLOS III, however, as the U.S. military presence ended, South Vietnam cast its lot with the developing countries. This was indicated clearly in the address at the opening of the first substantive session of UNCLOS III in Caracas by Foreign Minister Vuong Van Bac, who stated that "his country could not forget that it was a developing country and therefore a part of the third world, many of whose ideas it shared."[594]

During this period, the DRV was awaiting both control of the South and departure of the imperialists, as well as the expected conclusion of UNCLOS, before making any claims of its own.[595] At that time, according to Nhan Dan's editor, a conference of Southeast Asian states could be called to settle their maritime boundaries.[596] The desire to settle maritime boundaries and link island disputes with China and Cambodia, in particular, before entering the conference seems quite probable, with the intention of engaging in petroleum exploration providing a strong impetus. Approximately a month after rejecting the 1973 to UNCLOS III, the DRV had requested maritime boundary negotiation with China in the Gulf of Tonkin because the Vietnamese intended to begin petroleum exploration there.[597] The Vietnamese also had attempted to reach maritime boundary agreements with Democratic Kampuchea up through May 1976. By the time the SRV began to attend UNCLOS, solutions to any boundary or resource disputes with either China or Cambodia appeared increasingly remote. It is also clear that establishing their own legal positions prior to participating in UNCLOS III became essential to the Vietnamese, as the SRV made its declaration on maritime zones immediately before first attending the conference for the

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593 Epsey Cooke Farrell, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.60

594 UNCLOS III, *Official Records*, vol. 1, pp.64-65

595 The DRV, like other states at the time, expected UNCLOS III to conclude in 1975. See "Hanoi Reports Conclusion of Caracas Sea law Conference," Hanoi Radio, in *FBIS-APA*, 30 August 1974, K1.

596 Farrell, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*,p. 64

597 Ibid. p.86

1977 session.[598]

With the fall of RVN, most of the legal and technical experience and expertise in law of the sea matters which had developed in South Vietnam became unavailable to the DRV/SRV. There was a small group of French-educated experts in the bureaucracy, however.[599] From articles appearing in *Luat Hov* beginning in 1975, it is evident that the North Vietnamese were following developments at UNCLOS III. These articles dealt with topics under discussion in UNCLOS III, giving historical background, current developments and ideological interpretation on a number of issues. Ideologically, the Vietnamese found it difficult to reconcile the fact that, because the Soviet Union had become a maritime power, it shared a number of interests and positions with the imperialist U.S.[600]

Before 1990s, only one book appeared to have been written on the subject, a 186-page work entitled *Luat Bien* [law of the sea], which was written in 1977 by *Nguyen Ngoc Minh*, who in 1986 was listed as editor of *Luat Hoc* and head of the Institute of Jurisprudence in Hanoi.[601] *Luat Bien* deals with development of the law of the sea from the 1930 Hague Conference through the fourth session (spring 1976) of UNCLOS III and undoubtedly was written in preparation for Vietnam's entry into the law of the sea process. The book cites numerous French sources and makes frequent reference to Soviet doctrine and practice.[602] In 1990 a 123-page work on the continental shelf was published, which is indicative of the SRV's strong interest in that subject. It is entitled *Them Luc Dia: Nhung Van De Phap Ly quoc Te* (The Continental Shelf: Problems of International Jurisdiction).[603]

As an UNCLOS III participant, the Socialist Republic of Vietnam (SRV) was quick to make political statements.[604] The Vietnamese used the opportunities available to support political positions congenial to the Group of 77 and to the nonaligned movement. They hailed the completed Convention as "a first step in the establishment of a just and equitable new international economic order,"[605] long a tenet of the Group 77. The SRV has not

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598 See the synoptical table in UNCLOS, *Official Records*, p.158.
599 "Common Fishing Zone Plan Proposed to S. Veitnam", The Nations (Bangkok), in *FBIS-APA*, 3 September 1974, J7.
600 Farrel, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.88
601 Ibid.
602 But see the concerns expressed in D.P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p.133
603 On this point, See Churchill and Lowe, *The Law of the Sea*, p. 172. States are allowed to enforce their laws against ships of their own nationality on the high seas. Article 22 of the 1958 Convention on the High Seas and Article 110 of the 1982 CLOS cover ships reasonably believed to be of the same nationality as the inspecting warship, though not flying that flag.
604 R.L. Schreadley (Cdr., U.S. Navy), "the Naval War in Vietnam, 1950-1970,"*Naval Review* (1971), reprinted in *Vietnam: The Naval Story*, ed. Frank Uhlig, Jr., (Annapolis, Md.: Naval Institute Press, 1986), pp.283-285. The Market Time operation was "the U.S. Navy's first large-scale operational participation in the Vietnamese War," (281).
605 Colonel Duy Duc, "The Maritime Ho Chi Minh Trail," *Vietnam Courier*, no. 6 (1985), pp.19-20

developed policies concerning nor commented upon all aspects of the law of the sea either in UNCLOS III or elsewhere.[606] Further, statements made publicly in UNCLOS must be treated with some caution as they may be negotiating positions or intended for particular audiences. Nevertheless, it is possible to identify Vietnamese positions in major jurisdictional and functional areas and to give the background to those positions.

Vietnam became the 64th state to ratify the Law of the Sea Convention, despite the financial burdens of participation. The ratification by the national Assembly on 24 July 1994 indicated that having weighed the perceived benefits and shortcomings of the Convention, Vietnam believed its law of the sea interests would be better served within the Convention regime shortly to come into force.[607] Ratification also served to further Vietnam's image as a law-abiding state intent upon regional cooperation.

On 7 May 2009, Viet Nam submitted to CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in respect of the North Area (VNM-N). On 6 May 2009, Viet Nam and Malaysia submitted jointly to CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in respect of the southern part of the SCS.

2.3 Indonesia

As many other countries, Indonesia considers the Convention as one of the most –- if not the most –- spectacular achievement of the international community since the singing of the Charter of the United Nations in 1945.[608] For Indonesia it is also the culmination of its effort during 25 years, to get the principle of the archipelagic State formally accepted as part of the law of the sea by the international community.[609] When Indonesia became independent the Indonesia territorial waters were regulated by the "Territorial Zee en Maritieme Kringe Ordonantie 1939" (*Staatsblad* 422).[610] This ordinance established a three mile territorial sea around each island of the Indonesian archipelago, thereby virtually dividing Indonesia in many parts separated by water, some of which were governed by the

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606 Farrel, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*,p.92

607 Ibid. p.276

608 E. Hey and A.W.Koers, *The International Law of the Sea: Issues of Implementation in Indonesia* (Rijswijk, the Netherlands Institute of Transport, 1984), p.12

609 Ibid.

610 Ibid.

regime of the high sea. The provisions on the EEZ and CS in the Law of the Sea Convention reflect more of Indonesia's national aspirations than previous treaties on the law of the sea. In accordance with the provisions of this Convention, Indonesia, on March 12, 1980, adopted a declaration on the exclusive economic zone.

The members of the Group of Archipelagic States during UNCLOS negotiation were Indonesia, Fiji, Mauritius and the Philippines. Generally their common interest was to ensure that the Convention would recognize the special method of drawing archipelagic straight baselines connecting the outermost points of the outermost islands so as to create a sense of political unity. The territorial sea would be measured seawards from such baselines. Waters landwards from these baselines would be archipelagic waters over which the archipelagic States would exercise sovereignty analogous to internal waters. Specially, their objective was to adopt a common position on passage through archipelagic waters, on claims by neighboring States for provisions on guaranteed access and communication and on fishing rights.[611]

Under the legitimacy of UNCLOS 1982, as an archipelagic state, Indonesia in 1996 revised the Law number 4/Prp.1960 with the Law Number 6/1996 on the Indonesian Waters.[612] Indonesia also constructed its new archipelagic baseline, using the new definition of straight archipelagic baseline in the UNCLOS 1982, through the GR Number 38/2002 on the Geographical List of Coordinates of the Indonesian Archipelagic Baselines.[613] The law is one of the important instruments to protect Indonesia's territorial integrity. Besides that, it also becomes the basis of the Indonesian sea as a uniting factor of the archipelago. Due to various political developments and some special circumstances which are occurred and influenced the configuration of Indonesian archipelagic baselines, on 19th May 2008, Indonesian Government established GR Number 37/2008 that revised the GR Number 38/2002 on Geographical List Coordinates of Indonesia's Archipelagic Baselines.[614]

On 16 June 2008, Indonesia submitted to CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of

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[611]Myron H. Nordquist (ed.) *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. I (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1985),pp.77-78

[612] See respectively, *Law No.4 Concerning Indonesian Waters 1960* (United Nations The Law of the Sea: Practice of Archipelagic State (New York: United Nations, 1992); and *Law No.6 of 1996 concerning the Indonesian Territorial* http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session6-Paper2-Patmasari.pdfWaters (1998) 38 LOSB 32), preamble para. (c) and arts 11-21.

[613] E. Hey and A.W.Koers, *The International Law of the Sea: Issues of Implementation in Indonesia* (Rijswijk, the Netherlands Institute of Transport, 1984), p.12

[614] http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session6-Paper2-Patmasari.pdf

the territorial sea is measured relating to the continental shelf of North West of Sumatra Island.

2.4 The Philippines

The Philippines has retained its original archipelagic legislation[615] to which accords the waters enclosed by archipelagic baselines that status of internal waters and says nothing about other States' navigational rights therein, although according to a Philippine *note verbale* of 1955[616] there is a right of innocent passage. When ratifying the LOS Convention the Philippines made a declaration that the

> *Provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lands and [...] that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage of international navigation.*[617]

In February 2009, The Philippine Congress passed a bill that spelt out the archipelagic baselines of the Philippines and claimed Huangyan Island (Scarborough Shoal) and Nansha Islands (Spratlys) as "a regime of islands under the Republic of the Philippines" (know as Republic Act 9522 or the Philippine Archipelagic Baseline Law). RA 9522 was enacted in time to meet the deadline of UNCLOS for countries and archipelagic states to submit their respective claims to their extended continental shelf, set on May 13 2009.

On 8 April 2009, the Philippines submitted to CLCS information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in the Benham Rise region.

3. Maritime Legislation

3.1 Summary of Marine Legislation by the SCS Countries

These following tables summarize the marine legislation of the SCS states in marine pollution prevention, environmental protection, maritime safety, and fisheries agreements.

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615 Republic Act No.3046 of 17 June 1961, as amended by *Republic Act No. 5446 of 18 September 1968* (United Nation, The Law of the Sea: Practice of archipelagic States, at p.75)

616 Philippine *note verbale* of 7 March 1955 to the UN Secretary-General (UN Doc. A/2934 (1955), reproduced in M.M. Whiteman Digest of International Law (US Department of States, Washington DC: 1963) vol. IV< pp.52-53.

617 United Nations, at United Nations, *Multilateral Treaties Deposited with the Secretary-General.* Vol. II, p.279

Maine Pollution Prevention

a. International Convention for the Prevention of Pollution from Ships (MARPOL) 1973
b. MARPOL as modified by the Protocol of 1978 (Annex I/II)
c. MARPOL Annex III (Optional): Hazardous substances carried in packaged form
d. MARPOL - Annex IV (Optional): Sewage
e. MARPOL - Annex V (Optional): Garbage
f. MARPOL – Protocol 97 –Annex VI
g. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter - 1972
h. Protocol on the Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter - 1996
i. International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties - 1969
j. Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil - 1973
k. International Convention on Oil Pollution Preparedness, Response and Co operation (OPRC) 1990
l. Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (BASEL) 1989

Table III.2 Status of Conventions of Maine Pollution Prevention in the SCS region

	Brunei	Cambodia	China	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
a	23-Oct-86								
b	23-Jan-87	28-Feb-95	2-Oct-83	21-Jan-87	?-?-96		1-Feb-91		29-Aug-91
c		94	94				94		
d		28-Nov-94							
e		94	88		97		94		
f									
g		2-Jan-73	14-Dec-85			29-Aug-72			
h									
i			90						
j			90						
k			98		97				
l			5-May-92	20-Dec-93	20-Jan-95	19-Jan-94	1-Apr-96	S	11-Jun-95

Source: http://faculty.law.ubc.ca/scs/status-conv.htm

Maritime Safety & Security

a. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978
b. International Convention for the Safety of Life at Sea (SOLAS) – 1974
c. Protocol to SOLAS –1978
d. Protocol to SOLAS – 1988
e. Convention on the International Regulation for Preventing Collisions at Sea (COLREG) 1972
f. International Convention of the Suppression of Unlawful Acts at Sea (SUA) –1988
g. Protocol to SUA – 1988

Table III.3 Status of Conventions of Maritime Safety & Security in the SCS region

.	Brunei	Cambodia	China	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
a	X		X	X	X	X	X	X	X
b	X	X	X	X	X	X	X	X	X
c	X	X	X	X	X		X		X
d			X				X		
e	X	X	X	X	X		X	X	X
f			X						
g			X						

Source: http://faculty.law.ubc.ca/scs/status-conv.htm

Environmental Protection

a. ASEAN Agreement on the Conservation of Nature and Natural Resources-1985
b. Convention on International Trade in Endangered Species of Wild Fauna and Flora -1973/79
c. Convention of the Conservation of the Migratory Species of Wild Animals
d. Convention on Biological Diversity, 1992
e. Convention concerning the Protection of the World Cultural and Natural Heritage 1972
f. Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR) 1971
g. Protocol to RAMSAR- 1982
h. BASEL 1989

Table III.4 Status of Conventions on Environment Protection in the SCS region

.	Brunei	Cambodia	China	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
a	S			S	S	S	S	S	
b	2-Sep-90	S	8-Apr-81	2-Mar-79	18-Jan-78	16-Nov-81	28-Feb-87	21-Apr-83	20-Apr-94
c									
d		9-May-95	23-Nov-93	21-Nov-94	22-Sep-94	6-Jan-94	20-Mar-96	S	14-Feb-95
e		28-Feb-96	12-Mar-86	6-Oct-89	7-Mar-89	9-Dec--85		17-Dec-87	9-Jan-88
f				8-Aug-92	10-Mar-95	8-Nov-94			20-Jan-89
g									
h			5-May-92	20-Dec-93	20-Jan-95	19-Jan-94	1-Apr-96	S	11-Jun-95

Source: http://faculty.law.ubc.ca/scs/status-conv.htm

Fisheries Agreements

a. Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958
b. Agreement for the Development of a SEA Fisheries Development Centre – 1967
c. Agreement for the Establishment of the Asia Pacific Fishery Commission – 1948
d. Agreement for the Establishment of the Network of Aquaculture Centres in Asia and the Pacific - 1988
e. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks – 1995 (Agreement has not yet entered in force)
f. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas - 1993 (Agreement has not yet entered into force)

Table III.5 Status of Conventions of Fisheries Agreements in the SCS region

.	Brunei	Cambodia	China	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
a		20-Mar-66		S	20-Mar-66			1-Aug-68	
b					26-Jan-68	16-Jan-68	28-Dec-67	28-Dec-67	26-Jan-68
c		19-Jan-51	23-Jul-93	29-Mar-50	15-Sep-58	9-Nov-48		9-Nov-48	3-Jan-91
d		23-Apr-92	11-Jan-90		04-Jun-92			28-Mar-94	11-Jan-90
e				4-Dec-95(S)		30-Aug-96(S)			
f									

Source: http://faculty.law.ubc.ca/scs/status-conv.htm

3.2 China's Maritime Legislation

Not long after the People's Republic of China was founded in 1949, China began to wage a struggle against the armed provocation carried out by the US Navy so as to safeguard its sovereignty and jurisdiction over the territorial sea.[618] Together with many strong protests against the encroachments of US warships into China's territorial sea, the Chinese Government, on 4 September 1958, promulgated the Declaration on China's Territorial sea,[619] which is a very significant legal document in the history of Chinese marine legislation. China declared that,

> *(1) the breadth of the territorial sea of China would be 12 nautical miles, which would apply to all territories of China, including the Chinese mainland and its coastal islands, as well as other islands belonging to China; (2) China's territorial sea would take, as its baseline, the line composed of the straight lines connecting basepoints on the mainland coast and on the outermost of the islands; the water area extending 12 nautical miles outward from the baseline would be China's territorial sea, and the water areas inside the baseline would be China's inland waters, including the Bohai Sea and the Chiungchow Strait; and (3) no foreign vessels for military use and no foreign aircraft would be allowed to enter into China's territorial sea or the airspace above without the permission of the Chinese Government.*

The general position stated in the above Declaration continued to be maintained in China's Law on the Territorial Sea and Contiguous Zone of 1992. Two regulations relating to the passage through China's inland waters and territorial sea were also promulgated. One was the Regulations required to be observed by Merchant Vessels. The other was the Regulations on Non-Military Foreign Vessels Passing through the Chiungchow Strait in 1964,[620] which contained several restrictions, especially providing that the passage of foreign merchant vessels should be subject to prior permission by the Chiungchow Strait Administrative Agency. In order to safeguard the security of its territorial sea, China has also publicized a number of prohibited areas for navigation and closed sea lanes. Besides above, China has promulgated several laws and regulations regarding fishing, navigation and harbor administration, such as the Order on Prohibited Area Trawl-net Fishing in the Bohai Sea, the Yellow Sea and the East China Sea of 1957; the Provisional Regulations on the Safety at Sea

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618 Zou Keyuan, *China's marine legal system and the law of the sea* (Leiden: Martinus Nijhoff, 2005.). p.5

619 Both Chinese and English versions may be found in Office of Laws and Regulations, Department of Ocean Management and Monitoring, State Oceanic Administration (ed.), Non-*Power Collection of the Sea Laws and Regulations of the People's Republic of China* (Beijing: Ocean Press, 1991), pp.1– 4.

620 See Office of Laws and Regulations, pp.56– 63.

of the Non-Power-Driven Boats of 1958; and the Provisional Regulations on harbor Administration of 1953. Many of the earlier laws and regulations have been replace or amended.[621]

Among all the domestic laws and regulations, the most important is the 1992 law on the Territorial Sea and the Contiguous zones[622] which has improve the territorial sea regime established under the 1958 Declaration on the Territorial Sea. China has set its territorial sea at a breadth of 12 nm and the contiguous zone of 24 nm, measuring from the coastal baselines. Merchant ships enjoy the right of innocent passage through China's territorial sea but foreign warships are subject to the requirement of prior permission.[623]

China promulgated the precise location of straight baselines and the outer limit of that part of its territorial sea adjacent to Mainland China and adjacent to the Paracel Islands in the SCS on the same day that the PRC decided to ratify UNCLOS.[624] The baseline and basepoints publicized by the Chinese Government in May 1996 is arguable not consistent with the LOS Convention relates to the baseline and basepoints.[625] In addition to the above fundamental stipulations, the law provides that all international organizations, foreign organizations or individuals should obtain approval from China for carrying out scientific research, marine operations or other activities in China's territorial sea and comply with relevant Chinese laws and regulations (art.11). The Chinese competent authorities may, when they have good reasons to believe that a foreign ship has committed violations, exercise the right of hot pursuit against the foreign ship (art.14). This law applies to all of China, including Taiwan and the various islands locate in the China seas.

On June 26, 1998, two years after the ratification of UNCLOS and the declaration of the baselines, the PRC enacted the Law of the People's Republic of China on the Exclusive

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[621] Zou Keyuan, *China's marine legal system and the law of the sea* p.6
[622] The English version may be found in Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, US Department of State, *Limits in the Seas*, No. 117 (Straight Baselines Claim: China), July 9, 1996, 11– 14.
[623] Zou, *China's marine legal system and the law of the sea*, ch.3
[624] For the Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996, see *Law of the Sea Bulletin*, No. 32, 37–40 (1996).
[625] In accordance with the LOS Convention, there are two specific geographic situations which allow a coastal state to draw straight baselines: either "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". It is obvious that most of the publicized baselines are consistent with the above conditions, but it is argued that some of them are not consistent with the LOS Convention, such as the baseline along the Chinese coastline from the Shangdong peninsula to the area of Shanghai, which is essentially smooth with no fringing islands. Furthermore, it is argued that the length of some of Chinese baselines is excessive, based upon some suggestions of straight baseline legs ranging from 15 nm to 48 nm, though the LOS Convention does not set down a standard for a specific distance limit on the length of a straight baseline.

Economic Zone and the Continental Shelf.[626] There are 16 articles contained in the 1998 PRC EEZ/Continental Shelf Law. Article 2 is perhaps the most important relative to the other articles and will surely be referred to during negotiations of maritime boundaries of the EEZ and the continental shelf between the PRC and its neighboring countries, such as Japan, South Korea, and Vietnam.[627]

After the promulgation of the 1998 PRC EEZ/Continental Shelf Law, it can be said that the PRC legislation on maritime jurisdiction is complete. According to China's Law on the Exclusive Economic Zone and the Continental Shelf, foreign vessels including warship can enjoy the freedom of navigation in China's EEZ provided that they comply with the relevant Chinese laws and regulations as well as international law.[628] Although there is no substantive difference, the navigation under the EEZ regime may not be as free as under the high seas regime simply because of the sovereign rights and jurisdiction of the costal state over its EEZ. For example, the Chinese EEZ Law provides that China should have the right to take necessary measures against violations of Chinese laws and regulations, and to investigate according to the law those who are liable, and may exercise the right of hot pursuit.[629]

China has granted navigational rights to foreign vessels in its jurisdictional waters. However, the degree and extent of the rights are different in accordance with the different status of the sea zones.[630] Where a certain sea zone is much closer to the coast of China, such rights are more limited as manifested. There are several problems relevant to navigation of foreign vessels within China's jurisdictional waters. The first one is the issue relating to China's military zones. China designated three military zones in the early 1950s: the Military Alert Zone in the Bohai and Yellow Sea; the Military Prohibited Navigation Zone around the mouth of the Qiantang River of Zhejiang Province and close to the Taiwan Strait,; and the Military Operational Zone south of 27 N latitude which encompassed Taiwan and its

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[626] Referred to herein as the 1998 PRC EEZ/Continental Shelf Law. For the Chinese text, see *People's Daily* (in Chinese), June 30, 1998, 2. The English version of the text is published in U.N. Division for Oceans and the Law of the Sea, *Law of the Sea Bulletin*, No. 38, at 28–31.

[627] Article 2 establishes a 200-nautical-mile EEZ, extending from the baselines from which the breadth of the territorial sea is measured. It also defines the PRC continental shelf as the seabed and subsoil of the submarine areas that extend beyond the PRC territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines where the outer edge of the continental margin does not extend up to that distance. Article 2 also provides that the delimitation of the EEZ and the continental shelf between the PRC and opposite or adjacent states should be effected by agreement on the basis of international law and in accordance with equitable principles.

[628] See art.11 of the Chinese EEZ Law.

[629] Art. 12 of the Chinese EEZ Law. It is based on Article 111 (2) of the LOS Convention.

[630] Zou, *China's marine legal system and the law of the sea*, p.47

environs.[631]

Finally, it is worth mentioning that in the PRC legislation there is a clause on the historic rights of China: "the provisions of this Law shall not affect the historic rights enjoyed by the People's Republic of China".[632] It is not usual in national legislation to provide for historic rights. The wording of 'historic right' in PRC's EEA/CS Law might lead to the assumption that China is preparing for a future bargaining. It is not clear what the provision exactly refers to because the PRC has provided no explanation regarding the clause.[633] However, it can be reasonably assumed that such historic rights refer to the SCS, where there has been a traditional maritime boundary line drawn on Chinese maps since 1947.

There are several Chinese laws and regulations on navigation, such as the Regulations with Respect to Sea Port Pilotage of 1976,[634] and the Regulations Governing Supervision and Control of Foreign Vessels of 1979.[635] The Maritime Traffic Safety Law of 1983 is the most important so far on the safety of navigation, and provides for survey and registration of vessels, manning of vessels and installations, navigation, berthing or carrying out operations, assurance of safety, carriage of dangerous goods, salvage and wreck removal, maritime traffic accidents, and legal responsibilities.[636] In 1990, the Regulations Governing the Investigation and Settlement of Maritime Traffic Accidents was promulgated,[637] and has become a supplement to the above law in dealing with the maritime traffic accidents.

China also promulgated regulation on resource management and marine environment protection. In 1979, China Enacted the Regulations on the Protection of the Breeding of aquatic Resources.[638] For the Regulations on the Protection of Underwater Cultural Relics, there are also a number of inconsistencies with the LOS Convention. Article 3 of the Regulations provides that China has the title to "the cultural relics originating from China or from an unidentifiable country which remain beyond China's territorial sea but within other

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631 Jeanette Greenfield*, China's Practice in the Law of the Sea* (Oxford: Clarendon Press, 1992), p. 97.
632 Article 14 of the PRC EEZ/Continental Shelf Law
633 See Li Zhaoxing, "Explanation on the Draft Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China," 23rd Session of the Standing Committee of the 8th National People's Congress, 24 December 1996, in *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China* (in Chinese), 1998, No. 3, 278–279.
634 See *Office of Laws and Regulations*, pp.52– 55.
635 Ibid. pp.5-29
636 Ibid. pp.235-249
637 Ibid, pp.268-282
638 Zou, *China's marine legal system and the law of the sea***,** p.19

sea areas under China's jurisdiction according to Chinese laws". However, regarding underwater cultural relics with original foreign ownership, if the foreign ownership is not abandoned by the foreign owner or the successor thereof, China's claim would be inconsistent with Article 303 (3) of the LOS Convention concerning the right of the identifiable owners and might result in diplomatic disputes.[639]

In comparison with other relevant marine laws and regulations, the laws and regulations on marine environmental protection are more complete and systematic. The principle law in this field is the Marine Environmental Protection Law[640] promulgated in 1982 and amended in 1999 the purpose of which is to protect the marine environment and resources, prevent pollution damage, maintain ecological balance protect people's health and promote knowledge of marine matters.

3.3 Taiwan's Marine Legislation

Taiwan was prevented from participating in UNCLOS III mainly because of PRC opposition.[641] Taiwan has also been barred from acceding to UNCLOS because the majority of countries of the world do not consider Taiwan a *de jure* state or one of the entities listed in Article 305 (1) and Annex IX of UNCLOS.[642] Although Taiwan was not invited to attend UNCLOS III, its government closely followed the progress achieved at UNCLOS III. In 1970 the Republic of China (Taiwan) ratified the Geneva Convention on the Continental Shelf, making two reservations.[643] The first is that natural prolongation should be used in the delimitation of the continental shelf between states with adjacent or opposite coasts. Second, that rocks and islets should not be considered in the delimitation of China's continental shelf boundaries.[644] The ROC EEZ/Continental Shelf Law adds to this provision wording respecting the possibility of a "provisional arrangement" for a transitional period pending the settlement of a boundary dispute. Since the general trend in state practice concerning the boundary delimitation of EEZ/continental shelf is towards a single line to delimit the two

639 Section 1.3 of the Tokyo MOU, available in http://www.iijnet.or.jp/tokyomou (accessed 18 March 2001).
640 See Office of Laws and Regulations, ibid.pp.69– 93.
641 Hungdah Chiu, "Political Geography in the Western Pacific after the Adoption of the 1982 United Nations Convention on the Law of the Sea," *Political Geography Quarterly*, 5(1):25 (1986).
642 Under Article 305, the UNCLOS is open for signature by: (1) all states; (2) Namibia; (3) all self-governing associated states; (4) all territories that enjoy full internal self-government, recognized as such by the United Nations, and (5) international organizations, in accordance with Annex IX.
643 Song and Zou, p.315
644 See generally Zhang Haiwen, *The Legal Regime Applicable to the SCS Islands*, Ph.D. Dissertation (in Chinese), Peking University, 1995, 56.

different but closely associated sea areas, it is uncertain whether natural prolongation would still play a significant role in such elimination. Moreover, the ROC, in Article 11 of its EEZ/Continental Shelf Law, has asserted the right to take action against a vessel suspected of polluting which navigates in its EEZ area.

In ROC EEZ/Continental Shelf laws, freedom of scientific research is restricted and is subject to governmental approval.[645] Article 9 of the ROC law further provides that in conducting scientific research, the following regulations should be followed: (1) such scientific research should not interfere with any rights exercised by the ROC in its EEZ and on its continental shelf; (2) the right to designate representatives to participate in such scientific research by the ROC should be guaranteed; (3) provision should be made at any time of progress reports and preliminary and final conclusions; (4) provision should be made at any time of the complete copies, data, and specimens and all assessment reports; (5) the use of research materials should not harm the security and interests of the ROC; (6) immediate notification should be given to the ROC government when a research plan has a substantial change; (7) no investigation of marine resources is to take place except where otherwise agreed; (8) the marine environment should not be damaged; and (9) all research facilities and equipment should be moved away immediately after the completion of the work.

The ROC EEZ/continental shelf law has 10 clauses that deal with penalties as well as compliance.[646] Under the ROC law, penalties will be imposed for violations relating to dumping of waste, damaging of natural resources or the natural environment, illegal fishing, illegal construction of installations, illegal scientific research, and illegal laying of pipelines and cables.[647] In serious cases, criminal charges may be imposed. It is unknown whether these provisions are applicable to Mainland Chinese, but it is assumed that if Mainland Chinese violate the law within the ROC's effective jurisdiction, they will be subject to these penalties.

The draft ROC Law on the Territorial Sea contained a clause on historic waters, but this was dropped at the last minute.[648] It was stated afterwards by the ROC government that the non-inclusion did not indicate the abandonment of the application of the concept of

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[645] Song and Zou, p. 317

[646] Articles 16 to 25 of the ROC EEZ/Continental Shelf Law.

[647] Song and Zou, p.318

[648] "A General Explanation for Proposing 'Draft Law on the Territorial Sea and the Contiguous Zone,'" prepared by Mr. Lin Cho-Shui, the DPP member of the Legislative Yuan; see *Legislative Gazette*, 86(11): 467–470 (1997); 86(44):189–196 (1997).

the historic waters to the South China Sea.[649] In comparison, the PRC used legal means to define its historic rights in the SCS. However, it is recognized that 'historic rights' is not equivalent to 'historic waters' in international law, though the former may carry a broader meaning and include 'historic waters'. The Chinese inclusion of historic rights in its EEZ/Continental Shelf Law indicates that such rights are not rights derived from historic waters. Since they are included in the legislation, it may be assumed that these rights are confined to fishery rights for which there is historical evidence in the SCS favorable for China. As to other natural resources, rights may only be justifiable based upon historic evidence that is accepted in international law.

3.4 Vietnam's Marine Legislation

The SRV has made three basic laws of the sea-related unilateral declarations which the government considers to form a linked triad defining the country's sovereignty, rights and boundaries in major jurisdictional and functional areas. The three documents are the 12 May 1977 statement on the territorial sea, contiguous zone, exclusive economic zone and continental shelf; the 12 November 1982 declaration on the baseline of the territorial waters of the SRV; and the 4 June 1984 statement on the airspace of Vietnam. In the 12 May 1977 statement the SRV claimed the entire suite of maritime zones allowable within the law of the sea as it was evolving in UNCLOS III.[650]

Just prior to entering UNCLOS the SRV had announced the establishment of an EEZ in its 1977 maritime zone statement. It remains impossible to state a precise figure for the size of the Vietnamese EEZ or continental shelf, as no mainland boundary claims have been settled and ownership of the Paracel and Spratly Islands remains unresolved. One frequently used figure, originally provided as a research tool by the U.S. Geographer in 1972, allocates Vietnam 210,600 sq nm of jurisdiction, using the 200 nm criterion.[651]

South Vietnam appears to have adhered to the 'normal baseline', which is defined

[649] See Virginia Sheng, "Territorial waters statute passed," *The Free China Journal* (Taipei), January 9, 1998. See also Song and Zou, p.318

[650] Epsey Cooke Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime,* p.71

[651] This figure for Vietnam was calculated using normal baselines rather than a straight baseline system and used a simplified equidistance line to calculate boundaries between states which had not reached bilateral agreements. See U.S.D.S., Geographer, See U.S.int he Seas No.46, "Theoretical Areal Allocations of Seabed to Coastal States Based on Certain U.N. Seabeds Committee Proposals", 12 August 1972, esp. 33. See also Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.158

in Article 3 of the 1958 Convention and Article 5 of UNCLOS as "the law water line along the coast as marked on large-scale charts officially recognized by the coastal State". Although the RVN did not address the topic at UNCLOS I or in the 1965 decree on sea surveillance, the 1936 French fishery decree on which South Vietnam based its original fishery zone specified that the zone "extends twenty kilometres from the shore at low-water mark". The 1982 CLOS baseline provisions were already settled before the SRV made its 1977 statement or entered UNCLOS III. The 1977 statement agree with the position taken by the South Vietnamese.

Over five years passed before the SRV implemented the 1977 statement by announcing a specific baseline system in its declaration on the baseline of the territorial waters of the Socialist Republic of Vietnam of 12 November 1982. This is the second of Vietnam's three basic documents on the law of the sea and established what has been called "one of the more radical baseline systems".[652] The declaration was issued just a month before the 1982 CLOS was opened for signature, and in two authoritative articles the Vietnamese claimed that its provisions are "in accordance with international law and practice".[653] Undoubtedly, however, the Vietnamese wanted it in place before signing the Convention, as the baseline system deviates from both customary and conventional law.[654]

Using "a continuous system of straight baselines with ten segments running 846 miles", Vietnam has enclosed as internal waters about 27,000 sq nm, or 93,000 sq km.[655] The length of the baseline segments ranges from 2.0 nm to 161.8 nm.[656] Nine of eleven basepoints are on islands, with the closest 7.6 nm from the mainland and the farthest 80.7 nm.

The drawing of baselines from which the outer limits of the territorial sea and other maritime zones are measured has become controversial because of the straight baseline systems being implemented by a number of states, including the SVR, rather than using the "normal" low-water line of the coast.[657] Vietnam made use of the controversial historic waters doctrine both in designating a joint historic waters zone with Cambodia and in

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652 Lewis M. Alexander, "Baseline Delimitations and Maritime Boundaries," *VJIL* 23, no.4 (Summer 1983): 518

653 Vu Phi Hoang, "May Van De Phap Ly Trong Tuyen Bo Cua Chinh Phu Ta Ve Duong Co So Ven Bo Luc Dia Viet Nam" (Some Legal Points in Our Government's Declaration on the Baseline of Vietnam's Territorial Waters), *Luat Hoc*, no.1 (1983), p. 10. This article gives the rationale for the Vietnamese position in some detail. A shorter, but similar, article b Hai Thanh (pseudo.), ""the Base Line of Vietnam's Territorial Waters," appeared in *Nhan Dan*, 15 November 1982, and may be found in *JPRS* 82621, 12 January 1983, p.183-188

654 See Alexander, "Baseline Delimitations and maritime Boundaries," pp.503-521. See also Churchill and Lowe, *Law of the Sea*, pp.28-33

655 Smith, "Global Maritime Claims," *Ocean Development and International Law,* 83, 1989.

656 Limits in the Seas No.99, pp.5-6. All figures cited in the discussion of the SRV's 1982 declaration may be found in this study.

657 See Article 5 of UNLCOS. In it, baseline rules remain part of the territorial sea provisions.

unilaterally designating historic waters in the Gulf of Tonkin, the latter announced in the 1982 Vietnamese baseline declaration.

"Certain provisions" of the articles dealing with archipelagic states (Srts. 46-54) and the regime of islands (Art. 121) were difficult for the SVR to accept, delegate Le Kim Chung stated at the eleventh UNCLOS III session on 16 April 1982.[658] Vietnam "would not, however, obstruct the adoption of the convention by raising objections at so late a stage" to articles which essentially had been discussed and framed before the SRV entered the conferences.[659]

The published conference records provide little evidence of the SRV's EEZ positions, other than on delimitation, one of the issues on which the Vietnamese were more active.[660] When the SRV entered the conference, the critical and extremely divisive issue of the juridical nature of the EEZ, which involves the quality and extent of coastal state jurisdiction and the question of residual rights, was still very much open.[661]

Just prior to entering UNLCOS the SRV had announced the establishment of an EEZ in its 1977 maritime zones statement. It remains impossible to state a precise figure for the size of the Vietnamese EEZ or continental shelf, as no mainland boundary claims have been settled and ownership of the Paracel and Spratly Islands remains unresolved. The wording of the SRV's EEZ claim is based on that in the RSNT issued by the conference in 1976.[662] Much of the wording of the claim is taken verbatim from Article 44 (1) of the RSNT.

The SVR did not find it difficult to support the final CLOS articles on marine scientific research, which provided for coastal state consent for all scientific research in the EEZ and continental shelf.[663] This was an issue on which it could join most of the Group of 77 as well as other socialist countries and, in addition, publicly endorse international cooperation in marine research.

South Vietnam had used a system of fines and imprisonment to enforce its 50-mile zone. Under Decree Law 056 foreign fishing boats were banned unless licensed by the South

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658 Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.119

659 UNCLOS III, *Official Records*, vol. 16:110

660 Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime*, p.164

661 Bernard H. Oxman, "The Third United nations Conference on the Law of the Sea: The 1977 New York Session", *AJIL* 72, no.1 (January 1978), pp.67-75; and Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone", *VJIL* 24, no.4 (Summer 1984), pp.869-880

662 See Article 44 of Doc.A/CONF.62/WP.8/Rev.1, Part II, in UNCLOS III, *Official Records*, vol.5:160

663 UNCLOS III. *Official Records*, vol. 13:28

Vietnamese government.[664] Offending vessels could be searched and detained by captains of warships, patrol ships or ships of the fishery, navigation or customs directorates. The captain and crew of offending vessels would be sentenced to jail terms of one month to one year and/or a fine of VN$ 6 M. to VN$ 10 M. if the vessel were under fifty tons.

Under the SRV's 1980 regulations (Enactment No. 30-CP), 'military ships', which are identified as warships and auxiliary ships, must seek permission their days in advance through diplomatic channels to enter the Vietnamese contiguous zone and territorial sea, although no such control over navigation in the contiguous zone is permissible in conventional or customary law.[665] Foreign non-military ships which wish to enter Vietnamese internal waters or ports, as distinguished from those which are simply traversing the territorial sea, are required to obtain permission to do so. Ships used for transport or communications must ask permission from the Ministry of Commerce and Transport seven days in advance and then notify the Ministry twenty-four hours before entering the SRV's territorial sea.

The RVN government put in place the petroleum legislation through which South Vietnam defined and delimited its continental shelf. Since they had been operating under inadequate mineral legislation held over from the colonial era, the South Vietnamese had begun preparing draft petroleum legislation, which was completed in June 1969, to cover both onshore and offshore exploitation.[666]

Petroleum Law No. 011/70 was promulgated 1 December 1970, and the Ministry of Economy's implementing decree of 9 June 1971 delineated specific continental shelf claims. These claims totaled about 160,000 sq nm or 400,000 sq km. The decree listed 33 zones or blocks extending from the 11th Parallel into the Gulf of Thailand.

3.5 Indonesia's Marine Legislation

In order to attain an improvement of Indonesia's welfare by exploiting all its available natural resources, both living and non-living, a Declaration on the EEZ was adopted by the government on March 21, 1980.[667] The EEZ of Indonesia is the area beyond the

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[664] "Saigon Decree Sets 50 nautical Mile Fishing Limit", *Vietnam Press* (Saigon) in FBIS-APA, 24 January 1973, L11-L12. See also Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* , p.179

[665] Farrell, *The Socialist Rebpulic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime,* p.137

[666] "Good Prospects in Vietnam for Offshore Oil drilling," *Vietnam Economic Report* 2, no. 4 (April 1971). p.9

[667] E. Hey and A.W.Koers, *The International Law of the Sea: Issues of Implementation in Indonesia* (Rijswijk, the Netherlands Institute of Transport, 1984), p.32

Indonesian territorial sea, as promulgated by virtue of Law No. 4 of 1960, concerning Indonesian waters, the breadth of which extends to 200 nautical miles from the baselines from which the breadth of the Indonesian territorial sea is measured. In the EEZ, Indonesia has and exercises[668]:

> *a) sovereign rights for the purpose of exploring, exploiting, managing, and conserving living and non-living natural resources of the sea-bed, the subsoil and the superjacent waters and sovereign rights with regard to other activities related to the economic exploration and exploitation of the zone, such as the production of energy from water, currents and winds; and*
> *b) Jurisdiction with regard to: i, the establishment and use of artificial islands, installations and structures; ii, marine scientific research; iii, the preservation of the marine environment; and iv, other rights based on international law.*
> *c), The sovereign rights of Indonesia as referred to in paragraph 2 of this Government Declaration shall, with respect to the sea-bed and subsoil, continue to be exercised in accordance with the provisions of the laws and regulations of Indonesia concerning Indonesian waters and the Indonesian continental shelf, international agreements and international law.*
> *d), in the EEZ of Indonesia, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines will continue to be recognized in accordance with the principles of the new international law of the sea.*
> *e), where the boundary line of EEZ of Indonesia poses a problem of delimitation with an adjacent or opposite State, the Indonesian Government is prepared, at an appropriate time, to enter into negotiations with the State concerned with a view to reaching an agreement.*
> *f), the above provisions will further be regulated by a law and regulations.*

Law number 1 of 1973, on the CS of the Republic of Indonesia illustrates the concern of an archipelagic State with regard to its natural resources.[669] This same concern is also emphasized in the Declaration on the continental Shelf of the Republic of Indonesia of February 17, 1969.[670]

Indonesia has replaced its original archipelagic legislation, which accorded foreign ships a right only of innocent passage through its archipelagic waters (which were referred to as internal waters), in express recognition of the fact that the original legislation was contrary to the LOS Convention: the new legislation fully conforms to the Convention.[671] Indonesia is also the only State so far to have designated archipelagic sealanes in accordance with the Convention by submitting them to the IMO for adoption.[672] On the other hand, it should be noted that Article 53 (12) provides that even if an archipelagic State does not designate sea lanes, the right of archipelagic sea lanes passage may nevertheless be exercised through

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[668] Ibid. p.34.
[669] Ibid. p.35
[670] Ibid, p.25
[671] See respectively, *Law No.4 of 1960 concerning Indonesian Waters, 1960* (United Nations, the Law of the Sea: Practice of Archipelagic States (United Nations, New York: 1992)), and *Law No.6 of 1996 concerning the Indonesian Territorial Waters* ((1998) 38 LOSB 32)
[672] See *IMO News* 1998, No.2, p.27. For comment, see C. Johnson "A Rite of Passage: the IMO Consideration of the Indonesian Archipelagic Sea-Lanes Submission" (2000) 15 *IJMCL*, pp.317-332 at p.332

the routes normally used for international navigation.

3.6 Philippine's Marine Legislation

The LOS Convention establishes a maximum breadth for the territorial sea of 12 nautical miles.[673] Only four parties to the Convention claim a greater breadth. The Philippines claims as its territorial sea a rectangle defined by coordinates, which in places extends beyond 12 nautical miles from the baseline.[674]

The Philippines has retained its original archipelagic legislation[675] to which accords the waters enclosed by archipelagic baselines the status of internal waters and says nothing about other States' navigational rights therein, although according to a Philippine *note verbale* of 1955[676] there is a right of innocent passage. When ratifying the LOS Convention the Philippines made a declaration that the

> *Provisions of the Convention on archipelagic passage through seal lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and [...] that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high seas from the rights of foreign vessels to transit passage for international navigation.*[677]

This declaration has been objected to by Australia, Belarus, Bulgaria, Czechoslovakia, Russia, Ukraine and the USA on the grounds that it exceeds the permissible scope of declarations given by Article 310 of the Convention and is in reality an impermissible reservation and indicates an intention by the Philippines to contravene the Convention.[678] In response, the Philippines said that it intended to harmonize its domestic legislation with the provisions of the Convention and that

> *The necessary steps are being undertaken to enact legislation dealing with archipelagic se lanes passage and the exercise of Philippine sovereign rights over archipelagic waters, in accordance with the Convention.*[679]

The Philippines also passed a serial of maritime laws and regulation, such as Republic Act 8550-Philippine Fisheries Code of 1998, Presidential Decree No. 1219-Providing for the

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[673] See UNCLOS, art.3
[674] Act No. 3046 of June 1961 (UNLS B/15, 105)
[675] Republic Act No. 3046 of 17 June 1961, as amended by Republic Act No. 5446 of 18 September 1968 (United Nations, The Law of the Sea: Practice of Archipelagic States New York: 1992), p.75
[676] Philippine *note verbale* of 7 March 1955 to the UN Secretary-General (UN Doc. a/2934 (1955), reproduced in M.M. Whiteman Digest of International Law (US Department of State, Washington DC: 1963) vol. IV, pp.52-53)
[677] United Nations, *Multilateral Treaties Deposited with the Secretary-General,* Status as at 31 December 2003 (United Nations: New York, 2004), vol. II at p.279
[678] For the objections of all but the USA, see ibid. pp,.285-288. For the objections of the USA, see J.A. Roach and R.W.Smith, *United States Responses to Excessive Maritime Claims 2nd* (Martinus Nijhoff Publishers, The Hague: 1996). At pp.221-22 and 401-403
[679] United Nations, *The Law of the Sea. Current Developments in State Practice II* (United Nations: New York, 1989), p.96

Exploration, Exploitation, Utilization and Conservation of Coral Resources, and Presidential Decree No. 979-Providing for the Revision Of Presidential Decree No. 600 Governing Marine Pollution.

4. Practice of Dispute Settlement

In Chapter III, the dispute settlement mechanism set by Part XV of UNCLOS, in particular the role of third party compulsory forums has been elaborated from the theoretical perspective. This following section will unfold the state practices in terms of dispute settlement in the SCS, in order to present the political culture and context of China and Southeast Asia when addressing international disputes.

4.1 China

Ways of peaceful settlement of dispute cover good office, mediation, consultation, negotiation, arbitration, courts and etc. In most cases, China prefers to selecting negotiation and/or consultation directly with the other party. This orientation is mostly original from and owing to the Chinese culture and history. China has always advocated bilateral negotiations as the most practical means of dispute settlement between states. In practice, China has resolved several of its bilateral disputes with other countries through negotiation and consultation, such as border disputes and dual nationality, among other issues. So far as judiciary is concerned, China's attitude is very conservative. Thus far no dispute between China and any other state has been brought to the ICJ or other international tribunals. During the Sino-India border conflict in 1962, China refused India's proposal to submit the dispute to international arbitration by stating that "Sino-India border dispute is an important matter concerning the sovereignty of the two countries, and the vast size of more than 100,000 square kilometers of territories. It is self-evident that it can only be resolved through direct bilateral negotiations. It is never possible to seek a settlement from any form of international arbitration."[680] However, after the 1980s, it changed its policy by consenting to arbitration in treaties that it ratified to, but confined this only to economic, trade, scientific, transport, environmental and health areas.[681] Some conventions require the contracting

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[680] Gao Yanping, "International Dispute Settlement", in Wang Tieya (ed.), *International Law* (Beijing: Law Press, 1995) (in Chinese), pp.611-612.

[681] Zou, China-*ASEAN Relations and International Law* (Oxford: Chandos Publishing, 2009), p.31

states to accept compulsory judicial dispute settlement procedures. For instance, the LOS Convention makes it obligatory for its state parties to select at least one of the compulsory procedures: ICJ, ITLOS, arbitration and special arbitration. Upon ratification of the convention, China did not state which mechanism it had accepted. Therefore, it was deemed to accept the mechanism of arbitration.[682]

Meanwhile, China's perception of the role of international courts in dispute settlement is also passive. In treaties in which it is a party, China has usually made a reservation about the clause of judicial settlement by the ICJ. On 5 September 1972, China declared not to recognize the statement of the former Chinese government on Acceptance of the Compulsory Jurisdiction of the ICJ. In fact, it refused to settle any dispute with other countries through the ICJ.[683] On the other hand, as a UN Security Council member, it has nominated judges of Chinese nationalist to the ICJ as well as to other international courts, such as ITLOS. Since these courts are composed mainly of judges from the West, developing countries, including China, are doubtful about the impartiality and justice the international judiciary can maintain.[684] As for UNCLOS, China declared on 7 September 2006 under Article 298 of the LOS Convention the exclusion of certain disputes (such as concerning maritime delimitation territorial disputes or military use of the ocean) with other countries from the jurisdiction of international judiciary or arbitration.[685] As one Chinese scholar points out, there is slim hope for China to change its attitude towards third-party forum in the near future with regard to its dispute in the SCS.[686]

Nevertheless, some other international legal scholars in China start to bring to the table the issue of third party compulsory dispute settlement forums. At the "Symposium on China's Energy Security and the South China Sea" which was held China in December 2004, for example, scholar Jia Yu explained the reasons why China feels reluctant to go to an international court to address its disputes with other countries, especially on claims of sovereignty and maritime jurisdiction. Unlike the assumption from some western scholars, China' hesitation does not come from the lack of evidence finding in terms of sovereignty claims in case of its East China Sea and SCS claims. In fact, as the past ITLOS Judge Chan Ho Park pointed out, compared with Vietnam and other SCS countries, China has more

682 See Article 297 (3) of UNCLOS.
683 Gao Yanping, "International Dispute Settlement", in Wang Tieya, *International Law*, p.612
684 Zou, China-*ASEAN Relations and International Law*, 2009, p.32
685 "China's Declaration in Accordance with Article 298 of UNLOCS," 7 September 2006, available at http://www.fmprc.gov.ch/chn/wjb/zzjg/tyfls/wizdtyflgzlzgzhyflydgz/t270754.htm (accessed 6 February 2007)
686 Interview with Dr. Wu Shicun.

historic evidence to show its jurisdiction in the SCS.[687] Jia Yu argued that China's reluctance to accept a third party settlement forum comes from, first of all, the lack of experience in international litigation, and secondly, the lack of expertise in the international law field with regard to dispute settlement. Apart from the reasons given by Jia Yu, the political culture of China, and many Asian countries—believing in a good neighboring relations will be jeopardized if their difference has to be resolved by a third party involvement, sets the psychological obstacle for pursuing a third party mechanism.

China and the ASEAN countries have been negotiating for years to conclude a code of conduct for the SCS. The 2002 Declaration on the Conduct of Parties in the SCS (DOC) is based on a multilateral dimension as well as on a convergence of views on the need to peacefully manage the dispute. With the exception of Vietnam and the Philippines, who feel threatened by China's actions, the problem of sovereignty in the SCS is not regarded as a direct danger to the national security of the individual ASEAN countries. A similar situation of status quo exists on the diplomatic front. China and the ASEAN countries have been negotiating for years to conclude a code of conduct for the SCS. Beijing has preferred a non-binding multilateral code of conduct limited to the Spratlys that would focus on dialogue and the preservation of regional stability rather than on the problem of sovereign jurisdiction.

The PRC has on several occasions used force to consolidate its position in the SCS. In January 1974, China completed its control over the Paracel archipelago by acting militarily against South Vietnam before the expected fall of Saigon and the reunification of the country.[688] A naval confrontation with Vietnam on 14 March 1988 led to renewed Chinese seizure of territory.[689] Since the Mischief Reef incident,[690] China in its foreign policy has increasingly been acting as a status quo power respecting standard international norms, rather than as a revisionist power seeking to undermine the international order. Shambaugh explains that, both at a bilateral and multilateral level, "Beijing's diplomacy has been

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[687] Interview with Judge Chan HO Park in Shanghai, 2005.

[688] See Gerald Segal, *Defending China* (Oxford: Oxford University Press, 1985), pp. 197-210.

[689] See Shee Poon Kim, 'The March 1988 Skirmish over the Spratly Islands and its Implications for Sino-Vietnamese Relations', in R.D. Hill, N. Owen and E.V. Roberts (eds.) *Fishing in Troubled Waters: Proceedings of an Academic Conference on Territorial Claims in the SCS* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1991), pp. 177-191.

[690] On 8 February 1995, the Philippines discovered the Chinese occupation of Mischief Reef, located in Kalayaan. Then Philippine President Fidel Ramos strongly criticized China's action. Manila responded to the discovery of the Chinese occupation by seeking multilateral support and taking retaliatory measures that included the destruction of Chinese territorial markers and the arrest of Chinese fishermen in March 1995. The Philippines also announced a defence modernization programme. The PRC and the Philippines eventually signed in August 1995 a bilateral statement that rejected the use of force and called for the peaceful resolution of their bilateral disputes in accordance with the principles of the 1982 Convention on the Law of the Sea

remarkably adept and nuanced, earning praise around the region."[691] This has been reflected in its actions toward the SCS, as China has not seized disputed features in the Spratlys since the Mischief Reef incident. Even though it expanded its structures on the Reef in November 1998, Beijing's policy towards the SCS has been moderate in recent years in an attempt not to antagonize the ASEAN countries. China's readiness to accommodate the Southeast Asian countries over the SCS can be explained by Beijing's economic priorities as well as by its difficult relations with Japan and its concern over increased US military presence in the region, particularly since the terrorist attacks of 11 September 2001.

On December 25, 2000, China and Vietnam signed an agreement on the delineation of the Tonkin Gulf and fishery cooperation in the Tonkin Gulf. After 3 years of talk, on April 29, 2004 an additional protocol on fishery cooperation in the Tonkin Gulf was signed; two Agreements on delineation of the Tonkin Gulf and an Agreement on fishery cooperation in the Tonkin Gulf entered into effect on June 30, 2004.[692]

In a joint communiqué with Viet Nam issued on 8 October 2004, China and Viet Nam agreed to strictly follow the SCS Conduct Declaration[693]:

> *Both parties agree to strictly follow the consensus reached by the high-level leaders of both governments and the purpose and principles of the Declaration on The Conduct of Parties in The SCS (DOC) signed between China and the member states of ASEAN. The two parties will remain restrained, neither adopting unilateral action which might add to the complexity or expand existing disputes nor resorting to force or threats by force, including not resorting to force against fishing boats. Both sides will take tangible actions to maintain the stability of the SCS.*[694]

On 28 August 2007, Chinese Ambassador Liu Zhenmin made a statement on prevention and resolution of conflicts at the Open Debate of the Security Council.[695] He put forward four points on this issue on behalf of the Chinese government:

> *Firstly, greater importance should be attached to preventative diplomacy. [. . .] Secondly, more reform and ingenuity should be encouraged. [. . .] While dealing with domestic conflicts of a country, it is essential to bring into full play the active role of the government of the country concerned, and the overall objective of the Council in this exercise is to help the national government to establish social stability. [. . .] Thirdly, coordination and cooperation with regional and sub-regional organizations should be significantly enhanced. It is widely acknowledged that, in recent years, African Union has played an ever more important role in coping with the conflicts in African region on behalf of the international community and made invaluable contributions to maintaining world peace and security. [. . .] Lastly, more efforts must be made to fully utilize the*

[691] David Shambaugh, 'China engages Asia: Reshaping the Regional Order', *International Security*, vol. 29, no. 3, Winter 2004/05, p. 64.
[692] Embassy of Vietnam in China website. At http://www.vnemba.org.cn/en/nr050706234129/ (accessed on July 29, 2009)
[693] http://chinesejil.oxfordjournals.org/cgi/content/full/4/2/607#SEC4
[694] "China and Vietnam Issues a Joint Communiqué" (www.fmprc.gov.cn/eng/wjdt/2649/t163759.htm).
[695] http://chinesejil.oxfordjournals.org/cgi/reprint/7/2/485

system-wide resources of the United Nations and give full play to the good offices of the Secretary General [. . .].

Chinese leaders in many occasions stress Chinese approach of addressing the SCS dispute. For example, Chinese Premier Wen Jiabao said in Beijing on June 3rd 2009 that China and Malaysia should enhance dialogue and cooperation and handle relevant issues in a proper way to jointly safeguard peace and stability on the SCS.[696]

4.2 Vietnam

Along with other socialist states and a number of other states participating in UNCLOS, the SRV refused to accept compulsory dispute settlement procedures in delimitation cases. When the Vietnamese cosponsored NG7/10, they reserved their position on paragraph 2, which called for resort to procedures in Part XV of the Convention if agreement could not be reached within a reasonable period of time.[697]

By the spring of 1979 they had "firmly opposed" any compulsory third-party settlement because that would violate "the principles of the sovereign equality of states". Any settlement must be "through agreement of the parties by means of procedures freely chosen by them". As a compromise, they would consider resort to a conciliation commission whose recommendation would be nonbinding.[698]

Le Kim Chung gave a fuller exposition of the Vietnamese position in a 1980 U.N. Sixth (Legal) Committee debate on criteria for a general declaration on peaceful settlement of dispute between states. Elaborating on the same points made earlier by Vietnamese UNCLOS delegates and with maritime boundaries obviously in mind, he emphasized that the SRV could not accept compulsory settlement procedures, including ICJ jurisdiction, in disputes involving sovereignty or sovereignty rights. "In such cases, only the parties themselves would be in a position to appreciate all the sensitive aspects, specific circumstances and particular interest involved; only they would be able to reconcile their positions with a view to reaching an equitable and mutually acceptable solution"[699] He noted that the UNCLOS proposal on nonbinding conciliation could be as a possible solution. Beyond that, only if both parties agreed, could a compulsory procedure be used.

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696 http://english.peopledaily.com.cn/90001/90776/90883/6671212.html

697 Epsey Cooke Farrell, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (PhD Dissertation), p.120

698 See UNLCOS III, *Official Records*, vol. 11:13 and 31.

699 United Nations General Assembly, *Official Records*, 35th sess., 1980/1981, vol.12, Sixth Ctee., 7-8 (Doc.A/C.6/35/sr.43)

Le Kim Chung had already indicated at the UNCLOS III ninth session in April 1980 Vietnam's willingness to accept "in a spirit of compromise" Article 298 (1)(a) on dispute settlement procedures.[700] This allows states to declare at any time from signature of the Convention onward that they do not accept any or all of the compulsory dispute settlement procedures which would entail a binding decision and which are listed in Part XV, section 2, with regard to disputes concerning delimitation of territorial seas, EEZ, CS, or historic bays or title. While states may make use of nonbinding conciliation procedures if all parties agree, only "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" may a state be compelled by the action of the other party to undertake conciliation (under Annex V, section 2). Even then, in practice, the process may end without an agreement.

In the SRV's case, there can be no disputing that all the Vietnamese maritime boundary disputes arose before the Convention will have gone into effect. In any event, under Article 298 no state may be required to submit a dispute to compulsory conciliation if the dispute involves "the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory". Vietnam's disputes with China, the Philippines, Malaysia and Cambodia all involve such question.

Stretching out along the SCS and having borders with several countries, Vietnam is a country with numerous boundary disputes to be settled. In the north, Vietnam needs to resolve the questions of a land boundary and a maritime delimitation in the Gulf of Tonkin with China. In the south, Vietnam has disputes with Kampuchea, Thailand, Malaysia, and Indonesia. In the east, there is a conflict over the Paracels and Spratlys.[701] Vietnam holds the position that all disputes should be settled through peaceful means. Concerning this issue, Clause 7 of the 12 May 1977 Declaration of the Socialist Republic of Vietnam (SRV) on the Territorial Sea, the Contiguous Zone, the EEZ and the Continental Shelf of Vietnam clearly states: "The Government of the Socialist Republic of Vietnam shall, together with the concerned countries through negotiations on the basis of mutual respect of independence and sovereignty, in compliance with international law and practices, resolve the issues relating to the maritime zones and the continental shelf of each side."[702]

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[700] UNLCOS III, *Official Records*, vol.13:28

[701] Nguyen Hong Thao, "Vietnam and the Code of Conduct for the SCS", *Ocean Development & International Law,* 32:105–130, 2001, p.111

[702] Reprinted in Thao Nguyen Hong, Thao Nguyen Hong, *Le Vietnam face aux problèmes de l'extension maritime dans la mer de Chine méridionale*,

On 29 March 1990, Vietnam and the Philippines exchanged views in Manila about extending bilateral political and economic exchanges, as well as measures for reinforcing security, stability, and peace in the region.[703] The Joint Statement on the Fourth Annual Bilateral Consultations between the SRV and the Republic of the Philippines in November 1995 reaffirmed that the two sides "shall settle all disputes relating to the Spratlys through peaceful negotiations in the spirit of friendship, equality, mutual understanding and respect."[704] In September 1983, when the troops of Malaysia landed on Swallow Rock, Vietnam and Malaysia agreed to settle their claims over islands, islets, and shoals in the SCS through negotiations.[705] Vietnam has supported the 1992 ASEAN Manila Declaration on the SCS. In November 1995, Vietnam signed a document with the Philippines containing eight principles of code of conduct, which incorporates a firm mutual commitment of both states to promoting bilateral and multilateral efforts to find a long-term solution to the various disputes in the SCS.

Yet claimant states have used military means to take control of reefs claimed by other states, and friction over the disputed territories has continued.[706] Tensions have surged between the Philippines and Malaysia, Malaysia and Vietnam, and Vietnam and the Philippines. In March 1999, Malaysia's seizure of Navigator Reef, claimed by the Philippines, strained relations with Manila and was criticized by Vietnam, Brunei and China. In August 2002, Vietnamese troops based on one islet fired warning shots at Philippine military planes. Additionally, some claimants have also used non-military means to protect their interests. In May 2004, Vietnam started re-building a runway on the disputed island of Truong Sa Lon (Big Spratly) with the purpose of sending small groups of Vietnamese tourists to the SCS. China strongly criticized the Vietnamese actions and described them to be in violation of the DOC (discussed below). In sum, all these initiatives and counter-initiatives have been part of an attempt by the claimant states to secure their presence in the Spratlys.

4.3 Philippines

Compared with its ASEAN counterparts, the Philippines pioneers in leaning for a third party compulsory dispute settlement mechanism. In many occasions, the Philippines call for UN

(Paris: Septentrion Presses Universitaires, 1997),annex 10, pp. 848–849 and Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia* (Singapore: Oxford University Press, 1987), annex IV.

703 *AP du Vietnam*, March 30, 1990; Nguyen Hong Thao, "Vietnam and the Code of Conduct for the SCS", p.113

704 Nguyen Hong Thao, "Vietnam and the Code of Conduct for the SCS",p.113

705 BBC, October 6, 1983.

706 http://www.rsis.edu.sg/publications/WorkingPapers/WP87.pdf

to get involved in the settlement of the SCS. Not only does Manila want to internationalize the issue, it would also like to bring the USA into the Spratly dispute. Although the USA does not want to get involved in this dispute and does not feel obligated to come to the rescue of the Philippines in its territorial conflict over the Spratlys, there are some indications that US–Philippine security cooperation might be increased. After all, the US security alliance with Manila is among the oldest in the Pacific. And, in 1999, the Visiting Forces Agreement (VFA) between the Philippines and the USA entered into force, making it possible for Washington to resume normal US–Philippine military-to-military contacts, such as warship visits and joint military exercises. In fact, the two countries held their first large-scale joint exercise since 1993 in February 2000, involving more than 2,500 US military personnel[707]. In the wake of 11 September 2001, the USA and the Philippines have begun to hold joint operations against the Al-Qaeda-linked Abu Sayyaf.

4.4 Other ASIAN States

Not all the claimants wish to see the United States becoming involved in the resolution of this issue. In contrast to the Philippines' apparent preference for a multilateral and if necessary, international process of conflict resolution, Malaysia agrees with China that a bilateral solution is best. Malaysia is also concerned about a PRC announcement of baselines in the SCS and its impact on Malaysia's EEZ and the continental shelf claims.[708] In July 1996, during the PRC-ASEAN dialogue, Malaysia's foreign minister, on behalf of ASEAN, asked the PRC foreign minister to clarify the meaning and implications of the announcement of the baselines for the Paracel Islands.[709]

Indonesia has not been a direct participant in the Spratly Islands sovereignty dispute. However, since 1990 when it organized the unofficial Workshops on Managing Potential Conflicts in the South China Sea (SCS Informal Workshop) attended by the countries of the SCS area, it has played an important role as an 'honest broker.'[710] After the PRC announced its baselines around the Paracel Islands and that the baselines around the Spratly Islands would be set in the future,[711] it has been questioned whether Indonesia can retain its

[707]ASEAN Regional Forum, 2000: 11

[708] Zou and Song, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", p.327

[709] Central Daily News, May 29, 1996, 2.

[710] The 10th Workshop was held in December 1999 in Borgor, Indonesia. Funding has been provided by the Canadian International Development Agency.

[711] The 1996 Baseline Declaration. For the Declaration of the Government of the People's Republic of China on the Baselines of the

role as 'honest broker' in the Spratly Islands dispute.[712] Should the PRC establish baselines around the Spratly Islands, the PRC could extend its EEZ and the continental shelf to the Natuna Islands area, which is within Indonesia's claimed 200-nautical-mile EEZ. Accordingly, it would be necessary for the two countries to delimit as a maritime boundary an area that is believed to have "the largest concentration of gas reserves in the world."[713]

Vietnam, the only claimant to have actually gone to war with China over the Paracels and the Spratlys, has an obvious stake in deterring Chinese military actions, but it has not openly supported US involvement, preferring also to focus on bilateral negotiations and ASEAN's confidence-building processes with China.[714] Meanwhile, China has also tried to play down the significance of its recent territorial assertions, whether through separate bilateral consultations with ASEAN claimants or assurances given to ASEAN as a whole. It has pledged to abide by international law, including UNCLOS, in seeking a resolution to the disputes, and agreed to sign a regional 'Declaration of Conduct' with ASEAN to govern their behavior in the disputed areas. China has also embarked on defence diplomacy with Southeast Asia, consisting of high-level visits among defence officials, port calls of its ships, exchanges of defence attaches, and cross-invitations to military training courses, among others.

In comparison with China, some ASEAN member states are more willing to resort to the international judiciary for settling their disputes. In 1998, Indonesia and Malaysia jointly bring dispute of Sovereignty over Pulau Ligitan and Pulau Sipadan Island to ICJ.[715] In 2003, Malaysia and Singapore jointly submit a dispute concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge to ICM.[716] A request for the prescription of provisional measures on land reclamation activities in and around the straits of Johor was submitted to ITLOS by Malaysia against Singapore in September 2003.[717] Besides, the scenario of resorting infrequently to the international judiciary may change in the future with the coming true of the proposed "ASEAN Court of Justice, comprising

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Territorial Sea, 15 May 1996, see *Law of the Sea Bulletin*, No. 32, 37–40 (1996).

712 See Douglas Johnson, "Drawing into the Fray: Indonesia's Natuna Islands Meet China's Long Gaze South," *Asian Affairs*, 1998, pp.153–161.

713 United Daily News, May 19, 1995, 2.

714 Aileen San Pablo-Baviera, The China Factor in US alliances in East Asia and the Asia Pacific, *Australian Journal of International Affairs*, vol.57, No.2, pp339-352, July 2003

715 For the judgment, see http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=df&case=102&code=inma&p3=4

716 For the judgment, see http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=4

717 See http://www.itlos.org/start2_en.html

designated judges nominated by each member-state".[718] However, whether a third party forum will be welcomed in settling sovereignty of islands and maritime delimitation in the SCS, still remains as an answered question. When being interviewed with this question, the interviewees, including scholars and government officials of foreign affairs or marine affairs from Indonesia, the Philippines, Vietnam, Malaysia and Brunei, are reluctant to express their opinions, even though the author encourages them to speak in their personal capability, rather from a government's position.

Although the East Asian countries are not as active as their African and Latin American counterparts in their recourse to legal means for dispute settlement, they frequently and usually use political forms, particularly direct negotiation and consultation, or regional arrangements, as reflected in the agreements reached among the ASEAN members as well as those between the ASEAN/its members and China. Through the operations of ASEAN, the unique 'ASEAN way' has been created which refers to a loose arrangement including 'informal processes, weak regional institutions, and decisions by consensus.'[719] It contains three core values: (1) consultation – due to various diversities and contradictions between/among the states in Southeast Asia, regional integration must rely on consultation rather than on coercive forces; (2) harmony – ASEAN regards itself as a harmonious entity of states, like an orchestra consisting of its member states, without interfering in their domestic affairs and resort to peaceful dispute settlement; and (3) cooperation – unlike the 'hard way' of law used by the European Union (EU); ASEAN adopts the 'soft way' for cooperation.[720] It is commented that the ASEAN way has played an active role in establishing the regional order, constructing a platform for states from outside the region to be involved in participation and dialogue, maintaining regional stability and balancing big powers' influences.[721]

5. Summary

This chapter elaborates the state practices with regard to the internal coherence of UNCLOS in the SCS, from four aspects respectively, namely attitude to international law,

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[718] Jusuf Wanandi, "ASEAN Future Challenges and the Importance of an ASEAN Charter", *Asien: Deutsche Zeitschrift fuer Polik, Wirtschaft und Kulture*, no.100, 2006, p.87

[719] Rodolfo C. Severino, 'Framing the ASEAN Charter: An ISEAS Perspective', in Rodolfo C. Severino (comp.), *Framing the ASEAN Charter: An ISEAS Perspective* (Singapore: Institute of Southeast Asian Studies, 2005), p.4

[720] Zhang Yunlin, "The Valuable ASEAN Way", *People's Daily* (in Chinese), 8 August 2007, p.3

[721] Ibid.

process in UNCLOS negotiation, marine legislation and dispute settlement practice. A conclusion may be drawn from there. No Asian State has ever claimed to reject the whole system of international law; the claims have always been more discrete and have related to specific issues. Asian States had no part in the creation of much of modern international law which has been fashioned largely by European States in the past three or four hundred years. In other words, the States of Asia may reject those parts of international law, developed without their participation, which they consider contrary to their interest. Asian States and people are said to be less legalistic, less in favor of codes, and more prone to settlement according to more flexible criteria. This contention, especially in the context of the Asian attitude to compulsory third-party settlement of disputes although it has, of course, a wider significance; it goes to the very basis of a system ordered by objective rules. Since the World War II, Asian States, together with African States which often have similar interests, have in past decades acquired considerable numerical strength in international organization, especially the General Assembly of the United Nations. They realize that this voting power can be used to press their views in the process of codifying and progressively developing international law. This point is well demonstrated from the analysis on the process of UNCLOS negotiation in which both China and other disputant States of the SCS have been actively participated and pushed the direction, to different extend, towards what it is desired by them.

All the States involved in the SCS disputes have developed a comparatively comprehensive marine legal system under the framework of UNCLOS, which can be illustrated from section 3 on the marine legislation by these States. These legislations provide a legal framework to deal with many maritime issues in a domestic context. Nevertheless, in the situation where multiple issues interrelate with each other, such as the SCS, a theoretically sound legal system does not always do the good job in many fields, such as maritime delimitation, overlapping maritime jurisdiction claims, fishing disputes, transboundary marine environmental pollution, etc. Hence, a third party compulsory dispute settlement regime needs to play its desired role. Section 4 elaborates the practice of dispute settlement in the SCS by unfolding the political culture of relevant States on their attitude to a third party forum. China, Vietnam and Indonesia are opponent of international litigation, and in all occasions insist on the merit of negotiation, while the Philippines is more willing to bring an extra party to the stage of SCS. Nevertheless, as some Chinese scholars in recent years

bring to the table for discussion, China should be encouraged to place more weight on the third party dispute settlement mechanism, given its desired responsibilities in many contemporary global issues and its role in international organizations.

So far a picture has been clearly unfolded on the internal regimes of UNCLOS and its, applicability and implementation in the SCS. The state practice, from both a legal and political perspective, helps to build up the argument, that there can be little doubt about the centrality of UNCLOS in the legal framework for ocean management, albeit it may be perceived to have certain shortcomings. As the author argues in Chapter I, in order to objectively assess the effectiveness of an international regime, it is equally important to evaluate the relationship of this regime with other institution and regimes in the same political and social context. Chapter V will elaborate and unfold this relationship.

Chapter IV "UNCLOS – other Regimes" Relationship in the SCS

This chapter explores the relationship between UNCLOS and other regimes and institutions in general in the SCS. This chapter is composed of four sections that look at four fields respectively, namely maritime security, marine environment protection, oil and gas joint development and political interaction (ASEAN+1 Model). The discussion on "UNCLOS – other regimes" relationship will be developed in the framework of these four fields.

1. Maritime Security Cooperation Regime

Maritime security concerns in the SCS are increasing for several reasons: higher volumes of shipping traffic, protection of EEZ resources, piracy, terrorist threats, greater international scrutiny of ports and shipping, and the modernization of regional naval and coast guard forces. Coastal states and international user states have many overlapping interests in the SCS, for example, in promoting safe navigation through its busy sea-lanes. On other issues, in particular, antipiracy or anti-maritime terrorism measures, they have different views about the seriousness of the threats and the responses necessary to address them. Despite the difference, enhancing maritime security has been listed in the agenda of most SCS states. In this section, the applicability of UNCLOS, with the support from other legal, political and institutional regimes will be closely observed in tackling maritime threats. A maritime security cooperation mechanism is then advocated.

1.1 UNCLOS and other Legal and Quasi-legal Instruments[722]

What is the role of international law in the battle against piracy and maritime terrorism in terms of providing legal protection to shipping? Such legal protection of shipping seems to result from the rules of international law applicable to sea piracy, as contained in Articles 15-19 of the 1958 High Seas Convention (HSC) which was the first legal instrument to codify such rules, and the 1982 LOS Convention, which reproduces the same regime in its Articles 100-107 and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) which regulates, as amongst states parties,

[722] The major content of this sub-section has been published as Nong Hong, Adolf K.Y. Ng, "The international legal instruments in addressing piracy and maritime terrorism: A critical review", *Research in transportation economics,* Volume 27, Issue 1, 2010, pp.51-60.

unlawful acts against the safety of maritime navigation. Besides, the SUA Convention 2005, the PSI Interdiction Principles, and the U.S. Ship Boarding Agreement have been developed after 911 as efforts against maritime terrorism. The following sub-sections analyze the contribution and limits of these mentioned conventions or agreements.

1.1.1 UNCLOS

International law has established an obligation on States to cooperate in suppression of piracy and grants States certain rights to seize pirate ships and criminal. UNCLOS is a major anti-piracy treaty in contemporary ere with the following relevant provisions. Article 100 provides that "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". Article 105 provides that "on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by pirate and under the control of pirates, and arrest the persons and seize the property on board". The rules of piracy provide an exception to the principle of exclusive jurisdiction of the flag state on the high sea.[723] They give warships of all states the right, on the high seas or in an EEZ, to seize a pirate ship, to arrest the pirates, and to seize the property on board the pirate ship. The rules on piracy also give the state whose warship has seized the pirate ship the right to prosecute the pirates in its courts under its national legislations.

The UNCLOS definition on piracy consists of five core elements: (i) the acts complained against must be crimes of violence such as robbery, murder, assault or rape; (ii) committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State; (iii) by a private ship, or a public ship which through mutiny or otherwise is no longer under the discipline and effective control of the State which owns it; (iv) for private ends; and (v) from one ship to another so that two ships at least are involved.[724] However, the definition provided for in the UNCLOS has limitations in respect to the phenomenon of piracy. First, for an illegal act of violence or detention or any act of depredation against a ship to be considered an act of piracy, it also has to meet the 'private ends' requirement. That is to say, UNLOCS defines 'piracy' as only for 'private ends,' though it

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[723] Robert Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward", *Ocean Development and International Law*, vol. 33, 2002, p328

[724] L.F.E. Goldie, "Terrorism, Piracy and the Nyon Agreement", in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1988), p227.

is argued that such wordings could be given a wider interpretation. Therefore, the terrorist acts at sea for political ends are generally excluded.[725] This requirement seems to exclude sheer politically motivated acts directed at ships or their crew from the definition of piracy.

Second, according to the above definition, piracy *juris gentium* presupposes that a criminal act be exercised by passengers or the crew of a ship against another ship or persons or property on its board. The 'two-vessel' requirement is an ingredient of the crime of piracy, unless a criminal act occurs in *terra nullius*. Thus 'internal seizure' within the ship is hardly regarded as 'act of piracy' under the definition of UNCLOS. Jesus argues that the piracy definition does not and was not supposed to contemplate the one-ship situation.[726]

Third, since the above definition is only applicable to the acts of piracy on the high seas (traditional vessel-specific exceptions of exclusive flag states' jurisdiction or non intervention of free navigation) or places outside jurisdiction of States, it has a geographic limitation and could not cover the whole practical situation in some regions, such as Southeast Asia. According to the International Maritime Bureau (IMB), almost all attacks on moving ships in Southeast Asia are against ships exercising rights of passage in the territorial sea or in archipelagic waters, including the attacks against ships in the Straits of Malacca and Singapore. Hence, very few of the incidents in Southeast Asia are 'piracy' as defined in international law. As a matter of fact, it may not even be considered an act of piracy, under the coastal state domestic law. Therefore, the definition of piracy in the UNCLOS appears to be a weak tool for preventing and suppressing attacks on ships in Southeast Asia.

In addition, this high sea limitation renders international obligations to combat piracy unenforceable once the pirates have moved into the jurisdiction of any coastal state. Similarly, the said international obligation does not expressly compel any country to crack down on suspected pirates who move within the territorial waters of the country. The limitation also opens a back door for countries to shy away from any blame laid against them for their inefficiency in controlling piracy such as in their territorial seas or areas subject to disputed jurisdiction.

Besides the problem of definition, lack of effective law enforcement is another severe problem in anti-piracy in Southeast Asian seas. First, after the entry into force of UNCLOS,

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[725] Zou Keyuan, "Crackdown on Piracy in Southeast Asian Seas: Need a More Effective Legal Regime?" 2005

[726] Jesus, Jose Luis, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects", *The International Journal of Marine and Coastal Law,* Vol. 18, No. 3 / September, 2003, pp.363-400

the water areas under national jurisdiction have been greatly expanded. Such expansion gives coastal countries additional sovereignty or sovereign rights over their respective jurisdictional waters; but, on the other hand, it also causes difficulty in enforcement within these areas, particularly with regard to piracy. It even poses a big problem for some small countries which own vast water areas but lack an effective enforcement mechanism (e.g., archipelagic waters of Indonesia). As indicated, pirate attacks often occur in areas where the law enforcement response is either non-existent or negligible.[727] The high seas are shrunk upon the expansion of territorial seas and EEZs, and the free mobility area in the high seas to control piracy is becoming smaller. The question then arises whether the patrol vessels can freely enter into the EEZ areas of other States. Although the provisions in UNCLOS regarding piracy are applicable in the EEZs (Article 58 (2) of UNCLOS), the coastal States may not be very happy to see warships or government vessels of other countries pursuing and arresting piracy vessels in their EEZs, where they have sovereign rights and jurisdiction. The above zoning provisions of the UNCLOS may thus complicate the enforcement of the law of piracy.[728]

Second, unresolved maritime delimitation among Southeast Asian seas, including the multi-overlapping claims of maritime jurisdiction in the SCS, makes the work on anti-piracy even more complicated. As pointed out by Ng and Gujar, within the Asian-Pacific region, the meaning of maritime security often implies traditional power rivalries between nation states.[729] For instance, claimed by five adjacent countries — China (including Taiwan), Vietnam, The Philippines, Malaysia, and Brunei — the territorial disputes of the Spratly Islands have not yet been solved. Even if the territorial disputes had been solved, there are still boundary delimitation issues in the SCS to be settled. As is pointed out, disputes over maritime boundaries make accurate delineation of enforcement responsibility challenging, if not impossible.[730] In addition, effective law enforcement is difficult in the SCS, because of its vastness and due to the fact that it is dotted with numerous uninhabited islands to which pirates can easily retreat.[731]

The third problem is on 'hot pursuit.' Gal Luft argues that navies of foreign countries are normally forbidden to chase pirates across national boundaries, in what is known as the

[727] Eric F. Ellen, "Piracy", in Eric F. Ellen (ed.), *Violence at Sea,* Paris: ICC Publishing S.A., 1986, p 228.
[728] Zou Keyuan, "Crackdown on Piracy in Southeast Asian Seas: Need a More Effective Legal Regime?" 2005
[729] Ng, K.Y.A., Gujar, G.C., 2008. "Port security in Asia". In: Talley, W.K. (Ed.), *Maritime Safety, Security and Piracy*, Informa LLP, London, pp. 257-278.
[730] Clingan, Thomas A. Jr, "The Law of Piracy", in Eric Ellen (ed.), *Piracy at Sea* (Paris: ICC Publishing SA, 1989)
[731] IMO report, June 17, 1998

'right of hot pursuit' (Article 111 of UNCLOS).[732] This is of particular concern in areas such as the Malacca Strait, where pirates often rapidly escape from one country's territorial waters to another's, leaving frustrated security forces in their wake. The view by Brittin may be insightful. He once mentioned that "if a pirate is chased on the open sea and flees into the territorial maritime belt, pursuers may follow, attacking and arresting the pirate there; but they must give him up to the authorities of the littoral state".[733] In other words, foreign warships have the right of 'hot pursuit' within the EEZ of a coastal State and the right to arrest the piratical vessel there, but the coastal State may have the right to request the State which has exercised the rights in respect of suppression of piracy to hand over the pirates for trial in the coastal State. To conclude this point, as Jesus holds, the piracy regime contained in the UNCLOS only deals with the "powers, rights and duties of the different states *inter se*, leaving to each state the decision how and how far through its own law it will exercise its own powers and rights."[734] It does not impose on the state any obligation to prosecute and punish the offenders and dispose of the properties.[735]

1.1.2 The 1988 SUA Convention

When UNCLOS was drafted more than three decades ago, the most important criminal activities at sea included piracy, armed robbery against ships, narcotic drugs and illegal dumping and discharge of pollutants. Since 1982, and especially after the 911 attacks, the importance of other crimes at sea, like terrorism or transportation of WMD, rose dramatically. It was felt that in order to deal effectively with future cases of maritime terrorism from a judicial point of view; a specific international regulation was needed to secure the prosecution and punishment of the offenders, since the piracy laws seemed to be inadequate to that end[736].

The first international legal instrument on a specific legal regime covering sea terrorist acts, though without mentioning terrorism, came about only in 1988 with adoption of the IMO Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). The main goal of the SUA is to punish any person who commits an offense by unlawfully and intentionally seizing or exercising control over a ship by force or

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[732] Luft, Gal and Anne Korin, "Terrorism Goes to Sea", *Foreign Affairs*, November/December 2004, pp.61-71
[733] Brittin, Burdick H. "The Law of Piracy: Does It Meet the Present and Potential Challenges?" in Ellen (ed.), *Piracy at Sea* (Paris: ICC Publishing SA, 1989)
[734] See Jesus, Harvard Research in International Law, "Draft Convention on Piracy", 1932, 26 *American Journal of International Law*, p758
[735] Jose Luis Jesus, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects", p374.
[736] Ibid, pp363-400

threat thereof; or performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship[737]. It covers the unlawful acts no matter whether they are for political ends or for private ends.

The fundamental purpose of SUA Convention, along the lines of other anti-terrorist Conventions from which it drew inspiration, is the adoption of the 'extradite or prosecute' clause, imposing an international obligation on all states parties in which the offenders may be present to either prosecute them in their own court system, whether or not the offence was committed in their territory, or to extradite the offenders to one of that states that has jurisdiction under the Convention.[738] Indeed, the SUA Convention only establishes a mechanism to secure the punishment through judicial means of those involved in maritime terrorism, by imposing a legal obligation on a state party to activate extradition of the offender if he is present in the state's territory or, if failing to do so for whatever reason, to prosecute him in the state's own court system.

The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Protocol) contains similar provisions. Both SUA Convention and Protocol can be regarded as complimentary as anti-piracy legal measures. However, the scope of the territorial application between the UNCLOS and the SUA Convention is different: while the former applies only to the high seas and the EEZ, the latter applies not only the waters beyond, but also waters within national jurisdiction.[739] This enlarged territorial scope responds to the need to combat maritime terrorism in all areas of the ocean.

Beckman claims that the SUA Convention could be an important tool for combating major criminal hijacking, the most serious type of attacks against ships in Southeast Asia. The convention would apply to such attacks whether they were committed in port, in the territorial sea, or in maritime zones outside the jurisdiction of the coastal states.[740] If all the states in Southeast Asia were parties to the convention, people who committed offences under the convention in Southeast Asian waters would become 'international criminals'. If they entered the territory of any state party to the convention, that state would be under a legal obligation

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737 See Ted L.McDorman, "Maritime Terrorism and the International Law of Boarding of Vessels at Sea: Assessing the New Developments", paper presented at the Conference on Maritime Security in the SCS, December 8-9, 2005

738 Ibid.

739 The SUA Convention clearly states that "this Convention applies if the ship is navigating or is scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States."

740 Robert Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward", p329

to take them into custody and either prosecute them themselves or extradite them to another state for the purpose of prosecution. By making such persons 'international criminals' among states parties to the convention, it would help ensure that offenders had nowhere to hide.

However, though the US and other maritime powers are pressing other countries to ratify the 1988 SUA Convention, as at 30 April 2009, only 152 states were parties to the SUA Convention. In this respect, even though Southeast Asia is one of the regions with the highest incidents of piracy and armed robbery against ships, no all ASEAN countries are parties to the SUA Convention, notably Indonesia and Malaysia.[741] Some ASEAN nations fear that the obligations under the SUA Convention could compromise their national sovereignty ant that the Convention could eventually be expanded to even allow maritime forces of other nations to pursue terrorists, pirates, and maritime criminals in general into their waters. In addition, they also feel the Rome Convention only makes sense for those countries with already established maritime dominance or unchallenged maritime boundaries. For countries with recent colonial histories, just only won independence, as well as disputed or porous maritime boundaries, the SUA Convention could be a serious compromise to both national pride and domestic support for their respective governments.[742] However, if piracy and terrorism were fused into a general threat to maritime security, developing countries may find outside 'help' easier to accept and to 'sell' to their domestic polity. So it may be in the US' interest to conflate piracy and terrorism to persuade reluctant developing countries to assist maritime powers to pursue pirates and terrorist in their territorial and archipelagic waters"[743].

Besides the lack of membership as analyzed above, the limitation of the SUA Convention lies on its lack of preventive approach.[744] As Jesus argues, in order to effectively prevent acts of sea terrorism from happening and address terrorist attack against ships and other targets, states should be able to enjoy not only a judicial jurisdiction over offenders by claiming that they be prosecuted or by prosecuting themselves, but also a police jurisdiction that will allow them to prevent and stop terrorist ships from making terrorist attacks against other ships or against other targets such as port and pipeline facilities, platform structures, or that may be directed at blocking traits used for international navigation or causing major marine environment damage. Valencia holds that the SUA Convention may not be the

[741] http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25655/status-x.xls
[742] Ibid.
[743] Ibid
[744] Jose Luis Jesus, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects", p374

appropriate instrument to combat piracy.[745] The enumeration of offences under its Article three, even if interpreted broadly, will clearly cove only the serious but admittedly less common incidents of vessel hijackings and not the most common forms of piracy and armed robbery at sea, specifically in the Southeast Asian region.[746] Thus more than 95 percent of the piracy and sea robbery incidents reported thus far would not be covered by its application. There is indeed a need for standardized international law that will facilitate the prevention and prosecution of piracy, but the SUA Convention may not be it.[747]

1.1.3 The 2005 SUA Protocols

The Amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (2005 SUA Protocols) was adopted in October 2005.[748] It substantially expands the scope of the original 1988 SUA Convention.[749] According to McDorman, for instance, the 1988 SUA Convention does not touch upon the possibility of a State Party boarding a vessel of another State Party to prevent a SUA offence, while article *8bis* of 2005 SUA Amendments has created the possibility for the boarding of Sate Party vessel on the high sea.[750] The 2005 SUA Protocols considerably broadens the covered offences beyond concerns of vessels and navigation safety to deal directly with: 1) the use of a vessel as an instrument of or platform for terrorist activity; 2) the transport of certain suspect materials or biological, chemical or nuclear weapons; and 3) the transport of a person who has committed an act that is an offence under any of nine terrorist conventions.[751]

However, the breadth and nature of the new SUA offences may have made some States nervous about supporting a robust boarding regime.[752] First, the transport of "any equipment, materials or software or related technology that significantly contributes to the design, manufacturing or delivery of a biological, chemical or nuclear weapon" is impressively broad and could bring almost any commercial vessel under suspicion. Second, the international

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[745] Adam J. young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", p277

[746] International Chamber of Commerce and IMB Piracy Report: http://www.iccwbo.org/home/news_archives/2002/stories/piracy%20report%20Oct2002.asp>; see also Adam J. young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", p277

[747] Adam J. young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", p.277

[748] See IMO Document, LEG/CONF.15/DC/1, 13 October 2005, adopted by the Diplomatic Conference on the Revision of the SUA Treaties, 10-14 October 2005, held in London. See: IMO Press Release, "Revised treaties to address unlawful acts at sea adopted at international conference," 17 October 2005, available on the IMO website.

[749] See Ted L.McDorman, "Maritime Terrorism and the International Law of Boarding of Vessels at Sea: Assessing the New Developments".

[750] Ibid.

[751] For more details see 2005 SUA Amendment.

[752] Ted L.McDorman, "Maritime Terrorism and the International Law of Boarding of Vessels at Sea: Assessing the New Developments".

political climate is currently one of skepticism respecting the true motives of States seeking developments in international law and practice for dealing with terrorist activity. Third, adopting a robust boarding regime may have been seen as having the consequence of discouraging States from becoming a party to the SUA Convention 2005. For instance, none of the ASEAN states have ratified the SUA 2005 Protocols.[753]

The 2005 SUA Protocols contains a very conservative approach to flag State consent. In the situation of a State Party having reasonable grounds to believe a vessel (or someone on board) is, has or may commit a SUA offence, it is necessary to have direct consent from the flag State to board, inspect or take other actions. More generally, the issue of the consent to boarding in the SUA Convention 2005 has made it "an air of unreality".[754] First, while the precise wording leaves consent to a request to board and inspect (and take other action respecting the vessel, cargo and persons on board) in the hands of the flag State, the realities are such that when confronted with a request to board and inspect a suspect vessel, unless a flag State is in a position to take its own direct action, it is highly unlikely that a flag State would withhold authorization since such a withholding would be tantamount to an admission of complicity in the activities of the vessel. Second, it is highly unlikely that "states of proliferation concern" (the wording from the PSI Interdiction Principles) are going to become a party to the SUA Convention 2005, while the new boarding regime only applies to those States that become a party to the SUA Convention 2005.

1.1.4 The PSI Interdiction Principles

The frustrating experience with the North Korean vessel in November 2002[755] led the then US President— George W. Bush— to announce on 31 May 2003 in Krakow a new initiative against shipments of WMD and missile-related equipment in transit via air, land, and sea named as the 'Proliferation Security Initiative' (PSI), which was described by US as "an activity, not an organization" with the goal being enhanced cooperation amongst participating States respecting the existing framework of nonproliferation and control of weapons of mass destruction. As of November 2008, a total of 93 states had thus acceded to the initiative, but only nine states had actually signed the envisaged bilateral ship-boarding

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[753] See IMO website.

[754] McDorman, "Maritime Terrorism and the International Law of Boarding of Vessels at Sea: Assessing the New Developments".

[755] For details on this case please see Angelos M. Syrigos, "Developments on the Interdiction of Vessels on the High Sea", in Anastasia Strati, Maria Gavouneli and Nikolaos Skourtos (ed.), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), pp149-150.

agreements. Moreover, highly relevant states such as China, India and Indonesia, or countries regarded by the Bush administration as 'rogue states' such as Syria or members of the 'Axis of Evil' such as Iran and North Korea, had not joined the initiative. In Southeast Asia, only Cambodia and the Philippines are participants of the PSI.[756] The PSI Interdiction principles were released in September 2003 following several meetings of the then PSI participants (Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the US) that refined the wording and content.[757] The PSI Interdiction Principles are directed at "States or non-state actors of proliferation concern" which are engaged in proliferation through: (i) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (ii) transfers (selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

The PSI Interdiction Principles do not create legal obligations or responsibilities and do not, on their own, create or provide an international legal justification for the boarding of foreign flag vessels or any other interference action. There is no formal process by which States indicate they are willing to accept, apply or act on the PSI Interdiction Principles. Rather, the Principles indicate that the PSI participants (in September 2003) are committed to the Principles and call other States to make a similar commitment to take "specific actions," including to board and search their own flagged vessels that are suspected; to stop and search suspect vessels "in their internal waters, territorial seas, or contiguous zones" and seize cargo; and to enforce condition on vessels "entering or leaving their ports, internal waters or territorial seas" such as that suspect vessels will "be subject to boarding, search, and seizure of…cargoes priory to entry."[758]

These specific actions are generally in accord with the existing international legal framework respecting boarding and inspection, since a flag State has authority over its own vessel and the 'geographic exception' covers the listed interferences with foreign flag vessels.[759] However, the action of a coastal State to stop and search suspected commercial vessels engaged in passage through territorial waters or to enforce conditions on the entry of a vessel into a State's territorial seas where the vessel is not heading to a port or internal waters may be

756 Jack I. Garvey, "The International Institutional Imperative For Countering The Spread Of Weapons Of Mass Destruction: Assessing The Proliferation Security Initiative", *Journal of Conflict & Security Law* (2005), Vol. 10 No. 2, 125–147

757 Ibid.

758 Statement of Interdiction Principles', declaration issued by the Proliferation Security Initiative (PSI), Paris, September 4; The White House, http://www.whitehouse.gov, September 4, 2003

759 Geographic exceptions to the exclusive authority of a flag State arise as a result of either the location of a foreign flag vessel in waters under the jurisdiction of another State or the intention of a foreign flag vessel to enter waters under the jurisdiction of a foreign State.

questioned, since in either case there may be an interference with the vessel's innocent passage rights. In other words, these specific actions may not be included within the "geographic exceptions".[760]

Syrigos questions whether PSI was consistent with international law.[761] The founders of the PSI claimed that their initiative was based on the Statement made by the President of the UN Security Council on 31 January 1992, at the conclusion of the 3046th meeting of the UN Security Council, in connection with the item entitled "The responsibility of the [UN] Security Council in the maintenance of international peace and security."[762] Nevertheless, this statement was quite vague as to the exact actions that could be undertaken for its implementation. Furthermore, Presidential Statements do not enjoy the same status as Security Council Resolutions. Thus the statement could not legitimize actions of pre-emptive interdiction of vessels on the high seas on the ground of shipment of WMD.

Supporters argue that PSI training exercises and boarding agreements give a structure and expectation of cooperation that will improve interdiction efforts. Many observers believe that PSI's "strengthened political commitment of like-minded states" to cooperate on interdiction is a successful approach to counter-proliferation policy.[763] But some caution that it may be difficult to measure the initiative's effectiveness, guarantee even participation, or sustain the effort over time in the absence of a formal multilateral framework. Others support expanding membership and improving inter-governmental and U.S. interagency coordination as the best way to improve the program. President Obama in an April 2009 speech said that PSI should be turned into a "durable international institution," but how this would be implemented is not yet clear.[764]

We may note that even in the face of maritime terrorism, the recent developments — the 2005 SUA Amendments, the PSI Interdiction Principles — all respect the 'traditional' international legal framework of requiring direct flag State consent before boarding and inspection of a foreign flagged vessel can be undertaken on the high sea. They make some progress in terms of measures to counter maritime terrorism regarding boarding of vessels of flag states, but the problem of consent from flag states still remains a problem.

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[760] For explanation of "innocent passage rights" please see Article 17-19 of UNCLOS.
[761] Angelos Syrigos, "Development on interdiction of vessels on the high seas", pp149-202.
[762] According to the statement: "The proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end."
[763] Mary Beth Nikitin, "Proliferation Security Initiative (PSI)", *CRS Report for Congress*, available at http://www.fas.org/sgp/crs/nuke/RL34327.pdf (accessed on January 18 2010)
[764] Ibid.

1.2 Policy Approach

Apart from legal instruments, policy making plays an important role in maritime security. This sub-section elaborates the clash between sovereignty and freedom of navigation which is reflected through the maritime policy of coastal states and maritime states (here refer to users states).

1.2.1 US' RMSI

The Bush Administration launched three major international maritime security initiatives: PSI,[765] the Container Security Initiative (CSI),[766] and the Regional Maritime Security Initiative (RMSI). While the first two are global in scope, the third was directed specifically at the Strait of Malacca and SCS. According to Admiral Thomas B. Fargo, then commander-in-chief of US Pacific Command in 2004, RMSI would involve not only closer intelligence-sharing with Southeast Asian states, but also deployment of US Marines and Special Forces on high-speed vessels to interdict maritime threats, particularly from terrorists. This initiative aims to combat the transnational threats of maritime piracy and terrorism in the Strait of Malacca and the Singapore Strait by introducing joint naval exercises and other mechanisms for information sharing and cooperation on law enforcement operation. An additional objective of the RMSI is to monitor, identify, and intercept suspected vessels in national and international waters. This, however, required strong naval forces, and the navies of most countries affected by maritime terrorism were simply not up to the task.

In sharp contrast with CSI and PSI, RMSI caused considerable consternation around the SCS.[767] Fargo secured support for RMSI from Singapore, which was negotiating a 'strategic framework agreement' on security with Washington and had already supported other key US maritime security-related measures, notably PSI and CSI. However, Malaysia and Indonesia immediately and vehemently rejected the idea of U.S. troops in the area, emphasizing their own capabilities in tackling the threat. Both stated that security there was the responsibility of the coastal states, that they possessed the capacity to ensure security without any deployment of extra-regional forces, and that the introduction of such foreign forces might even be counterproductive by provoking terrorist incidents. Washington began

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[765] David Rosenberg and Christopher Chung, "Maritime Security in the SCS: Coordinating Coastal and User State Priorities", *Ocean Development & International Law*, 39:51–68, 2008, pp.54-55

[766] Ibid. pp.53-54

[767] Ibid. p.55

almost immediately to backpedal on the idea. The then Defense Secretary Donald Rumsfeld and Pacific Fleet Commander Admiral Walter Doran stated that Admiral Fargo's earlier comments on the RMSI had been misreported. They said the plan was still very much in its early stages and that it would focus primarily on intelligence sharing, not US troop presence.[768]

The U.S. Navy has since sought to pursue its regional maritime security interests through other, primarily bilateral means. In June 2005, for example, it began a series of bilateral naval antiterrorism exercises in Southeast Asia as part of the annual Cobra Gold exercise regime. In the joint U.S.-Singapore training drill in the SCS, more than 15,000 troops took part along with naval aircraft, a submarine, and 12 ships. A major emphasis of the exercise was preventing a maritime terrorist strike on the high seas. From Singapore, the U.S. Navy traveled to Malaysia, Thailand, Brunei, Indonesia, and the Philippines to continue separate bilateral exercises.[769]

1.2.2 US-India Alliance

In the wake of the Cold War and 9.11, the Unites States and India have developed a new political and military relationship. Indeed, it appears that the Bush administration desires a full-fledged alliance which would make India the Unites States' foremost military ally in Asia[770]. In cooperation with India, the Unites States has undertaken a proactive attempt to control both piracy and terrorism in the Strait of Malacca. This effort uses U.S. and Indian warships to escort commercial vessels of high value transiting the Strait. However, naval patrols by major powers may be not the effective or politically acceptable way to combat either piracy or terrorism.[771] First, these patrols have created suspicion in Southeast Asia regarding the real goals of the Indian and U.S. naval presence in the Strait of Malacca.[772] This suggests that the Indian and U.S. naval presence in the Strait is not just to combat piracy and terrorist, but is part of a broader attempt to assert a U.S.-friendly Indian naval presence in the region. Naval patrols by India and the United States in the Malacca Strait may be perceived in Southeast Asia as part of a much broader regional security plan whose scope goes well beyond combating piracy and terrorist threats in the Strait of Malacca.

Although the indigenous capacity in Southeast Asia is insufficient to combat the

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768 John D. Banusiewicz, "Officials Clarify Maritime Initiative amid Controversy," *American Forces Press Service*, 4 June 2004.
769 Eric G. John, "The United States and Southeast Asia: Developments, Trends, and Policy Choices," Statement before the House International Relations Committee, Subcommittee on Asia and the Pacific, Washington, DC, 21 September 2005, available at www.state.gov/p/eap/rls/rm/2005/53683.htm (accessed 1 December 2006).
770 Ibid, p278
771 Adam J. young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", p277
772 Ibid, pp277-78

problem, naval patrols by outside maritime powers are perceived as a challenge to national sovereignty. Additionally, when the 1988 SUA Convention is considered in this context, it could be interpreted as a device to allow the dominant naval powers to undermine the authority of regional powers.[773] This could also account for the reluctance of Southeast Asian nations to ratify the 1988 SUA Convention. Furthermore, their practical effectiveness is questionable. The arrest authority of foreign naval vessels exercising rights of transit through international straits is unclear. Beyond the legal jurisdictional issues, the sheer size of these vessels may inhibit their effectiveness in pursuing pirates and would-be terrorists using small high-speed craft that have intimate knowledge of the surrounding waters. Moreover, traditionally, it is not the role of the military to function as police.

1.2.3 Japanese Anti-Piracy Initiatives

Maritime piracy concerns many nations, but it particularly alarms Japan, a State vitally dependent on the flow of resources through the pirate-infested waters of Southeast Asia. Since the mid-1990s concern over the piracy threat has triggered changes in Japan's outlook and led it to initiate significant efforts aimed at leading a regional effort to cooperatively eradicate piracy in Southeast Asia.[774] Japan's initiatives have met with mixed success. The most radical ideas, proposals which envisioned standing ocean-peacekeeping fleets conducting multinational patrols in both territorial and international waters, made very little progress. Initially, it made a sweeping proposal for tackling maritime security, an ocean peacekeeping (OPK) fleet to conduct multinational naval and coast guard patrols in both territorial and international waters.[775] Japan's OPK proposal was met with skepticism, if not suspicion, by China and several Southeast Asian states. Indonesia, in particular, was unwilling to allow Japanese vessels to patrol Indonesian waters and was further reluctant to bear the cost of participating in joint exercises. Faced with disaster relief challenges, separatist struggles, and widespread poverty, Jakarta does not rate piracy as a top priority security issue. Malaysian policymakers also rejected Japanese joint patrols, concerned about violation of their country's sovereignty and limitations on controlling their EEZ. Singapore, possessing interests closely aligned with those of Japan, was most receptive.

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[773] Ibid.

[774] John F. Bradford, "Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Responses", *Contemporary Southeast Asia* 26, No.3, 2004, pp480-505

[775] D. Rosenberg and C. Chung, "Maritime Security in the SCS: Coordinating Coastal and User State Priorities", pp.56

China opposed the OPK proposal, perhaps out of concern that Tokyo might be using the piracy issue "to justify the expansion of its naval presence, to compensate for any decline of US patrols, and to prevent Chinese influence over SLOCs in Southeast Asia."[776]

In November 2000, Japanese Prime Minister Mori, while attending the ASEAN+3 (China, Japan and South Korea) summits in Singapore, pushed for another regional conference to organize anti-piracy cooperation. That conference, held in Tokyo in October 2001, reaffirmed the need for regional cooperation, but again secured no commitments. Similarly, in 2001 retired JMSDF Vice Admiral Hideaki Kanede proposed a regional "Maritime Coalition" which would include JMSDF vessels in a multinational maritime security force.[777] Despite the efforts, these ideas, like other multilateral initiatives, were overly demanding and have failed to find acceptance. Another recent multilateral initiative has also stalled. After successfully conducting bilateral exercises with the Indonesian Coast Guard and Marine Police in March 2002 and the Singapore Police Coast Guard in December 2003, the JCG proposed a trilateral anti-piracy exercise involving maritime law enforcement agencies from Indonesia, Singapore, and Japan. Singapore has endorsed the idea, but Indonesia has been less cooperative. Japanese officials now regard the proposal as on indefinite hold.

Nevertheless, Japan has succeeded in promoting bilateral anti-piracy exercises involving its own Coast Guard and regional states' security forces, and negotiations to establish a Regional Cooperation Agreement on Anti-Piracy in Asia (ReCAAP), primarily involving intelligence exchange between members of ASEAN, Japan, China, South Korea, India, Bangladesh and Sri Lanka.[778] The Japanese intent is for members to commit themselves to supporting a primarily Japanese-funded Information Sharing Center where full-time staff would both maintain a database of piracy-related information and facilitate communication between national agencies prosecuting piracy cases. Malaysia, Singapore, South Korea, and Indonesia have all volunteered to host the ISC, but after two years of negotiations the delegates have been unable to settle on a text agreement for its mandate and protocols. If a ReCAAP agreement is reached, it will be the first multilateral Japanese efforts to succeed. However, ReCAAP is far less ambitious than the Japanese ideal concept. The

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[776] Christopher W. Hughes, *Japan's Security Agenda. Military, Economic, and Environmental Dimensions* (Boulder, CO: Lynne Rienner, 2004), 225.

[777] Hideaki Kaneda, "Japanese Maritime Strategy in the New Era", in Jurgen Schwarz et al .*Maritime Strategies in Asia*, Bangkok: White Lotus Press, 2001, pp.244-54

[778] John F. Bradford, "Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Responses", *Contemporary Southeast Asia* 26 (2005), pp. 494–497,p492

negotiations have been limited to information sharing, while maritime patrols and training exercises have not been discussed and ReCAAP is unlikely to have enforcement mechanisms.

Tokyo's efforts in working with SCS littoral states to combat the shared threats of piracy and maritime terrorism have generally been welcomed. Bilateral approaches by the Japanese Coast Guard (JCG) have enjoyed considerable success. The JCG has provided training, equipment, and funding to all the coastal states of the SCS, and has conducted joint training exercises with a number of Southeast Asian states. Tokyo has also funded the installation and maintenance of navigational aids and buoy tenders, and provided technical assistance to upgrade marine safety data management systems and hydrographic surveys. Singapore, in particular, has appreciated Japan's offers of assistance and encouraged Tokyo in its bilateral and multilateral initiatives.[779] In relation to the Strait of Malacca, however, both Malaysia and Indonesia oppose Japan's (and other user states') direct involvement in patrolling the waterway, citing concerns about infringement of sovereignty. Instead, they welcome the provision of technical assistance and information sharing to develop better maritime situational awareness. Tokyo, in response, has emphasized capacity building through training and provision of equipment.

1.2.4 Australia and FPDA

The primary vehicle for Australia's multilateral security commitment in the SCS has been the Five Power Defence Arrangements (FPDA). Under the FPDA, Australia, New Zealand, and the United Kingdom commit themselves to consult with Malaysia and Singapore regarding the defense of the latter two countries' territory against external aggression. Traditionally, the annual FPDA exercises have focused on conventional security threats.[780] Air defense exercises have been held since the 1970s, while regular land and sea exercises first began in 1981. Since 1991, combined air, land, and sea exercises have been held, known as 'Stardex'. More recently, joint air and sea exercises have been launched titled 'Flying Fish.'[781] In June 2004, the FPDA defense ministers agreed to expand the focus of the exercises to include nonconventional threats such as terrorism and piracy. The first exercise to focus on maritime security took place in the SCS in October 2004, followed by a second in September 2005.

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[779] Ibid.

[780] Damon Bristow, "The Five Power Defence Arrangements: Southeast Asia's Unknown Regional Security Organization," *Contemporary Southeast Asia* 27 (2005): 7–8.

[781] Ibid., at pp.7-8.

Venturing further into the nontraditional security realm, the 2006 meeting of FPDA defense ministers agreed to explore cooperation in humanitarian assistance and disaster relief.[782]

1.2.5 India's 'Look East' Policy

India has pursued its 'Look East' policy on two fronts: by seeking bilateral ties with individual governments and by seeking partnership status with ASEAN. India became a 'Sectoral Dialogue Partner' of ASEAN in 1992; a 'Full Dialogue Partner' in 1995; joined the ASEAN Regional Forum (ARF) in 1996; became a full summit Partner of ASEAN in 2002; acceded to ASEAN's Treaty of Amity and Cooperation[783] in 2003; and in 2004 signed an agreement with ASEAN to promote peace, progress, and shared prosperity. More recently, India attended the inaugural East Asia Summit in December 2005.

India established a presence in the SCS in the early days of the 'Look East' policy, conducting its first-ever joint naval exercises with Indonesia (1991), Malaysia (1991), and Singapore (1993). In 2001, India held separate bilateral exercises in the SCS with the Vietnamese and South Korean navies. Singapore, which during the Cold War had considered the Indian navy to be a threat, reversed course in 1996 and signed an agreement on military cooperation with India. The Indian navy now conducts exercises regularly with Singapore. Thailand has developed a complementary "LookWest" policy and has become an increasingly close ally of New Delhi. Coordinated naval patrols are an element of this closer relationship. India's ties to Vietnam were greatly strengthened in 2000 following the visit of the Indian defense minister to Vietnam.[784] India has entered into bilateral defense cooperation agreements with Malaysia, Singapore, Laos, and Indonesia. It has also provided military aid to the armed forces of Myanmar and Thailand. India is now embarking on Phase II of its 'Look East' policy, expanding its scope to include Australia, China, Japan, and South Korea. More emphasis will be placed on security cooperation, including joint operations to protect sea-lanes and the pooling of resources against common threats. The military contacts and joint exercises that India launched with ASEAN states on a low-key basis in the early 1990s are now expanding into full-fledged defense cooperation. As the 2004 India-ASEAN

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[782] Ministry of Defence, Singapore, *6th FPDA Defence Ministers' Meeting*, 5 June 2006, available at www.mindef.gov.sg/imindef/news and events/nr/2006/jun/05jun06 nr.html (accessed 26 June 2006).
[783] 1976 Treaty of Amity and Cooperation in Southeast Asia, 1025 *U.N.T.S.* 319.
[784] Faizal Yahya, "India and Southeast Asia Revisited," *Contemporary Southeast Asia* 25 (2003): 7.

Summit Statement noted, "Never before has India engaged in such multi-directional defense diplomacy."[785]

India's current maritime doctrine states that "[t]he Indian maritime vision for the first quarter of the 21st century must look at the arc from the Persian Gulf to the Straits of Malacca as a legitimate area of interest."[786] While India's naval chief, Admiral Arun Prakash, indicated in 2005 that India had no intention of patrolling the Malacca Strait, this view changed in 2006 when New Delhi signaled its willingness to help patrol the strait subject to an invitation from the littoral states.[787]

India's rapid rise to strategic prominence in the region has been aided by its absence of any history of disputes in the region. It has no territorial claims in the region. Unlike Japan, China, or the United States, India is perceived as having no strategic ambitions in the region. It is seen as a power that could balance China's rise without posing a direct threat. However, as its trade with ASEAN and China grows, India has an increasing economic incentive to keep regional SLOCs open for international shipping.

1.2.6 Coastal States' Maritime Policy

For some SCS coastal states, any proposed international coordination to combat terrorism or piracy is a lesser priority than other issues. These issues include maintaining control over newly acquired ocean resources, protecting national security, or protecting bureaucratic interests.[788] In Indonesia, all these three issues may coexist. With a coastline twice as long as the circumference of the earth, and with no more than a few dozen operating vessels to patrol its territorial waters, the Indonesian navy and marine police face a range of problems, including illegal fishing, illegal migration, drug smuggling, and marine pollution. The Indonesian government has estimated that the country loses US$4 billion each year due to illegal fishing, several times more than the estimated cost of all pirate attacks worldwide.[789]

Indonesia has been the coastal state least receptive to both U.S. RMSI and Japanese anti-piracy proposals. They strongly reiterate their unwillingness to allow Japanese forces to patrol Indonesian waters and have been hesitant to engage in joint training exercises.

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[785] India-ASEAN Summit, *India-ASEAN Summit Declaration, 30 November 2004* (New Delhi: Press Information Bureau, Government of India, 2004).
[786] Integrated Headquarters, Ministry of Defence (Navy), *Indian Maritime Doctrine. INBR 8* (New Delhi: Integrated Headquarters, Ministry of Defence, 2004), 56.
[787] "India Has No Intention of Patrolling Malacca Straits," *Daily Times,* 23 July 2005.
[788] Rosenberg and Chung, "Maritime Security in the SCS: Coordinating Coastal and User State Priorities", p.60
[789] Stefan Ekl¨of, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (Copenhagen: NIAS Press, 2005).

However, Indonesia has accepted Japanese funds and equipment offered with few obligations. Indonesian policymakers decline to cooperate with the more substantive Japanese proposals because they believe such cooperating would produce few gains at high coast[790]. First, Indonesia's maritime forces suffer from critical shortages of equipment, funding, and expertise. Cooperative efforts such as joint exercises with Japan are costly not only in terms of fuel and manpower, but that they divert vessels away from other activities. Second, cooperation is also perceived as costly to Indonesia's sovereignty, especially over its archipelagic waters, which is a particularly sensitive issue in Indonesia. Preserving sovereign control over these waters is not just of symbolic value, but is also practical. Not only do Indonesian waters hold vast resources, but exercising exclusive jurisdiction has been of continued importance in securing the state against both external threat and irredentist movements[791]. Intense sensitivity to maritime sovereignty issues has made Indonesia perceive cooperation with foreign forces in its waters as coming at exceptionally high cost. Even cooperative ventures which do not directly undermine sovereignty, such as joint exercises, are viewed with caution out of fear that such activities might lead to creeping infringement. Besides the eradicate of piracy occupies an extremely low position in the government's hierarchy of interests since the policymakers are preoccupied with dozens of more urgent matters ranging from suppressing terrorism and separatism, to alleviating poverty and to sustaining democracy.

Since the Japanese launched their anti-piracy initiatives, Malaysian officials have spoken favorably concerning cooperation in general, but voiced strong opposition to joint patrols and exhibited significant caution with regard to multilateral arrangements.[792] Malaysia's bilateral cooperation with Japanese anti-piracy proposals has been greater than its support for multinational initiatives, but that has also been restrained. Like Indonesia, Malaysia has also regarded the costs of such cooperation as high. Although more wealthy than Indonesia, Malaysia is constrained with regards to the resources it can devote to maritime security. And Malaysia highly values protection of its sovereignty and the maintenance of legal control over its sea territory. Malaysian policymakers are not only concerned about violations of sovereignty, but any agreements which might potentially erode their exclusive control. Therefore they also cite sovereignty concerns as impeding multilateral cooperation and stress

[790] Ibid, pp497-499
[791] Ibid, p498
[792] Ibid, p499-502

the importance of tackling piracy at the national rather than transnational level.[793] Malaysian policymakers also consider dealing with the problem of piracy in its territorial waters to be a matter of national prestige. Cooperation with Japan has increased in recent years because Malaysian policymakers have increasingly politicized countering maritime security threats as a policy priority and as economic recovery has made more resources available.

Singapore has been the coastal state most willing to cooperate with both U.S. RMSI (analyzed above) and the Japanese initiatives. Not only has Singapore agreed to bilateral arrangements with Japan, but it has also encouraged Japan to take a leadership role in enhancing multilateral cooperation. Singapore has been generally cooperative because it perceives a tremendous amount to gain and relatively little to lose by working with Japan against piracy. The gains include improved regional and maritime security. Singapore is particularly interested in cooperating with the Japanese anti-piracy initiatives as a tool for securing Japanese commitment to regional security. Because Singapore is s small state surrounded by large neighbors, Singaporean policymakers share a strong sense of vulnerability and regard cooperation with extra-regional powers as essential to survival.[794] However, those benefits are offset by perceived cost that include the expenditure of resources and harm to sovereignty and nation-building efforts. Therefore, Singaporean cooperation has not been without limit. For example, although Japan approached Singapore to conduct bilateral anti-piracy training exercises in 2000, Singapore did not agree until 2003.

Singapore has taken the most forceful measures to address maritime security threats. It was the first Asian port to join the U.S.-sponsored CSI and has provided sea security teams to escort selected vessels transiting the Singapore Strait. It has restricted circulation of small craft and ferries within the port area and increased surveillance efforts, spending $3.5 million to install tracking devices on all Singapore-registered small boats that identify their location, course, and speed. Together with Indonesia, it operates a radar tracking system on Batam Island to identify, track, and exchange intelligence on shipping in the Singapore Strait. And, in mid-August 2005, it hosted the first PSI exercise to be held in Southeast Asia, code-named 'Deep Sabre', involving military, coast guard, customs, and other agencies from 13 countries.[795]

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793 Ibid.
794 Ibid, pp494-497
795 "Singapore, Allies to Stage Maritime Security Drill," *Reuters*, 15 August 2005.

1.2.7 China's Dual Role

China is both a coastal state with an extensive coastline and EEZ resource claims as well as a user state with a large shipping fleet and a growing dependence on energy imports. Hence, it plays a dual role in its participation in maritime security cooperation in the SCS. Beijing is very concerned about securing freedom of navigation through the SCS; however, it is also aware that the presence of Chinese naval vessels in the Strait of Malacca or other choke points is unlikely to be welcomed by the littoral or user states. In the past few years, China has stepped up its participation in maritime cooperation in East Asia. It was these cooperative activities that have gradually changed the Chinese mindset, provided useful experience for the Chinese naval force, and contributed to China's confidence in embarking on the Gulf of Aden expedition.[796] Take joint search and rescue exercises as an example. In recent years, China has had joint naval search and rescue operations with a range of countries. The PLA Navy has had at least two such exercises with India. In July 2005, China, South Korea, and Japan held a joint search and rescue exercise in China's offshore area. In September and November 2006, Chinese and American navies conducted two search and rescue exercise off the US west coast and in the SCS respectively.

The year 2007 witnessed Chinese activism in these exercises. China participated in the first ASEAN Regional Forum maritime-security shore exercise hosted by Singapore in January; the multinational four-day sea phase of 'Peace-07' exercises in the Arabian Sea in March; the Western Pacific Naval Symposium exercise in May; and joint search and rescue operations with Australia and New Zealand in October 2007.[797]

The increased naval interactions with the outside world have had a positive impact on China's participation in regional maritime affairs. China is no longer an outsider in East Asian maritime cooperation, particularly in projects such as joint oceanic research, environmental protection, and many sea-based non-traditional security issues with neighboring countries. These major projects include various United Nations Environment Programme (UNEP) initiatives in East Asia. China joined the North Pacific Coast Guard Forum in 2004 and now actively participates in its six areas of cooperation: anti-drug trafficking, joint actions, counter-illegal immigration, maritime security, information exchange, and law enforcement on the sea. In addition, two Chinese ports—Shanghai and

[796] Rosenberg and Chung, "Maritime Security in the SCS: Coordinating Coastal and User State Priorities", pp.58-59.
[797] Li Mingjiang, "China's Gulf of Aden Expedition: Stepping Stone to East Asia", *RSIS Commentaries*, 9 January, 2009.

Shenzhen—are part of the US Container Security Initiative.

Despite the growing activism and confidence, China's vision and policy on any grand scheme of maritime cooperation in East Asia are restrained by the strategic and geopolitical realities in East Asia. The lack of strategic trust between China and other major powers, even between China and some smaller regional states, is likely to make China cautious in maritime affairs in the region. However, the fact that the People's Liberation Army Navy (PLAN) has deployed two warships and a supply ship to the Gulf of Aden and the waters off the coast of Somalia on an 'anti-piracy mission' make some people wonder whether the naval expedition to Africa represents a watershed in China's security policy.[798] Another question is how the Gulf of Aden operation will change China's policy and behavior in maritime affairs in East Asia. To many observers of Chinese foreign policy, this decision appears to break from Beijing's consistent position of maintaining a low profile international policy and marks a departure from its strenuous effort to downplay—and to a large extent conceal—the growth of its military power in the past decade.

1.2.8 Emerging Direction of Coastal States and User States?

New initiatives bringing together coastal and user states have emerged.[799] In September 2005, Indonesia and the IMO convened a meeting in Jakarta to discuss the safety, security, and environmental protection in the Strait of Malacca and Singapore Strait. It recognized the role of burden sharing between coastal and user states in the use and maintenance of international straits pursuant to Article 43 of UNCLOS.[800] Following on from this, in February 2006 the United States hosted a meeting in Alameda, California, involving Indonesia, Malaysia, Singapore, Australia, Germany, India, Japan, the Netherlands, Norway, the Philippines, South Korea, and the United Kingdom. While the meeting's objective was to coordinate potential user state contributions to assist the Strait of Malacca/Singapore Strait littoral states, little progress was made on burden sharing. On the one hand, the littoral states want burden sharing to include the cost of providing safety and environmental protection

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[798] Mingjiang Li, "China's Gulf of Aden Expedition and Maritime Cooperation in East Asia", *China Brief*, Volume: 9 Issue: 1, 2009. January 12, 2009.

[799] Rosenberg and Chung, "Maritime Security in the SCS: coordinating coastal and user state priorities", *Ocean Development & International Law*, 39:51-68, 2008, p.64

[800] Indonesian scholar Mat Taib Yasin recently puts forward a proposal which calls upon the user states of the Strait of Malacca and Singapore to share the burden of maintaining safety and security of navigation without the expense of coastal states' sovereignty erosion. See Mat Taib Yasin, "Sharing The Burden of Ensuring Safety and Security of Navigation in the Straits of Malacca Without Compromising Sovereignty", paper submitted to the Conference on Maritime Security in the SCS, December 8-9, 2005, China

services. On the other hand, user states view burden sharing as a means of becoming more directly involved in maritime security measures to address piracy and terrorism threats.[801]

There are also important differences in threat perception. The field of vision of maritime security for many user states is restricted to piracy and terrorism. For the littoral states, however, maritime security has a wider brief, including transnational crime, marine pollution, and marine resource management. Despite these difficulties, in September 2006 Malaysia and the IMO organized a meeting in Kuala Lumpur of coastal states, major shipping nations, and shipping companies. Working groups on safety of navigation and maritime security were established to undertake projects on issues such as the removal of shipwrecks; the establishment of a hazardous and noxious substance response center; the installation of automatic identification system (AIS) transponders for small ships; and the placement of tide, current, and wind measurement systems.

Substantial voluntary contributions have been made by China and Japan to provide for the safety and security of shipping in the Strait of Malacca. Cognizant of the free rider problem, the idea of a user-pays system to help fund measures such as pollution cleanup and the maintenance of navigational aids has been raised. The United States and many shippers oppose strongly the introduction of any fees, however. Rather, they prefer to see greater transparency and accountability in any use of funds for maritime safety and security. They would also like to see Malaysia and Indonesia ratify the 1979 Convention on Maritime Search and Rescue,[802] SUA Convention,[803]and ReCAAP.[804]

Perhaps the most ambitious proposal is the Marine Electronic Highway (MEH) program. Funded by the World Bank, UN Development Programme (UNDP), and the IMO, the MEH project aims to create a shipping traffic control system similar to the global air traffic control arrangement, with comprehensive, integrated electronic information, navigation, and control systems.

Whatever their conflicting claims and mutual suspicions may be, political leaders in the coastal states are beginning to understand that they must cooperate in order to manage the increase in shipping traffic, to address maritime security threats, and to use the resources of the SCS sustainably. While some progress has been made, there is as yet no durable

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[801] Sam Bateman, "Burden Sharing in the Straits:Not so Straightforward," *IDSS Commentaries* 17/2006 (20 March 2006).
[802] 1979 International Convention on Maritime Search and Rescue, 1405 *U.N.T.S.* 97.
[803] 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 *U.N.T.S.* 221.
[804] Nazery Khalid, "Burden Sharing, Security, and Equity in the Straits of Malacca," *Japan Focus*, 17 November 2006, available at www.japanfocus.org/products/details/2277 (accessed 14 December 2006).

agreement on how to share the burden for providing safety and security in the region. Closing the gap between goals and means remains a key challenge for all concerned parties.

1.3 Institutional Approach

Institutional approach to address maritime security concern is undoubtedly worth our attention, in addition to the earlier discussion on legal and policy making approach. We will now look at the regional and broadly international institutional responses which address the maritime security cooperation.

1.3.1 Regional Responses

The regional anti-piracy conferences produced some positive results in terms of regional cooperation and coordination. For example, heads of coast guard agencies from 16 countries and 1 region (ten ASEAN countries, India, Sri Lanka, Bangladesh, South Korea, China, Hong Kong, and Japan) attended the first regional conference held in April 2000, where 3 documents were adopted. In a statement "Asia Anti-Piracy Challenge 2000," the coast guard authorities expressed their intention to reinforce mutual cooperation in combating piracy and armed robbery against ships. The most significant development is ReCAAP, which was formulated for adoption among 16 Asian countries including Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand, and Vietnam. The agreement obliges contracting states (a) to prevent and suppress piracy and armed robbery against ships; (b) to arrest pirates or persons who have committed armed robbery against ships; (c) to seize ships or aircraft used for committing piracy or armed robbery against ships; and (d) to rescue victim ships and victims of piracy or armed robbery against ships (Article 3 of ReCAAP). For cooperation purposes, the Contracting Parties should endeavor to render mutual legal assistance as well as extradition for piracy suppression and punishment. In addition, the Agreement establishes an Information Sharing Center which will be located in Singapore. It is reported that Cambodia, Japan, Laos, and Singapore at first officially signed the Agreement on April 28, 2005.[805]

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[805] "Singapore, Japan, Laos and Cambodia take the lead to sign the Anti-Piracy Agreement", Lianhe Zaobao, April 29, 2005.

ReCAAP is a positive step, being an indigenous pan-Asian initiative devised primarily to deal with piracy, a phenomenon most conspicuous in Southeast Asia. The fact that members ultimately agreed to locate the Information Sharing Center (ISC) in Singapore demonstrates willingness to compromise in order to advance maritime security issues. However, the agreement does not obligate members to any specific action other than sharing information that they deem pertinent to imminent piracy attacks; furthermore, the ISC's funding will be based on "voluntary contributions" (Article 6 and 9). Although not insignificant, ReCAAP alone will not eradicate Asian piracy.[806].

Regional cooperation to combat maritime terrorism is, since 2003, continually being enhanced. The 37th ASEAN Ministerial Meeting in June 2004 in Jakarta agreed that the ASEAN Security Community would strengthen their capacity to deal with security challenges, both traditional and non-traditional security issues. The ASEAN Security Community would strengthen ASEAN relations with Dialogue Partners and its other friends and would enhance ASEAN's role as the ARF's primary driving force.[807] Similar statements can be seen in the Joint Communiqué of the 4th ASEAN Ministerial Meeting on Transnational Crimes (AMMTC) and the Joint Communiqué of the 1st AMMTC+3 in January 2004 in Bangkok. The Convening of the Bali Regional Ministerial Meeting on Counter Terrorism (BRMM-CT) in Bali in February 2004 aimed to translate strong political commitments of the countries in the Asia Pacific region in combating terrorism into practical collaborative actions. The Jakarta Center for Law Enforcement Cooperation (JCLEC) was formally opened in Semarang in July 2004, to build regional operational law enforcement capacity needed to fight transnational crimes, with a key focus on terrorism. The Second ARF Inter-sessional Meeting on Counter-Terrorism and Transnational Crime (ISM CT-TC) was held in March 2004 in Manila, Philippines. The ARF Statement on Strengthening Transport Security Against International Terrorism expand cooperation and enhance participation in international fora and international organizations; in particular, by adherence to the International Maritime Organization's (IMO's) International Ship and Port Security Code (ISPS) and relevant standards of the International Civil Aviation Organization (ICAO).

In addition to the internal cooperation, Southeast Asian countries have also set up a

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806 Bradford, John F., "The Growing Prospects for Maritime Security Cooperation in Southeast Asia", at http://www.southchinasea.org/docs/Maritime%20security%20cooperation%20in%20Southeast%20Asia.pdf (accessed on August 8 2009)
807 "Joint Communique of the 37th ASEAN Ministerial Meeting Jakarta", 29-30 June 2004, at http://www.aseansec.org/16192.htm (accessed on December 7, 2005)

sound communication mechanism through various means, especially through the consensus with the United States, China, EU, and South Asian countries on security issues. The signing of the Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues at the 1st AMMTC+3 provides concrete and operational measures on cooperation in the field of non-traditional security issues between ASEAN and China. Southeast Asian countries have been very positive on cooperating with the United States to combat terrorism, including maritime terrorism. Besides, joint military exercises amongst the ASEAN and with countries out of this region have increased sharply in 2004. ASEAN states also steps forward to enhance its military forces, with emphasis on the construction of air forces and navies to ensure the regional security. The Philippine, Indonesian and Malaysian militaries agreed in November 2005 to set up two defensive areas between Sulu Sea and Sulawesi Sea to monitor and inspect suspect vessels in order to prevent maritime terrorism and piracy.

In November 2002, the Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues was adopted, which initiated full cooperation between ASEAN and China in the field of non-traditional security issues and listed the priority and form of cooperation. The priorities at the current stage of cooperation include "combating trafficking in illegal drugs, people-smuggling including trafficking in women and children, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crime and cyber crime."[808] In addition, the 2002 Declaration on the Conduct of the Parties in the SCS also mentions suppression of piracy and armed robbery at sea.

In Southeast Asia, there is some degree of basis for cooperation against piracy. The tripartite cooperation amongst Indonesia, Malaysia and Singapore has already begun. Agreement made in 1992 between these countries provided for joint anti-piracy patrols and information sharing.[809] The three countries have been conducting a coordinated anti-piracy patrol off their waters in the Malacca and Singapore Straits and their efforts have resulted in a significant reduction of piracy in that region. A recent significant step was made by Indonesia, Malaysia and the Philippines which signed the Agreement on Information Exchange and Establishment of Communication Procedures in May 2002 with a view to

[808] "Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues 6th ASEAN-China Summit", Phnom Penh, 4 November 2002

[809] Young Adam J., and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", *Contemporary Southeast Asia*, 2003 Vol. 25 Issue 2, p269-283.

preventing the utilization by anyone of their land-air-sea territories for the purpose of committing or furthering such activities as terrorism, money laundering, smuggling, piracy, hijacking, intrusion, illegal entry, drug trafficking, theft of marine resources, marine pollution, and illicit trafficking of arms. The agreement is open to other ASEAN countries. Following this agreement, the ASEAN ministerial meeting held in Kuala Lumpur in early May 2002 adopted the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime, which focuses on eight 'priority areas.' Piracy is one of them. The ASEAN member States agreed to work towards the harmonization of laws among themselves in order to effectively deal with the issues of transnational crime. They also agreed to develop programmes for joint exercises and simulations in various areas to enhance cooperation and coordination in law enforcement and intelligence sharing.[810] In August 2005, the above-mentioned three countries agreed to implement the scheme of air patrol over the Malacca Strait from September 2005, and also agreed to establish a Tripartite Technical Experts Group on Maritime Security.[811]

1.3.2 International Responses

International cooperation implies two meanings. First, it refers to cooperation between private companies and organizations, for example, such the International maritime Bureau (IMB) and the Comite Maritime International (CMI). Second, it refers to collective acts performed by counties and government-based international organizations, such as International Maritime Organization (IMO) and ASEAN[812] (Analysis on ASEAN has been discussed above, no repetition in this part) and World Trade Organization (WTO) etc.

IMB and CMI

The major international cooperation carried out by private companies and organizations is seen in the work of the IMB and the CMI. The IMB has established a piracy reporting center in Kuala Lumpur. Its reports on piracy activities have been relied on by individuals and governments across the world. Besides its reporting function, it has increased the public awareness of the real danger and risks of modern maritime piracy both in human terms and

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810 "ASEAN plan to fight terror", *The Straits Times*, 18 May 2002.
811 See "Singapore, Malaysia and Indonesia carry air patrol over the Malacca Straits from next month", Liaohe Zaobao (in Chinese), 3 August 2005, www.zaobao.com/sp/sp050803_501.html (accessed 3 August 2005).
812 John Mo, "Options to Combat Maritime Piracy in Southeast Asia", p348

to the national economies of the relevant Southeast Asian country. Its work will constitute part of any effective future international piracy control mechanism.

The major contribution of CMI to combat maritime piracy can be seen in its efforts to draft a model law on piracy control for consideration by IMO.[813] The CMI has also contributed to piracy control by organizing studies and conferences on contemporary issues of shipping law to raise public awareness of the danger of modern maritime piracy.

IMO

At the international level, IMO, amongst other concerned organization, has obviously been in the forefront of the efforts being made at global level. It has adopted a series of measures in an attempt to curb and control piracy and armed robbery. Responding to the mounting concern with modern piracy, the IMO Assembly, in 1983, adopted a draft of initiatives, urging governments to take all measures necessary to prevent and suppression acts of piracy and armed robbery against ships in and adjacent to their waters, including strengthening security measures, and to report on any incident involving their ships.[814] In 1999 it also issued recommendations to governments as well as guidance to ship-owners, ship operators and crews on how to prevent and suppress piratical acts and armed robbery. It later approved a draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.[815]

IMO promoted the adoption, during the Conference on Maritime Security held December 2001 in New York City, of a set of amendments to International Convention for the Safety of Life at Sea (SOLAS) on measures, including far-reaching regulatory measures, to enhance ship and port security in order to prevent and suppress terrorist acts against ships at sea and in port, and to improve security aboard and ashore, preventing shipping from becoming a target of acts of terrorism at sea.[816] Amongst these measures that came into force in July 2004 is the new Code on International Ship and Port Security (ISPS) that contains detailed security-related mandatory requirements for governments, port authorities and shipping companies.

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[813] See the Draft Model Law on Acts of Piracy and Maritime Violence, *Comite Maritime International Yearbook 2000*, pp415-423.
[814] See Jose Luis Jesus, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects", pp363-400
[815] Ibid.
[816] Ibid.

WTO

Shipping is covered by the WTO agreements, in particular the General Agreement on Trade and Services (GATS), as a form of services.[817] The WTO members have adopted a broad definition of maritime services in the further negotiations on the maritime services market under the GATS, including international maritime cargo and passenger carriages, forwarding services, marine insurance services, port services, and multimodal transportations. Piracy has a detrimental impact upon international trade activities. Thus, there is a strong ground for WTO members to consider the issue of piracy control. The difficulty is, however, that as of March 2001, the WTO members have not reached any specific agreement on the issues of transportation and shipping. Thus, it may take some time for the WTO members to respond to the urgent need for piracy control.

The piracy problem has also been the subject of discussion in other international governmental and nongovernmental forums, including the ASEAN Regional Forum[818], the Asian Pacific Economic Cooperation Forum (APEC),[819] the Council for Security Cooperation in the Asia Pacific (CSCAP)[820] and the SEAPOL.[821]

1.4. Summary

The international legal instruments on piracy and maritime terrorism contain loopholes that might deserve consideration. The piracy regime contained in the UNCLOS only deals with the "powers, rights and duties of the different states *inter se*, leaving to each state the decision how and of how far through its own law it will exercise its own powers and rights."[822] It does not impose on the state any obligation to prosecute and punish the offenders and dispose of the properties. The SUA regulations represent a first step in what should be an ongoing effort on the part of the international community to build a network of legal mechanisms designed to facilitate the effective prevention and control by states of acts of maritime terrorism.[823]

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[817]Robert Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward", p328

[818] Report of Workshop on Anti-Piracy, AEAN Regional Forum, Workshop on Anti-Piracy, Mumbai, India, 18-20 October, 2000; Co-chairman's Summary Report of the ARF Experts' Group meeting (EGM) on Transnational Crime, 30-31 October 2000, Seoul, Republic of Korea. See also Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward"

[819] Report of Transportation Security Experts Group, 18th APEC Transportation Working Group Meeting, Miyazaki, Japan, 16-20 October 2000, Doc. TPTWG18/SCSE/9, see also Beckman "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Wof ay Forward"

[820] CSCAP Memorandum No. 5, "Cooperation for Law and Order in the Sea," Council for Security Cooperation in the Asia Pacific, February 2001.

[821] SEAPOL Inter-Regional Conference, Ocean Governance and Sustainable Development in the East and Southeast Asian Seas: Challenges in the New Millennium, Bangkok, Thailand, 21-23 March 2001. See also Robert Beckman, "Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward"

[822] Jesus, 2003

[823] Jesus, 2003.

However, the SUA Convention does not address all possible situations of maritime terrorism, and not even the most important ones that may affect maritime security in a substantial way. These international regulations should thus be reviewed to include situations that may need to be addressed. Even in the face of maritime terrorism, recent developments — the 2005 SUA Protocols and the PSI Interdiction Principles — all respect the 'traditional' international legal framework of requiring direct flag State consent before the boarding and inspection of a foreign flagged vessel can be undertaken on the high sea. They make some progress in terms of measures to counter maritime terrorism regarding boarding of vessels of flag states, but the problem of consent from flag states still remains a problem.

Increasingly, coastal state governments and major user states recognize that they have shared interests in ensuring the resources and sea-lanes of the SCS being used effectively and sustainably. But they differ markedly on the means for achieving them. Many coastal states give higher priority to protecting national sovereignty and control over their newly acquired ocean resources than collective antipiracy and counterterrorism efforts. Littoral states are insistent that the process of achieving regional maritime security should be locally initiated and led. They are willing to accept external assistance, but contend that ultimately they must have the capability to provide that security.[824] The international user states themselves have divergent priorities and activities.[825] The U.S. policy in the SCS during the past 4 years of the Bush administration has been driven primarily by its global war on terrorism. It has been very active in countering threats of maritime terrorism by promoting a broad range of measures, including the CSI, PSI, and RMSI. Japan is primarily interested in antipiracy measures, reflecting its experience in having its ships attacked by pirates and its acute vulnerability to any disruption to its trade and raw material flows. Australia's efforts are more in the 'soft' cooperation category rather than the formalized approach of the U.S. or Japanese dual-track programs.

In addition to the existing international legal instruments, one should also observe the hopes from recent active regional cooperation in fighting piracy and maritime terrorism, such as the adoption of the ReCAAP Agreement and the enhanced joint patrols and other exercises in the piracy and terrorism infested area of Southeast Asia. Given the complex situation in the SCS, to achieve maritime security cooperation in this region requires that the

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[824] Yoichiro Sato, "Malacca Straits Security Reflects Hazy Dividing Line," *Asia Times Online*, 14 July 2004, available at www.atimes.com/atimes/Southeast Asia/FG14Ae01.htm (accessed 14 December 2006).
[825] Ibid.

relevant states work hard to reach consensus and build up mutual confidence, and eliminate the concern that maritime cooperation will affect the claim of sovereign right. In addition, the claimant states of SCS should enhance cooperation through the international organizations in this region, such as IMO, ASEAN, to deepen the mutual understanding and confidence, eventually pave the way for maritime security cooperation.

2. Environment Protection Regime

The SCS is one of the most biologically diverse marine ecosystems in the world. Marine scientists, however, have warned that polluted, crossed by busy shipping lanes, and disputed by many countries, the SCS has taken an environmental battering that threatens future food supplies.[826] This section discusses the necessity for establishing a regional marine environmental cooperation regime, followed by the elaboration on the current international and regional efforts in pushing for the cooperation.

2.1 The Necessity for Regional Marine Environmental Cooperation

The SCS is an integral ecosystem, and as such it needs to be treated in a comprehensive manner by all the states surrounding it.[827] Over the years it has become increasingly clear that the SCS is affected by serious environmental problems that need to be solved by the surrounding states in cooperation. The complexity and inter-connectedness of these various issues challenge the littoral countries to take collective actions to reverse the environmental degradation trends, and thereby prevent adverse impacts on economic and security issues.[828] While the idea of joint development has been constantly raised as a confidence-building measure to ease the tensions among the parties to the conflict, there has been minimal concern about the imperatives for maintaining the environmental integrity of the territories in question.[829]

Most researchers studying the environmental situation in the SCS region point to the necessity of regional cooperation to come to grips with a growing problem.[830] So far, however, regionalism has not come too far in dealing with the international environmental

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[826] http://lateline.muzi.net/news/ll/english/10066636.shtml?cc=18140&ccr=

[827] Karin Dokken, Environment, "Security and regionalism in the Asia-Pacific: is environmental security a useful concept"? *The Pacific Review,* Vol. 14 No. 4 2001: 509–530, p.514

[828] Sulan Chen, *Instrumental And Induced Cooperation: Environmental Politics In The South China Sea*, PhD dissertation, pp.135-140

[829] Francisco A. Magno, "Environmental Security in the South China Sea", *Security Dialogue*, Vol. 28, No. 1, 97-112 (1997), p 98

[830] Karin Dokken, "Environment, security and regionalism in the Asia-Pacific: is environmental security a useful concept?", p.520

problems. The most obvious institution to do so is ASEAN. ASEAN has already cooperated on environmental issues for many years. However, the impression is that it does not put the environmental issues at the top of its agenda. To do so it would probably have to regard them even more serious than it does today. If serious environmental problems were defined by the political actors as security matters, then they would most certainly be put higher up on the agenda.

Marine environmental cooperation is needed not only for environmental cooperation, but also for the achievement of the region's economic prosperity and peace. Of particular relevance to developing states is that the regional level of cooperation offers the possibility of improved collective capacity and capacity building. Regional cooperation has at least the three following functions: pooling more efficient use of scare resources; attracting assistance from regional agencies, bilateral aid agencies and other donors; and the presentation of a unified 'regional front' allowing states to increase their 'leverage', whether in direct confrontations with external powers or in the context of highly fractionalized global negotiations.[831]

The trans-boundary nature of environmental problems itself requires states and people across boundaries to cooperate and deal with the problems together. The fact that environmental spillovers—physical, economic, and psychological—occur at a variety of geographic scales argues strongly for effective actions at various levels. Thus, problems that arise at the local level that have local effects should be handled by national governments and their sub-jurisdictions, and issues with a global dimension should be addressed by international institutions. The most appropriate approach to regional seas problems is probably to foster regional cooperation on the relatively non-political and non-sensitive problems such as the marine environment, and shelving for the time being the 'sovereignty' issues. Impacts of environmental degradation do not recognize national boundaries due to ecological interdependence. Environmental problems especially can be transferred easily in enclosed and semi-enclosed sea areas; therefore, regional cooperation is particularly important in these types of areas. UNCLOS provides a sound legal justification for the further development of regional cooperation on marine environmental issues. All the countries bordering the SCS have ratified the Convention. Article 123 of the UNCLOS stipulates that States bordering an enclosed or semi-enclosed sea should cooperate with each

[831] Sulan Chen, *Instrumental And Induced Cooperation: Environmental Politics in the South China*, pp.135-140

other in the exercise of their rights and in the performance of their duties under the UNCLOS. To this end they shall endeavor, directly or through an appropriate regional organization:

> *(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;*
> *(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;*
> *(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;*
> *(d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.*[832]

Although the physical and ecological degradation of the coastal and near shore areas, and the depletion of their resources are seemingly local in their nature, the impacts of these problems are widespread and are today so evident at sites far away from their origin that only globally applied strategies have a chance to achieve long-term solutions. However, due to their large scale and the wide coverage of global actions, global initiatives cannot address specific environmental problems, as Mark J. Valencia puts it:

> *The global approach serves an indispensable function in creating frameworks or blueprints for action, and in defining general principles. But the breath of the global approach is sometimes achieved at the expense of depth. Indeed, the nature of obligations to global agreements tends towards the lowest common denominator in order to ensure that the largest possible number of parties might be included. Neither can individual countries' actions address transboundary environmental problems, carried through ocean currents and winds. The region provides an important medium level between the generalities of global regimes and the specifics of national implementation, since national level actions without regional coordination tend to lead to the "tragedy of commons," and global level actions have been general, and not specific enough to deal with regional seas problems such as those of the SCS.*

In the quest for a cleaner environment and regional marine environmental cooperation in the highly complex situation of the SCS, several programmes, such as UNEP have taken a lead in the cause. The following sub-sections will review the development of marine environmental cooperation under the framework of these programmes and how they identifies issues for cooperation and fosters a sense of community, by interacting with the countries bordering the SCS in their efforts to forge multilateral environmental cooperation in the SCS.

[832] See www.unepscs.org for the approved full proposals of these three sites.

2.2 International and Regional Approaches

2.2.1 SCS Large Marine Ecosystem

SCS Large Marine Ecosystem (LME) is characterized by its tropical climate. Different sub-systems within the ecosystem have been identified.[833] Intensive fishing is the primary force driving the SCS LME, with climate as the secondary driving force. The Global Environment Facility (GEF) is supporting this LME project in the SCS to address critical threats to the coastal and marine environment, and to promote ecosystem-based management of coastal and marine resources.

Eight nations (Cambodia, China, Taiwan, Indonesia, Malaysia, Philippines, Thailand and Vietnam) are involved in the governance of the SCS LME, sharing concerns about the marine environment and an awareness of the importance of the Sea as a source of protein for the growing coastal populations.[834] The entire region is experiencing a phase of rapid economic development and population growth. Despite the political tension and competing claims in the SCS, seven countries have agreed to collaborate in the protection of the marine environment. In 2001, they signed a joint agreement to a regional plan sponsored by the United Nations Environment Program (UNEP). The plan will address the degradation of the SCS by starting 9 pilot projects for sustainable development at priority trans-boundary sites in the region. The Global Environment Facility (GEF) is contributing $16 million dollars to this plan, which will help build human and institutional capacity. Environmental laws and regulations are being formulated. These 7 countries are developing an ecosystem-based approach to management through the creation of a Trans-boundary Diagnostic Analysis (TDA), a science-based analysis of trans-boundary concerns and their root causes, leading to the setting of priorities for action in a Strategic Action Programme (SAP).[835]

2.2.2 The UNEP/GEF Project

Following the Informal Working Group[836] activities, UNEP initiated the development of

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833 see Pauly, D. and V. Christensen, "Stratified models of large marine ecosystems: a general approach, and an application to the South China Sea", in In Kenneth Sherman,Lewis M. Alexander,Barry D. Gold (eds.) *Large marine ecosystems: stress, mitigation, and sustainability* (Washington: AAAs Publication, 1993)

834 Ibid.

835 Ibid.

836 Since 1990 a series of workshops on "Managing Potential Conflicts in the SCS" have been held in Indonesia under the auspices of the Research and Development Agency within the Department of Foreign Affairs. These non-governmental gatherings, attended by government and military officials in their private capacities as well as by academics from the region and Canada, have been convened to explore ways to

the UNEP/GEF SCS Project in 1996, the first intergovernmental project involving all major SCS littoral countries. The UNEP/GEF Project Entitled "Reversing Environmental Degradation Trends in the SCS and Gulf of Thailand" is funded by the Global Environment Facility (GEF) and implemented by the UNEP in partnership with seven riparian states bordering the SCS (Cambodia, China, Indonesia, Malaysia, Philippines, Thailand, and Vietnam).[837] Building on the trust and confidence gained through the Informal SCS Working Group, the UNEP/GEF SCS Project has made path-breaking progress in formalizing regional marine environmental cooperation in the SCS, and undertaking substantive cooperative activities to address marine environmental problems.[838] The project became fully operational in February 2002.[839]

The project document outlines the overall goals of the project as follows: "to create an environment at the regional level, in which collaboration and partnership in addressing environmental problems of the SCS, between all stakeholders, and at all levels is fostered and encouraged; and to enhance the capacity of the participating governments to integrate environmental considerations into national development planning."[840] In the medium term, the project aims to "elaborate and agree at an intergovernmental level, the Strategic Action Programme (SAP) encompassing specific targeted and cost actions for the longer-term, to address the priority issues and concerns. More specifically the proposed activities are designed to assist countries in meeting the environmental targets specified in the framework SAP that was developed over the period 1996-1998."[841]

Miguel D. Fortes claims that the UNEP/GEP SCS project is the first attempt to develop regional coordinated programmes of actions designed to reverse environmental degradation in the SCS.[842] Its outcomes to date give a clearer picture of the strategic significance of the SCS in the context of the current regional coastal and marine environmental resources. It is developing a framework for regional cooperation to address environmental problems of the SCS.

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engender cooperation among the nations bordering on the SCS. The alternative is a jurisdictional void and the threat of armed conflict, since maritime boundary delimitation is an unlikely scenario at least in the short term.

[837] http://www.unepscs.org/Project_Background.html

[838] Chen Sulan, *Environmental Politics in the SCS*, PhD dissertation, p. 225

[839] http://pemsea.org/knowledge-center/links-to-coastal-and-marine-topics/habitat-protection-restoration-and-management/reversing-environmental-degradation-trends-in-the-south-china-sea-and-gulf-of-thailand/

[840] http://www.unepscs.org/Project_Background.html

[841] The mid-term evaluation of the SCS Project was conducted in 2004 at http://www.unepscs.org/scsdocuments/Mid-Term-Evaluation.pdf

[842] See Miguel D. Fortes at "The SCS: Towards a Cooperative Management Regime." Conference report, May 16-17, 2007, Singapore, p.6

2.2.3 UNEP/Action Plan

UNEP has been the major source of financial support to the East Asian Seas Action Plan.[843] The roles of UNEP in the development and implementation of the Action Plan have been critical from three aspects: intellectual and technical inputs, financial support and institutional support. These roles are instrumental, enabling UNEP to serve as a facilitator for collective action and a catalyst for other regional actions. UNEP's intellectual input and coordinating role was of particular and decisive importance in the preparatory phase of the action plan.[844] UNEP took overall responsibility for the logistics and administrative arrangements for the preparation, consultation, drafting and revision of the text of the Action Plan.

During the process, UNEP hired regional experts or consultants to draft the Action Plan and relevant policy documents, and organize various expert meetings to review them. UNEP has the power to influence the outcomes of the meetings not only by directly participating in these meetings and enunciating their technical opinions on the text (in most cases their opinions would be well taken by other participants), but also by choosing experts to participate in the meeting and drafting a meeting agenda.

UNEP's symbolic power as an authoritative international organization also helps to draw countries toward multilateral cooperation. Participation in UNEP sponsored activities provides countries with a way to present themselves as responsible states addressing regional environmental problems. Furthermore, for newly independent countries, such as Singapore, participation in international organizations' activities is a good way to execute their statehood, acting as equal sovereign states to their counterparts in the region.

UNEP's influences have had a double-sided effect on the development and implementation of the Action Plan. On the positive side, UNEP has been able to secure government support and participation in a relatively easy way, because UNEP can claim that this is a program approved by the Governing Council of UNEP. On the negative side, the Action Plan focused on environmental issues that were influenced or determined by factors external to the region. The Action Plan followed the global trend in addressing marine pollution, which in the 1970s was exemplified by a series of major oil spill accidents in the temperate northern hemisphere that raised extensive global attention due to their serious

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[843] East Asian Seas Action Plan is steered by the Coordinating Body on the Seas of East Asia (COBSEA) that is consisting of the ten member countries.

[844] Sulan Chen, *Environmental Politics in the SCS*, p.199

impacts on the marine environment. The oil spills problem was not a priority problem in the East Asian Seas region except in the Straits of Malacca, in comparison to the rapid loss and degradation of coastal habitats in the region.[845] With the notable exception of projects dealing with control of pollution from accidental oil spills, most of the other program activities were in the field of environmental assessment (research and monitoring) without much real impact on the management of environmental problems of the region."[846] The failure to identify regional priorities and shared marine environmental problems in the region was probably the main factor causing the failure to mobilize strong governmental financial support to the Action Plan.

2.2.4 The "ASEAN Way" of Marine Environment Protection

ASEAN's cooperation on the environment dates back to 1977 when the ASEAN Sub-Regional Environment Programme was drafted with the assistance of UNEP. The issue of trans-boundary pollution was highlighted in June 1990, and cooperation was strengthened when the ASEAN Ministers for Environment delivered the Kuala Lumpur Accord on the Environment and Development. [847] They agreed to initiate an enhancement of environmental management policies and formulated the ASEAN strategy and action plan for sustainable development.[848] The ASEAN states have often facilitated inclusion of all through an informal diplomacy that limits obligations and protocol.[849] It brings together a group of highly disputatious countries for dialogue and discussion. ASEAN provides a forum for member countries to exchange information and enhance trust and confidence; hence it promotes regional cooperation on various issues. In its early stage, it was envisaged that the Action Plan would grow to encompass other neighboring countries subject to favorable political developments in the region. A legally binding agreement providing the legal framework for the Action Plan was seen as a possible impediment to this future expansion of its membership. The strong attachment to the principle of 'non-interference' and caution in reaching any legally-binding agreements, based on a fear of losing some aspect of 'sovereignty' led to the inability of member countries to reach a regional

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845 Ibid. p.201

846 UNEP/GEF/SCS/RTF-L.1/13. 2002. *Review of Obligations of Signatory States under Global Environmental Conventions with Regard to Regional Cooperation*. www.unepscs.org.

847 Vivian Louis Forbes, *Conflict and cooperation in managing maritime space in semi-enclosed seas* (Singapore: Singapore University Press, 2001), p.244.

848 Ibid.

849 Michael Antolik. 1994. "The ASEAN Regional Forum: the Spirit of Constructive Engagement.", *Contemporary Southeast Asia* 16: 117-136

convention based on the East Asian Seas Action Plan.

The 'ASEAN Way' has contributed positively to the successful expansion of Coordinating Body on the Seas of East Asia (COBSEA) membership, but in contrast it is the main reason that COBSEA has failed to reach a legally binding regional convention.[850] As David Rosenberg observed, ASEAN serves as a useful forum for promoting economic growth, political stability, and social and cultural exchange in the region; however, it is sometimes subject to a "lowest-common-denominator" syndrome, whereby policies are watered down to satisfy the wishes of members with conflicting interests.[851]

The 'ASEAN Way' also contributed to the missing opportunity to address some problems in a timely manner. Meeting participants felt it inappropriate or a 'transgression' of other countries' sovereignty by confronting other countries with their problems in implementation or pointing out the delay of activities in other countries. This was unfavorable to mutual monitoring and supervision. For example, the most obvious issue was the lowest contribution of the richest country to the East Asian Seas Trust Fun. Singapore, with the highest GDP per capita, had been contributing merely $US 1,000 for over a decade. ASEAN countries' participation in the Action Plan was initially driven by the need to consolidate the ASEAN identity through UNEP, and strengthen environmental cooperation with members of the organization. As the Action Plan developed and expanded to other countries, ASEAN countries have treated it as a good opportunity to engage China and other countries, while still promoting ASEAN's cooperation through UNEP.

In February 1992, the ASEAN Ministers for Environment issued the Singapore Resolution on the Environment and Development. The document outlined the different policies and strategies that each ASEAN state must pursue in order to advance regional cooperation for sustainable development. More specifically, the Ministers agreed that each country within the group should introduce policy measures and promote institutional development that will encourage the integration of environmental factors in all developmental processes. They proposed to work closely on the interrelated issues of environment and development based on multilateral treaties such as UNCLOS, MARPOL 73/78 and declarations of principles — for example, the 1987 Montreal Protocol, the 1992 Rio Submit on the Environment (Agenda 21), and the 1995 Berlin Conference on Climate

[850] Sulan Chen, *Environmental Politics in the SCS,* p. 202
[851] David Rosenberg. 1999. "Environmental Pollution around the SCS: Developing a Regional Response." *Contemporary Southeast Asia* 21 (1): 118-145.

Change.

2.2.5 China's Role

China, trying to build good neighbor relationships with ASEAN countries and realizing that COBSEA is the only intergovernmental body for marine environment in the East Asian Seas region (covering the sensitive sea of the SCS), has demonstrated a great interest in supporting and strengthening COBSEA.[852] It is the member country with greatest annual financial contribution to the Trust Fund. Upon joining the Action Plan, China pledged US$15,000 to the East Asian Seas Trust Fund. Two years later China unilaterally decided to increase its contribution to the East Asian Seas Trust Fund by doubling its original commitment, to $US30,000 per annum starting from 1996.[853] China's intent to build mutual confidence and trust with the ASEAN countries is demonstrated in the Statement made by the Head of Chinese Delegation, Mr. Liu Yukai, as follows:

> *"China is in favor of the making out of the East Asia Sea Action Plan and the equal cooperation between other countries bordering the East Asia Sea within the framework of this Action Plan, for the purpose of protection of the marine environment of this region… Embracing the sincere and cooperative attitude, China will cooperative with all the countries and positively take part in the various actions taken for the environmental protection of our region, for the end of making contributions to the marine environmental protection of this region."* [854]

China also expressed its concern at the latest dysfunction of the East Asian Seas Regional Coordinating Unit (EAS/RCU) and enunciated the need to strengthen the EAS/RCU, but China has shown continuous political support for COBSEA, despite its current challenges and problems. In the seventeenth meeting of COBSEA, China emphasized that "COBSEA is an appropriate body, and can and should coordinate activities…"[855]

2.3 De-politicization of Environmental Cooperation in the SCS

Environmental cooperation in the SCS has never been a purely technical or environmental issue. ASEAN countries want to engage China on SCS issues in a multilateral forum. China is, on the one hand, afraid of losing its stakes if it is forced to negotiate with multiple states in a multilateral forum, and on the other hand, concerned that non-participation in such a

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852 Ibid. p.204
853 Ibid.
854 UNEP (WATER)/EAS IG. 8/6. 1996. *Report of the Twelfth Meeting of the COBSEA*. Manila, Philippines, 3-4 December 1996.
855 UNEP (DEC)/EAS IG. 17/3. 2004, p.7.

forum would put it into a more disadvantageous position by missing information and the loss of opportunity to influence the agenda within the forums. The third party's strategies become extremely important in promoting regional cooperation.[856]

UNEP's most important strategy in the region is to de-politicize environmental cooperation, and it tries to build a 'neutral' and 'independent' image in the eyes of ASEAN countries and China. The practice of environmental cooperation in the SCS has provided some good experience for forging environmental cooperation in similarly highly contentious regions. The environmental cooperation started in an informal forum, and later evolved into a formal cooperative form under the framework of a politically neutral yet authoritative UN forum.

During the process, the 'neutral' and 'non-political' nature of environmental problems has made marine environmental cooperation a convenient and relatively easy issue area for initiating and forging substantive inter-governmental cooperation.[857] Marine environmental degradation problems have been picked by environmental activists as 'neutral' problems, which transcend national jurisdictional boundaries, and which should be exempt from political contests. These activists, normally marine scientists, academics, and international civil servants, have tried to persuade the government officials that environmental cooperation does not require clear benchmarking of national boundaries, and "that the benefits resulting from cooperative actions in managing the environment of the SCS are not dependent on a resolution of the unresolved issues."[858] Hence, marine environmental protection has been identified by the Informal SCS Working Group as a priority area for regional cooperation. The particular 'neutral' nature of marine environmental protection was also a critical factor for the successful initiation of formal environmental cooperation in the region.

The clear separation of roles of the policy and decision-making structures from the scientific and technical functions has been a key to the successful implementation of the UNEP/GEF SCS Project.[859] The highest-level decision-making structure is the Project Steering Committee, which consists entirely of government officials from the participating countries. The main scientific and technical forum, Regional Scientific and Technical

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[856] Sulan Chen, *Environmental Politics in the SCS*.p.280
[857] Ibid, p.281
[858] UNEP. 2001. *UNEP/GEF SCS Project Document*. p.10.
[859] Mike Bewers and Su Jilan. 2004. *Mid-term Evaluation of the UNEP/GEF SCS Project.* Published in hard copy by UNEP Evaluation and Oversight Unit, and electronically at www.unepscs.org.

Committee, forms the bridge between the PSC and the Regional Working Groups (RWGs) dealing with the scientific and technical aspects of the project. The RSTC makes recommendations to the PSC as to the appropriate actions based on the scientific work carried out within the RWGs and at the national level. This structure has allowed the PSC to make its decisions based on accurate and appropriate scientific and technical advice.[860] Major decisions had to be based on sound scientific and technical arguments. The selection of demonstrations sites had been entirely based on transparent and sound scientific procedures, which proved to be effective in preventing political struggles.

The Informal SCS Working Group had adopted a rule in the meeting that each country was given only five minutes to state their justifications for claims of the Spratlys and Paracels. No questions or debates were allowed after the statements. This rule effectively prevented the workshops from degrading into a useless debate over "who owns what."

The UNEP/GEF SCS Project has prevented the possible obfuscation resulting from fruitless debates and arguments on sovereignty issues, by stating clearly that the 'SCS' is used in its geographic sense. During the execution of the project, the principle has been restated in various regional intergovernmental and expert meetings, and has been generally followed by meeting participants.

The littoral countries of the SCS, as prosperous developing countries, have been carefully defending their rights of independent decision-making, and avoiding external influences in the disputes of the SCS. China is particularly sensitive about any external involvement in the SCS. While other small countries may wish to introduce their external allies, different countries have different external allies. Hence, despite the fact that the Informal SCS Working Group had been financially supported by Canada, a politically neutral country to the region, it was excluded from participation when it comes to formal intergovernmental cooperation under the framework of the UNEP/GEF SCS Project.[861]

One of the Chinese conditions to approve the UNEP/GEF SCS Project was that no other organizations, except COBSEA or UNEP, would participate in the implementation of the project. The project has no external agenda or conditions attached to the grant allocated to countries, which helped UNEP to gain trust from the participating countries.

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[860] Sulan Chen, *Environmental Politics in the SCS,* p.282
[861] Ibid.p.283

The SCS region basically shares a culture of preference for informality. Very often, businesses are done in informal situations outside the meeting rooms.[862] Socialization becomes a critical factor and sometimes a determining factor for the success of an intergovernmental meeting. Under the project framework, the same small group of people, having met at least five times in two and one-half years, helped to build close and personal relationships among them.[863] The icebreaker receptions and informal dinners in the duration of the meeting provide good opportunities for participants to interact with one another and build personal relationships, which become an important asset for future regional cooperation.

2.4 Summary

The complexity and inter-connectedness of various issues challenge the littoral countries to take collective actions to revere the environmental degradation trends. In the quest for a cleaner environment and regional marine environmental cooperation in the highly complex situation of the SCS, international and regional institutions have taken a lead by launching a serial of programmes such as SCS LME, UNEP/GEF Project and UNEP/Action Plan. An important strategy is to de-politicize environmental cooperation in the region, and to build a 'neutral' and 'independent' in the eyes of ASEAN countries and China, which has made marine environmental cooperation a convenient and relatively easy issue area for initiating and forging substantive inter-governmental cooperation.

3. Joint Development Regime

Modern state practice has developed a number of possible alternatives in the settlement of boundary disputes that involve the exploitation of natural resources which emphasizes the management aspects of such an agreement and which eschews the stricter, more rule-based approach towards boundary-delimitation.[864] There are some existing studies on joint development in the SCS literature. The British Institute of International and Comparative Law, in its book, lists the SCS as one of the potential areas for joint development.[865] In the

[862] See e.g. Tun-jen Cheng and Brantly Womack. 1996. "General Reflections on Informal Politics in East Asia." *Asian Survey* Vol. 36: 320-337; Lowell Dittmer. 1995. "Chinese Informal Politics." *The China Journal* No. 34: 1-34.
[863] Some people meet more than five times with each other since they may participate in different committees.
[864] Vivian Louis Forbes, *conflict and cooperation in managing maritime space*, p.225
[865] See the Statement of the PRC Ministry of Foreign Affairs, 4 February 1974, reprinted in Law Department of Peking University (ed.), *Collected Materials on the Law of the Sea* (Beijing, People's Press, 1974) (in Chinese), p. 88.

1980s there were two workshops organized by the East-West Center in Hawaii, discussing the possibilities of joint development in the SCS. However, though positive in advancing regional co-operation in the SCS, most of the presented papers are focused on geology, geophysics and hydrocarbon potential in the region, with few papers addressing joint development in legal perspective.[866] In the 1980 Workshop, the panel on "Precedents for Joint Development" contains five papers addressing joint development in the North Sea (by William T. Onorato), in the Persian Gulf (by Fereidun Fesharaki), in the East China Sea (by Choon-ho Park), in the Gulf of Thailand (by Prakong Polahan) and in legal aspects (by Masahiro Miyoshi). The Panel on "Joint Research, Investigation and Development" in the 1983 Workshop contains several papers on joint development including, *inter alia*, "The Malaysian Philosophy of Joint Development" (by Datuk Harun Ariffin), "The Japan-South Korea Agreement on Joint Development of the Continental Shelf " (by Masahiro Miyoshi), "Reaching Agreement on International Exploitation of Ocean Mineral Resources" (by Willy Østreng) and "Joint Jurisdiction and Development in the Southeast Asian Seas" (by Mark J. Valencia). Although the discussions during these two workshops were very preliminary, they provided a pioneer work for possible joint development in the SCS.

3.1 China's Proposal of "Joint Development"

To break the stalemate of the SCS dispute and to access new oil and gas falls into the interests of both China and other claimant states. The late Chinese leader Deng Xiaoping started Chinese movement in this direction in the early 1990s, when he initiated his famous proposal to "shelve disputes and go for joint development" in the SCS. This proposal ran much along the lines of code of conduct agreements such as the 1992 Manila Declaration and UNCLOS article 123, which also called for cooperation in SCS development. The term 'shelving the disputes' (gezhi zhengyi) is understood as shelving the disputes over maritime jurisdiction rather than the disputes over territorial sovereignty.[867] It is pragmatic to adopt a joint development arrangement as a provisional measure of solving the disputes peacefully and in conformity with the common interests of China and its neighboring countries.[868]

[866] The proceedings of the two conferences were later published in (1981) 6 Energy 11 and (1985) 10 Energy 3/4 as special issues.
[867] See Wu Shicun, "Certain Reflections on Joint Development in the Nansha (Spratly) Islands" in Zhong Tianxiang, Han Jia and Ren Huaifeng (eds.), *Proceedings of the SCS Workshop (2002)* (Hainan, Hainan Institute for the SCS, 2002) (in Chinese), p.72.
[868] Wu, ibid. p. 73.

Furthermore, there are some reasons for the necessity to enter into joint development in the SCS.

Many Chinese scholars hold positive comment on Deng's Proposal.[869] Zou points out, that the concept of joint development, which has been provided for under international law since the 1970s, may be the only solution.[870] This would involve agreement between two or more states to develop and share in an agreed proportion through interstate cooperation and national measures in a designated zone of the seabed. In fact, there have been many discussions with regards to joint development in the SCS within the Asian region and, most importantly, one of the main proponents embroiled in the disputes (China) has often reacted favorably towards the idea of joint development.

Chinese scholars and governmental officials also put forward proposals on how to launch joint development in the SCS. In 1991, the Chinese Society of the Law of the Sea and the Hainan Association of SCS Research (later evolved as the Hainan Institute for the South China Sea Research) jointly held a conference on the SCS in Hainan, China, where altogether five papers presented were concerned with joint development in the SCS. The papers discussed the joint development issue from military, economic, legal, political and regional perspectives.[871] It was the first time in China that joint development in the SCS had been deeply and widely discussed. Eleven years later, in 2002, the Hainan Institute for the South China Sea Research (renamed since July 2004 as National Institute for the South China Sea Studies), a think-tank institution jointly established by the Hainan Provincial Government and the Ministry of Foreign Affairs, held a conference on SCS, in particular focusing on two themes: joint development and the legal status of China's U-shaped line in the SCS. It is realized that while joint development is unable to solve the territorial disputes of the Spratly Islands, it can be a useful provisional measure of solving maritime jurisdictional disputes.

According to a government official from the State Oceanic Administration of China, although countries like Vietnam, the Philippines, Malaysia and Brunei had agreed orally to China's joint development proposal, they do not concede this in practice. The reason is that

[869] See Zou Keyuan's statement in the conference report of "The SCS: Towards A Cooperative Management Regime", p.7
[870] Ibid.
[871] For relevant papers, see China Institute for Marine Development Strategy, State Oceanic Administration (ed.), *Selected Papers Presented to the Conference on the SCS* (Beijing, March 1992) (in Chinese).

their unilateral development activities have not met serious challenges for a long time so they perceive that there is no need or necessity to have joint development with China. For that reason, China, while proposing joint development, may select some areas to create conditions for joint development, such as through China's efforts to persuade Vietnam or the Philippines to consult with China for joint development.[872] It is suggested that China can enter into joint development in the following disputed areas: Reed Bank (Liletan) (with the Philippines), Brunei-Shaba Basin and James Shoal Basin (with Malaysia or Brunei), North and West Vanguard Bank (Wan'an Bei and Wan'an Xi) Basins (with Vietnam).[873] In order to attract other countries to make joint development arrangements with China, China must create some favorable conditions, such as exploration activities around the Spratly Islands. Nanwei Tan (Riflemen Bank) is suggested as an ideal place to begin China's oil and gas activities since it is located beyond the continental shelf limits claimed by Brunei, Indonesia and Malaysia, beyond the 200-mile EEZ limit claimed by Vietnam and beyond the "Kalayaan" claimed by the Philippines.[874] It is said that the successful experiences accumulated from China's co-operation with foreign oil companies since the promulgation of the1982 Regulations on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises have become favorable factors for joint development.[875] While admitting a possibility of joint development in the SCS, Chinese scholars and governmental officials have realized that there are still a number of difficulties to be tackled before any joint development arrangements can be made. However, influenced by the governmental policy, they tend to emphasize Chinese sovereignty over all the islands in the SCS (zhuquan shuwo), which may in reality hamper any progress towards joint development.

A recent interview on scholars and government officials indicates that the joint development proposal is not viewed as very successful so far. Wu admits that there is a possibility to make China's proposal on joint development become a realized plan, but he also points out the obstacles in implementing the joint development.[876] Tentative proposals to resolve the SCS disputes have mainly focused on joint exploration and development

[872] See Liang Jinzhe, "Reflections on Certain Issues of Developing Disputed Areas in the SCS" in Zhong Tianxiang, Han Jia and Ren Huaifeng (eds.), *Proceedings of the SCS Workshop (2002)* (Hainan, Hainan Institute for the SCS, 2002) (in Chinese), p. 102.
[873] See Liang, *ibid.*, pp. 111–112.
[874] Ibid.
[875] Lin Zhong, "Scholarly Discussion on China and Joint Development", (1998) *Modern Legal Science* (in Chinese) 1, 75.
[876] An Interview with Wu Shicun, President of National Institute for the South China Sea Studies, in June 2009.

combined with the shelving of the sovereignty question, as Ralf Emmers argues. He holds that this approach is often seen as the only feasible option to enhance cooperation and stability in the region. However, he also admits that the claimants will undoubtedly face serious difficulties in clearly defining the disputed areas and the modalities of joint development.[877] Ramses Amer points that in areas without disputes over maritime zones and/or islands the prospects of joint development are good, while in disputed areas it all depends if the sovereignty dimension can be put aside or if the joint development scheme can be agreed upon without affecting the claims.[878]

Some scholars see joint development arrangements more properly as the foundation for long-term exploration for and production of oil and gas – witnessing the Gulf of Thailand and Timor Sea examples – and not merely as a convenient solution to seemingly intractable boundary problems (though they can accomplish this also). Joint development arrangement is the beginning of something, not the end. The agreement implementing the arrangement is the bedrock of jurisdictional certainty without which the (non-state-owned) oil industry will not be interested. And, of course, continued political will is required to maintain this degree of confidence, or the industry will disappear. [879]

3.2 Response from other SCS States

There have been a number of official indications of support for bilateral joint development solution. In May 1994, Premier Li Peng, in discussions with Prime Minister Mahathir of Malaysia, endorsed this approach.[880] In June 1994, the Speaker of the Philippines Congress proposed joint Development with China in the Rhhed Bank area.[881] Indonesian Ambassador at Large, H. H. Djalal, in June 1994, toured the countries involved in the dispute to suggest 'freezing' sovereignty and establishing relations.[882] In August 1994, Chinese Foreign Minister Qian Qichen observed, "If the conditions for negotiations are not yet ripe, then we should shelve the dispute and start joint development of the area".[883] These statements may be related to affirmations, such as the decision of the Vietnamese National Assembly in June, that all parties should refrain from the use of force to settle the

[877] An Interview with Ralf Emmers in June 2009.
[878] An Interview with Ramses Amer in June 2009.
[879] Ian Townsend-Gault's comment after the author's oral exam of this dissertation.
[880] UPI, 1994
[881] Reuters, 1994
[882] Central News Agency, 18 June 1994
[883] Chanda, 1994, p.18

dispute[884] which reinforces the 1992 Manila Declaration. On 26 November 1996, China's President Jiang Zemin, in talk with his Philippine counterpart, Fidel Ramos, agreed that China and the Philippines should "shelve differences" over the Spratly Islands and work together to build confidence and develop the disputed area jointly.[885]

Scholars and governmental officials in the ASEAN countries have also expressed their views on joint development in the SCS. Hasjim Djalal, a senior Indonesian diplomat, once wrote a paper on the relevance of joint development to the SCS.[886] Another South-East Asian perspective was reflected in a paper published by two Philippine scholars as they argued that "interest in the concept of joint development stems not only from its relevance to the large number of bilateral maritime boundary disputes in the region, but from its possible usefulness in the seemingly intractable multiple claim area of the Spratlys".[887]

The oil companies of the Philippines, China and Vietnam signed a landmark tripartite agreement in March 2005 to conduct a joint seismic survey of oil potential in disputed areas of the SCS.[888] In a joint statement, the three parties affirmed that the signing of the agreement was in accordance with the basic positions held by their respective governments to turn the SCS into an area of peace, stability, cooperation, and development in accordance with UNCLOS and DOC.[889] In August 2004, Manila announced that, in a departure from previous practice, it would no longer oppose exploration for hydrocarbon deposits in the disputed waters of the SCS.[890] This announcement paved the way for a landmark agreement between Manila and Beijing to conduct seismic studies in the SCS, in order to identify areas for oil and gas exploration. The agreement — known as the Joint Marine Seismic Undertaking (JMSU) — was signed during Philippine President Gloria Macapagal Arroyo's state visit to the PRC during 1-3 September 2004, and provided for a three-year study to be undertaken by the Philippines' state owned oil company Philippine National Oil Company

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884 Reuter Textline, 1994
885 The Straits Times, 27 November 1996, p.3
886 Hasjim Djalal, "The Relevance of the Concept of Joint Development to Maritime Disputes in the South China Sea", (1999) 27 *Indonesian Quarterly* 3, 178–186; see also Zou Keyuan, p.99
887 Aileen S.P. Baviera and Jay L. Batongbacal, "When Will Conditions Be Ripe? Prospects for Joint Development in the South China Sea", (1999) 4 *Chronicle* 1–2, http://www.up.edu.ph/cids/chronicle/articles/chronv4n1and2/infocus08baviera_pg3.html (accessed 1 November 2004).
884 Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes", *Harvard Asia Quarterly*, Volume IX, No. 4. Fall 2005.
889 Ibid.
890 "RP won't block oil searches in Spratlys", *Today*, August 23, 2004.

(PNOC) and China's state-run China National Offshore Oil Corporation (CNOOC).[891] Manila emphasized the JMSU was a "pre-exploration" study and would not involve any drilling in disputed waters. According to Manila, the JMSU can be classified as "marine scientific research" and is therefore covered by paragraph five of the DOC.[892]

The Sino-Philippine JMSU represented a 180-degree turn on the part of Manila, which had previously advocated a united-ASEAN front in the face of Chinese assertiveness in the SCS.[893] Several reasons account for this change of policy. First, as mentioned earlier, Manila has identified the spiraling cost of oil as a threat to national security. Given that oil prices are likely to remain high for the foreseeable future, Manila believes it is imperative to exploit energy resources in its own backyard. Second, as Ralf Emmers has argued, by the turn of the twenty-first century, the SCS dispute had reached a status quo, with none of the disputants possessing the military power to enforce their claims.[894] However, since the early 1990s, China's People's Liberation Army Navy (PLAN) has been undergoing a major modernization program, resulting in both quantitative and qualitative improvements.[895] Within a decade or less, the PLAN will be in a far stronger position to enforce China's sovereignty claims in the SCS. Before this occurs, it is better to lock the PRC into joint exploration and exploitation agreements. Third, since coming to power in 2001, Filipino President Arroyo has made rejuvenation of the Philippine economy her government's number one priority. Increasingly, Manila views the PRC as the regional economic dynamo that can help pull the Philippines out of its economic malaise. The JMSU can thus be seen as a measure aimed at improving Sino-Philippine relations, long strained by the Spratlys dispute.

Initially, Vietnam condemned the JMSU as a violation of the DOC. However, it later entered into negotiations with the Philippines and China, and on 14 March 2005 the three state-owned oil companies of the PRC, the Philippines, and Vietnam (PNOC, CNOOC, and PetroVietnam) signed a new JMSU to jointly prospect for oil and gas in the disputed waters of the SCS.[896]

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891 "Philippines, China to study potential oil deposits in South China Sea", *Agence France Presse*, Hong Kong, September 2, 2004.
892 Ibid
893 Schofield and Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes".
894 Emmers, Ralf. "Maritime Disputes in the South China Sea: Strategic and Diplomatic Status Quo" *Institute for Defense and Strategic Studies (IISS) Working Paper* No. 87, September 2005.
895 "Three nations sign pact for joint Spratlys survey", *Straits Times*, 15 March 2005.
896 Ibid.

Although the JMSU is a secret document, according to China's People's Daily the three-year agreement covers an area of 143,000 square kilometers and will cost an estimated US$15 million to conduct seismic surveys (a sum to be split equally among the three companies).[897] According to officials at the Philippine Department of Foreign Affairs (DFA), the JMSU provides for a Joint Operating Committee (JOC) composed of executives from the three state-owned energy companies, plus technical experts, and will meet three times per year.[898] In August 2005 the JOC awarded its first contract to China Oilfield Services Ltd. (COS), a subsidiary of CNOOC, to undertake a two-dimensional seismic exploration project.[899] Further contracts are expected to be awarded soon. After the three-year study is complete, the JOC will review the data collected and suggest policy options for further exploration and possibly exploitation.

The signing of the agreement was commonly regarded as initial practice by the Chinese side of Deng Xiaoping's proposal. It shows the three nations are taking active measures to fulfill the DOC. Some experts hailed that China, Vietnam and the Philippines, in a spirit of mutual benefit, flexibility and pragmatism, have cut a new path to peacefully settle the disputes on the SCS, and set an example for other countries to handle such kinds of issues.

Does the JMSU represent a profound breakthrough in the long-running territorial dispute? At this stage it is too early to tell. On the one hand, the JMSU represents a willingness to put aside competing sovereignty claims and engage in joint exploration for much needed energy resources. As such, it is an important Confidence Building Measure (CBM) envisaged by the 2002 DOC. An encouraging sign is that none of the other disputants — i.e., Malaysia, Brunei or Taiwan — has objected to the JMSU (according to the Philippine DFA, all ASEAN members have been briefed on the agreement's contents).[900] On the other hand, the three disputants have emphasized that the JMSU is a commercial agreement that does not change their basic territorial claims. The real difficulties will come after the three-year survey is concluded (as of June 2008, the survey has not yet been completed), and the disputants have to decide how the project is to move forward. The difficult questions that they will have to deal with will include: How is joint exploitation to

[897] "Turning 'sea of disputes' into 'sea of cooperation', *People's Daily*, 16 March 2005.
[898] Schofield and Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes".
[899] "China, the Philippines and Vietnam work on disputed South China Sea", *Xinhua News Agency*, August 26, 2005.
[900] Schofield and Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes".

be conducted? How are costs and profits to be shared? What role should the other disputants play? How these questions are answered will decide whether the SCS will become a 'sea of friendship and cooperation' or a continued source of interstate tension. The exigencies of energy security are sure to play an important role in the positions the disputants ultimately adopt.

3.3 Obstacles of the Implementation

Some argue that the Chinese appeal for joint development was at the outset and remains today a very ambiguous concept without any specific information of what should be interpreted of the suggestion.[901] "China has never specified exactly what it means by 'joint development', nor has China clarified where such joint development might take place. Furthermore, at the multilateral workshops, the Chinese delegation has had a limited mandate, and been allowed only to discuss joint development schemes which do not infringe on China's territorial claims."[902]

However, those who are skeptical about China's lack of a clear plan on joint development should also look at the potential external obstacles to its implementation. First of all, the involvement of major powers out of this region has led to added complexity and internationalization to the Spratly dispute, thus setting potential obstacles for the implementation of joint development. The United States is the most powerful player due to its great strategic interest in Southeast Asia. After the September 2001 terrorist attack on Washington and New York, the US government strengthened its military presence and control in the SCS. Another key extra-regional actor is Japan. The Japanese military force has been stretched to the SCS by establishing cooperation with some ASEAN countries in non-traditional security fields. Adding even more complexity to the security situation in the region is India. Along with becoming a nuclear power, India has gradually implemented its 'major power' strategy and enhanced its influence in regional and international affairs. Beginning in Southeast Asia to promote its 'orientation' policy, India has, to a large extent, improved its comprehensive relationship with ASEAN. Considering the geographical politics, and the history of enmity between the two nations, India watches carefully China's

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[901] Knut Snildal, *Petroleum in the South China Sea – a Chinese National Interest?* (A thesis submitted in partial fulfillment of the requirements for the award of the Cand Polit degree at the Department of Political Science, University of Oslo. June 30, 2000.

[902] 21Lee, Lai To (1999): "The South China Sea, China and multilateral dialogues*", Security Dialogues*, 30(2), 167.

increasing influence in Southeast Asia — an influence which could conceivably threaten the security of India and even that of other South Asian nations. India has held military exercises in the SCS in the past and has recently expressed interest in doing so again in the future.[903] Working in this way to restrict China's role in the area, India has become one of the latest players involved in the SCS dispute.

Secondly, it is also difficult to define the area for joint development in the SCS due to overlapping sovereignty claims. Such overlapping includes territorial and jurisdictional demands as well as sovereignty petitions for island, reef, cay and shallows. Hence, these problems in defining areas for joint development have largely restricted its implementation in the SCS. The engagement of oil companies out of the SCS region also brings difficulties to joint development efforts in the area. So far, there are more than 200 oil companies involved in oil and gas exploitation in the SCS, most of which are from the United States, Netherlands, Britain, Japan, France, Canada, Australia, Russia, India, Norway, and South Korea. These oil companies have made large amounts of financial and technical investment in the region. The engagement of these oil companies will undoubtedly enhance the complexity and internationalization of the SCS dispute and become a potential drawback for joint development in this area.

Some argues that the Timor Gap model could be applied in the SCS. However, direct adoption of a Timor Gap model for the Spratlys would raise major difficulties. Taiwan could not be a party to such an agreement due to its non-recognition by the PRC and the other states involved. Military action has already been taken in the Spratly. The occupation of a substantial number of the islands by military forces raises the additional obstacle that the states involved would be most reluctant to withdraw them. As Yu[904] and Dzurek[905] point out, the Spratlys present much great legal complexities than the relatively straightforward bilateral situation between Australia and Indonesia. Resource development has already begun in the Spratlys and may be far advanced by the time practical negotiations begin. It is much more difficult to negotiate a joint development zone when oil and gas has already been found in substantial quantities.

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903 Schofield and Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes".
904 Yu, K-H. Peter, "A Critique of the Three Proposals for "Solving" the Spratlys Dispute: A Chinese View from Taiwan", paper presented at the Workshop on the Spratlys Islands, Singapore. 1993b.
905 D.J. Dzurek, "The Spratly Islands Dispute: Who's on First ", *Maritime Briefing*, 2,1, International Boundaries Research Unit, Durham.(1996)

3.4 Summary

Joint Development regime has been proposed as *ad hoc* solution to the SCS dispute, without dressing the sovereignty claims and maritime delimitation. China initiated to 'shelve disputes and go for joint development' in the SCS in 1990s, which is welcomed by other disputant parties. However, obstacles exist in the process of implementation. First of all, there is no a clear definition by the Chinese government on what it means by 'joint development'. Secondly, it is difficult to define the area for joint development in the SCS due to overlapping sovereignty claims. Thirdly, potential external obstacles should be taken into consideration, such as the involvement of major external powers in the disputed areas.

4. ASEAN+1 Regime

As two major actors on the SCS stage, the ASEAN-China relationship develops parallel with the evolution of the SCS dispute. The following subsections observe closely the development of ASEAN-China relations, and its impact on the changing attitude of China on what approach should be taken to address the SCS disputes.

4.1 China-ASEAN Relations: Past, Present, Future

Southeast Asian countries used to view China as a clear and present danger to their security. In non-communist Southeast Asia, China was seen as supporting subversive and rebellious forces that sought to overthrow regimes in place by force — Malaya, Thailand, the Philippines. The new order in Indonesia attributed to China support for the attempted coup in that country in 1965.[906] At the height of the Great Proletarian Cultural Revolution, China was perceived as instigating anti-government riots in Burma. In 1974, Chinese forces seized the Paracels from Vietnamese troops stationed there. In 1988, the Chinese and Vietnamese navies clashed fatally in the Spratlys. Up to the early 1990s, Brunei Darussalam, Indonesia and Singapore withheld formal diplomatic relations from the People's Republic of China. As recently as 1995, the Philippine discovery of a substantial Chinese presence on Mischief Reef,

[906] Rodolfo C. Severino, "ASEAN-China Relations: Past, Present and Future Paper", *ASEAN Studies Centre, Institute Of Southeast Asian Studies,* At the Third China-Singapore Forum.

located well within the Philippines' claimed exclusive economic zone, sent alarms all across Southeast Asia.[907]

Today, all Southeast Asian countries have diplomatic relations with the People's Republic of China on the basis of one China policy. Despite the disagreements and differences, ASEAN and China have had occasions to work together on specific problems in the past. In the 1980s, ASEAN and China found common cause in resisting forcible regime change in Cambodia, consulting each other frequently. They cooperated in bringing about a political settlement of the Cambodian problem in 1991. By the mid-1990s, China had emerged as a strong economic power and a potential strategic partner, so that ASEAN granted it the status, first of a 'consultative partner' and then, in 1996, of a full 'Dialogue Partner'. China was a founding participant in the ASEAN Regional Forum, engaging constructively in political and security matters not only with ASEAN and its members but also with non-ASEAN participants in the ARF, like the United States, Russia, Japan and Australia.

China has formed part of the Asian side in the ASEAN-initiated Asia Europe Meeting, started in 1996 and now a going concern. It is a keystone of the 'ASEAN+3' process, which now covers 20 areas of cooperation and almost 50 mechanisms to manage them, including annual ASEAN Plus Three and ASEAN+1 Summits.[908] In the Chiang Mai Initiative, which is part of the 'ASEAN+3' process, China is a party to several of the 16 bilateral currency swap and repurchase agreements. China's proposal for an ASEAN-China free trade area and ASEAN's quick acceptance of it led the way for similar ASEAN FTA arrangements with others, including those with South Korea, India, and Japan. It helped to lend momentum to the economic cooperation process between the ASEAN Free Trade Area and the Closer Economic Relations of Australia and New Zealand. The trade in goods and trade in services components of the ASEAN-China Framework Agreement on Comprehensive Economic Cooperation, signed in 2002, are now in place. Indeed, China and ASEAN have each rapidly become one of the other's leading trading partners. In 2007, Hong Kong aside, the two were each other's fourth largest trading partner, after the United States, Japan and the European Union. Chinese and ASEAN companies have also started to invest in each other's country.

[907] ASEAN-China Relations: Past, Present And Future, *Paper Presented By Rodolfo C. Severino, Head, ASEAN Studies Centre, Institute Of Southeast Asian Studies ,At The Third China-Singapore Forum*

[908] Ibid.

China has built or improved transport links with mainland Southeast Asia, planning to construct oil and gas pipelines through Myanmar, widening navigational channels on the Mekong, financing roads from China to the countries to its south, and probably funding another bridge across the Mekong between Laos and Thailand. Special links have been forged between ASEAN's and China's ministries of trade and industry in the ASEAN Mekong Basin Development Cooperation process, whose flagship project is the Singapore-Kunming Rail Link. The SKRL would be a further transport connection between southern China and mainland Southeast Asia.[909]

China has helped ease tensions arising from conflicting territorial claims in the SCS. It has done so by agreeing to discuss the matter with ASEAN as a group in place of its former preference for dealing with individual Southeast Asian claimants. Such discussions led to the conclusion in 2002 of the Declaration on the Conduct of Parties in the Southeast China Sea. This joint declaration committed both ASEAN and China to self-restraint, to the non-use of force, to the peaceful settlement of disputes, to refraining from occupying unoccupied features in the area, and to agreeing on a more formal code of conduct in the future.[910]

4.2 From Bilateral to Multilateral

Competition on the SCS and its implications for national and regional security and economic development has become a matter of increasing concern to ASEAN states individually and collectively. On 22 July 1992, just after Vietnam acceded to the ASEAN Treaty of Amity and Cooperation, the ASEAN foreign ministers' meeting took the unprecedented step of issuing a security-related Declaration on the SCS calling for peaceful resolution of territorial disputes and restraint by all parties, to which China acceded.[911] China has offered to shelve the sovereignty issue and negotiate joint development agreements, but only on a bilateral basis and when it would appear to be to China's advantage. ASEAN states fear any bilateral solutions, especially between China and Vietnam, which could have a negative impact on other claimants or the region. The Chinese have warned against ASEAN taking up Vietnam's agenda. The PRC and Taiwan have made common cause on the issue, as they agree on a Chinese historical right to the islands. At a PRC-Taiwan seminar on the issue in

[909] Ibid.
[910] Ibid.
[911] Farrell, *the Socialist Republic of Vietnam and the Law of the Sea: an Analysis of Vietnamese Behavior within the Emerging International Oceans Regime,* p. 282

Taipei in July 1994, the Taiwan delegation urged that they band together to counter other claims.

ASEAN has sought to deal with SCS issues on a multilateral basis, but China consistently has refused and the matter was not even discussed at the 1994 ARF meeting. When China took over Mischief Reef in 1995, both Vietnam and ASEAN protested. Following that incident, China made it clear that it would not accept ARF's use as a vehicle for multilateral conflict resolution. Over China's protest the matter was discussed at the 1995 ARF meeting and SCS territorial issues were raised again at the 1996 meeting. They have also been tabled at the ASEAN-PRC dialogue.[912]

Created in 1994, ASEAN-China Dialogue marked the first time in history that China consented to multilateral negotiations.[913] This event was seen as the capstone of a great transformation which began five years earlier in Tiananmen Square. That revolution was, of course, the conversion from unilateralism to multilateralism in the SCS.[914] Heralded as the turning point in a long and complicated conflict, the conversion to multilateralism and the renunciation of the use of force led to conflict prevention rather than conflict resolution.[915]

Many scholars and government officials see this shift to multilateralism and military restraint in the early 1990s as a transformation in the nature of the conflict. Citing the absence of full-blown military confrontations, the increasingly pragmatic diplomacy of China in regards to its claims, and the various multilateral declarations and joint statements produced to control the conflict, academics, and diplomats have a tendency to dismiss the SCS as a set of disputes swept under the rug by *mulin zhengce*, or 'good neighbor policy'.[916]

Some chalk it up as a result of changes in China and the end of the Cold War.[917] Tiananmen Square was a public relations disaster for China. The global outrage expressed through criticisms and economic sanctions forced China to soften its stance against political dissension at home, and to conduct a foreign relations campaign aimed at saving face and establishing friendships. It also forced China to curb its military actions at home and abroad, thus ending an era of unilateralism in regional disputes. The fall of the Soviet empire and the end of the Cold War put an end to the Golden Triangle of China-USA-USSR relations and

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912 Ibid.
913 Jason Ray Hutchison, "The SCS: Confusion in Complexity", at http://www.politicsandgovernment.ilstu.edu/downloads/icsps_papers/2004/Hutchison1.pdf
914 Ibid.
915 Ibid.
916 Zhao Suisheng. "China's Periphery Policy and Its Asian Neighbors." *Security Dialogue* 30.3 (1999), p. 335.
917 The focus of domestic changes in China rests clearly on the Tiananmen Square massacre in 1989, which is credited with setting off the profound reforms of the 1990s.

caused China to redefine itself in a different context of relationships. Attention turned towards becoming a regional power with regional influence. Wariness on the part of external powers such as the United States and Japan furthered, but also checked, this ambition.

Others attribute the transformation to the increasing political and economic influence of ASEAN, increasing interdependence in Southeast Asia, or to the very introduction of multilateral talks within ASEAN and between ASEAN and China. ASEAN was becoming a more powerful voice in regional affairs. It provided a security mechanism able enough to prevent wars between its members and repel any communist insurgencies. It was also flexible enough to avoid superpower meddling during the Cold War. Furthermore, it provided a forum of cooperation in which Brunei, Malaysia, and the Philippines were able to develop a more unified approach towards China, Vietnam, and Taiwan in the SCS. Economic interdependence between the rapidly industrializing countries provided an ever-increasing incentive to avoid the escalation of disputes, reinforcing a spiral of increasing economic cooperation and interdependence in Southeast Asia. A number of scholars claim that the 'ASEAN Way' of slow, informal talks and negotiations has been the catalyst for change.

Any integral interpretation of the SCS disputes must address the role of multilateralism, and specifically that within ASEAN and between ASEAN and China. A true believer of the transformed conflict theory (TCT)[918] would claim that before the late 1980s and early 1990s, the SCS disputes were marked by unilateralism and Chinese demands that any negotiations occur on a bilateral basis. After the great transformation of 1989-1991 with Tiananmen Square and the fall of the Soviet empire, China changed its ways and consented to multilateral talks. Within a few years it joined the Indonesia Workshops on Managing Potential Conflicts in the SCS, the ASEAN-China Dialogue, and the ARF. By the time Vietnam acceded to ASEAN in 1995, China was ensnared in the trap of multilateralism. From this point on, Beijing was unable to force its will in the SCS and to play one ASEAN country against another in bilateral negotiations. In short, China's acquiescence to a multilateral framework ensured that the dispute would be negotiated on a regional platform with all claimants except Taiwan being party to the same deliberations. Scholars cite several factors in the movement from unilateralism and bilateralism to multilateralism. First and

[918] See detail on TCT at Timo Kivimaeki, "What Could Be Done?" in *War or Peace in the South China Sea*, pp.131-165

foremost, are always the changes in China and the outside world in the late 1980s and early 1990s.

Snyder adopted the realist power-politics approach and also the neo-liberal institutionalist approach to explain the behavior of ASEAN states and how policymakers often choose different approaches (either multilateral or bilateral) to deal with different situations.[919] He remarked that the multilateral approach has had some success in the SCS through joint development and increased transparency among the claimants. For example, after more than a decade of engagement with ASEAN, China is now moving towards this approach, often referred to as the 'smile diplomacy'. The Philippines, on the other hand, has been one of the strongest supporters of a multilateral approach, being the first to call for a regional code of conduct. In addition to the various multilateral discussions, several bilateral and trilateral initiatives have also been developed. These range from bilateral codes of conduct for state action in the area to the establishment of bilateral working groups to discuss territorial boundary issues.

While other claimants have engaged each other on a bilateral basis, the primary proponent of the bilateral process has been China. Snyder opined that the power-politics theory best explains state behavior in the SCS, i.e. all states seek to maximize their own power. For example, by adopting the strategy of a cooperative hegemon, China could shape the multilateral mechanism to achieve its policy objective while conceding only limited power or influence to the smaller states. The Philippines and Vietnam seek the multilateral approach to enhance their national objectives while adopting the hedging strategy to engage China on a bilateral basis. Malaysia, on the other hand, has assumed a pragmatic position as it feels that it is able to reach a bilateral deal with China. Ultimately, the ASEAN nations seek to engage China in the multilateral forum with the hope that the rules and norms of the institution will, over time, be gradually integrated into the official Chinese thinking that could eventually provide real restraint in its behavior.

Stein Tønnesson downplays the changes indicated in China's consent to multilateral talks, as signaled by its 1991 attendance at the ASEAN post-Ministerial Conference, and its movement into formal discussions on the SCS disputes via the Code of Conduct in 2002.[920]

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[919] Craig Snyder's comment in the Conference Report of "The South China Sea: Towards a Cooperative Management Regime", May 16-17, 2007, Singapore.

[920] Kivimaki, Odgaard and Tonnesson, *War or Peace in the South China Sea.*

He is also quick to emphasize that these changes amount to little in the grand scheme of the dispute, and that any real transformation beyond gradual shifting of policy is yet to come. Pointing out the general watered-down declarations produced by the ASEAN-China Dialogues he argues that the ASEAN Way is not as much of a conflict resolution mechanism as it is a means of conflict prevention. If one looks at the vigor with which China, Vietnam, Malaysia, and others have opposed external intervention it is far-fetched to conjecture that ASEAN-China multilateral talks are in fact a "holding operation" designed as a ploy to keep the USA, UN, and ICJ out.[921] This suggestion can be supported by the failure of the Indonesian Workshops on Managing Potential Conflicts in the SCS and the ARF even to discuss the disputes, as well as by China's reassertion at the signing of the Code of Conduct in late 2002 that it will only negotiate a settlement on a bilateral basis. The crux of the argument here is basically to admit that there has been a series of small shifts in the format of the dispute, but that the fundamental character of the negotiations remains the same.

No matter what caused China to join in 1994 an ASEAN-China Dialogue, it was a decision of profound significance. Never before, had China, in its long history, consented to embed itself in a regional framework, let alone "lowered itself" to negotiate with "barbarians," to use some vintage phrases of Chinese diplomacy. Whether the action is occurring at the multilateral ASEAN-China Dialogue or in a series of bilateral negotiations with ASEAN members, the fact that China has decided to sit down at the table and contemplate the fallibility of its territorial claims is a transformation that cannot be denied.[922] The paradoxical situation with general multilateral talks combined with detailed bilateral negotiations may not be ideal but it is a step in the right direction. One must not forget that the assemblage of claimants is far from evenly balanced.

Secondly, and this comes as a double-edged sword to all sides of the debate, the ASEAN Way of negotiating the SCS, no matter how undesirable, is necessary to its resolution. In a very pragmatic statement from Amitav Acharya, "If this were an ultimatum negotiation, China would walk out. Slow negotiations keep China at the table."[923] Truth be told, if Brunei, Malaysia, the Philippines, and Vietnam want any portion of their claims to the SCS without conceding to external arbitration, the ASEAN Way of slow, informal dialogue, of sweeping the dispute under the rug while extending cooperation and employing

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921 See S. Tønnesson (interview), in Jason Ray Hutchison, "The South China Sea: Confusion in Complexity".
922 See L. Xiang (personal communication) in Jason Ray Hutchison, "The South China Sea: Confusion in Complexity".
923 See Jason Ray Hutchison, "The South China Sea: Confusion in Complexity".

confidence-building measures, is the only way to go for now. If they want to change China's negotiating rules then they must first play by them. However, there is a serious problem with this approach. It easily loses sight of the long-term goal of solving the dispute. If short-term goals of cooperation and political amity are continually advanced without progress towards a long-term solution, there is always the risk that the issue could come back stronger. In the SCS, this could manifest itself as an environmental disaster such as over-fishing or a tanker spill, a confrontation which escalates out of control or even a renewed military challenge by China after the problems of Taiwan and North Korea have been put to bed. It is for this reason that the status quo and its interpretation cannot be accepted. A new interpretation of the SCS dispute, one with a wider understanding of the regional situation and its global and historical context, must be synthesized. Then it must be acted upon.

4.3 DOC and Informal Workshop

DOC

In November 2002, China and the 10 member ASEAN adopted a Declaration on the Conduct of Parties in the SCS (DOC), laying a political foundation for future possible commercial cooperation between China and ASEAN countries as well as the long-term peace and stability in the region.[924] The DOC builds on earlier declarations and codes of conduct. The signatory parties agree to resolve the territorial dispute by peaceful means, without resorting to force or threat of force, through friendly consultations and negotiations, and with respect to international law. According to paragraph five of the DOC, the parties "undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability" — as such, the DOC prohibits claimants from occupying presently unoccupied geographical features. But it does not prohibit claimants from upgrading existing facilities on presently occupied features. Paragraph five also identifies five kinds of cooperative activities; parties are allowed to undertake, either bilaterally or multilaterally, the following CBMs: marine environmental protection; marine scientific research; safety of navigation and communication at sea; search and rescue operations; and combating transnational crime.

However, the DOC suffers from a number of weaknesses. It is neither a binding

[924] For details of DOC see the ASEAN website at http://www.aseansec.org/13163.htm.

treaty, nor a formal code of conduct. The DOC has no teeth: it does not enumerate sanctions in the event of an infringement and does not have a geographical scope. Moreover, one of the claimants — Taiwan — is not a party to the DOC because Beijing regards Taiwan as part of the PRC while the ASEAN states, in accordance with the One China policy, do not recognize Taiwan as an independent sovereign state. Yet despite these flaws, the DOC represents a political statement meant to reduce tensions in the region and engage in cooperative activities. It is also an agreement to work toward a formal and binding code of conduct. This commitment was reaffirmed in the October 2003 ASEAN-China Joint Declaration on Strategic Partnership for Peace and Prosperity and the subsequent November 2004 Plan of Action to implement the 2003 Declaration.[925]

Informal Workshop on the SCS

Since 1990 a series of workshops on "Managing Potential Conflicts in the SCS" have been held in Indonesia under the auspices of the Research and Development Agency within the Department of Foreign Affairs. The initiative is the brainchild of Ambassador Hasjim Djalal of Indonesia, a leading authority on ocean affairs and one of the more influential participants at the Third United Nations Conference on the Law of the Sea. A detailed strategy for its implementation was worked out by Dr. Djalal and Prof. Ian Townsend-Gault, co-directors of the project, entitled "Managing Potential Conflicts in the SCS".[926]

These non-governmental gatherings, once a year in different locations in Indonesia, attended by government and military officials in their private capacities as well as by academics from the region and Canada, have been convened to explore ways to engender cooperation among the nations bordering on the SCS. The alternative is a jurisdictional void and the threat of armed conflict, since maritime boundary delimitation is an unlikely scenario at least in the short term.

A series of technical working group meetings, including those on Marine Scientific Research (Manila, May 1993), Resource Assessment (Jakarta, July 1993), Legal Matters (Phuket, July 1995) and Shipping, Navigation and Communications (Jakarta, October 1995),

[925] Schofield and Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes".

[926] Hasjim Djalal, Ian Townsend-Gault,"Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention", in Crocker, Hampson and Aall (eds.), *Herding Cats: Multiparty Mediation in a Complex World (* Washington, D.C., United States Institute of Peace Press, 1999.), pp.107-134

Marine Environmental Protection (1997), Legal Matters, Safety of Navigation, Shipping and Communication (1998), Safety of Navigation, Shipping and Communication (1999), Environmental Legislation (1999 and 2000), Hydrographic Data and Information Exchange (2000), and Marine Database Information Exchange (2006), Marine Ecosystem Monitoring, in the following respective years, have also been organized.

The workshops had aimed to move states from engaging in forceful exchanges to peaceful joint development in the SCS region in promoting the idea of cooperation.[927] "The workshop process tried to move beyond the fixation of sovereignty issues and worked on getting states to take a functional approach towards non-traditional security concerns, namely, scientific marine research, environmental and ecological research, sea-lanes of communication management, living and non-living resource management and conservation, and institutional mechanisms for cooperation."[928] What makes the workshop run smoothly since 1989 is that claimant states were given a platform to talk about the disputes in a 'non-confrontational' and informal 'off-the-agenda' basis, by providing the grounds for cooperation on nontraditional security issues without focusing on jurisdictional and sovereignty issues. Townsend-Gault holds that the workshop was a step towards a peaceful response, if not resolution, to the conflicts in the SCS region.[929]

Questions on the workshop process are raised, such as what needed to be changed and done differently if the Workshop Process were to be re-crafted and conducted all over again. Djalal holds that the workshop has been successful in minimizing the amount of forceful confrontation and heated exchanges among the claimant states. The peace-promoting mechanism of the workshop should persist and not change.[930] As different positions on territoriality continue to be a contested issue among states, subsequent workshops should try to concentrate more on 'peace-building' and 'cooperative projects'.[931] There was also criticism that both Southeast and Northeast Asia lack a collective, substantial and binding treaty that would help to ensure maritime security and safety in the region.

[927] Ian Townsend-Gault, See the conference report of " The SCS: Towards A Cooperative Management Regime" (May 16-17, 2007, Singapore), p.4
[928] Ibid.
[929] Ibid.
[930] The author interviewed Ambassador Djalal in December 2004 in Shanghai in person and in June 2009 via email.
[931] see Hasjim Djalal and Ian Townsend-Gault , "Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention", in Crocker, Hampson and Aall, eds., *Herding Cats: Multiparty Mediation in a Complex World* (Washington, D.C., United States Institute of Peace Press, 1999.). pp.107-134, p.127

"Economic development might drive cooperative measures in the region but there is still a general lack of political willingness by states to commit themselves to the joint development of the SCS."[932]

Some scholars see China's participation at the informal multilateral level as a good chance for China and the ASEAN countries to work towards progress and peace in the region at an official level.[933] In essence, attempts to solidify the current conditions of peace and security would become the regional interest. In other words, the region ought to look more closely at issues that are of common regional concern, of a certain degree of urgency and cannot be tackled by any individual state. In addition, the workshop could also help strengthen cooperative commitments in the region, especially if a state is made to adopt a theme of interest to work on. "Although there may be a stark gap between legal theories and the political reality of the situation in the SCS, the truth remains that states ought to shelve their sovereignty and delimitation issues and move towards cooperation and joint development."[934]

Djalal and Townsend-Gault sought to explain the Informal Workshop in the SCS as an approach of 'diplomacy for conflict prevention' or 'track-two' initiatives.[935] In the case of the SCS, the uncertain nature of the formal relationships between the claimant states sets obstacles in achieving the regional security and solving regional problems of marine management. Political pressures in both China and ASEAN countries tend to list disputed boundaries as top political agendas while leaving aside other issues such as living resources, the marine environment, and the safety of shipping and navigation. The informality associated with 'track two' initiatives allows for discussion and dialogue without being bound by political fetters.[936]

'Informality' provides for a "flexibility and inclusiveness that is simply not possible at the formal level."[937] Not only can a broader range of issues be discussed, participation from

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[932] For details see the discussion part of the conference report "The SCS: Towards A Cooperative Management Regime" (May 16-17, 2007, Singapore).
[933] Ibid.
[934] Ibid, p.13
[935] Hasjim Djalal and Ian Townsend-Gault , "Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention", pp.109-133.
[936] For discussion on 'track two' initiative, see the South China Sea Information Working Group at University of British Columbia, at http://faculty.law.ubc.ca/scs/.
[937] Ibid.

Chinese Taipei/Taiwan becomes possible under the 'informality' banner. 'Track two' diplomacy therefore "fills the holes in the long road of formal dialogue by providing a forum for discourse between players and on issues that simply cannot take place at the formal level, which are needed to advance cooperation and mutual understanding."[938]

5. Summary

This chapter explores the relations between UNCLOS and other regimes and institutions in the SCS regions. In the area of maritime security cooperation, marine environmental protection, joint development and ASEAN+1 political model, UNCLOS plays a critical but not comprehensive role in providing legal regulations and rules. Without the supplementary support of other regimes and institutions, UNCLOS won't be able to function as desired.

[938] Ibid.

Chapter V A Pragmatic Settlement Regime for the SCS

As is mentioned in the introduction, the implication of this dissertation is two-fold. On one hand, it bears the responsibility of assessing the effectiveness and implementation of UNCLOS as an international regime in the SCS. On the other hand, it aims at finding the most practical mechanism to settle the ocean disputes. This chapter proposes a pragmatic settlement regime for the SCS dispute from five dimensions.

1. Cross-Strait Cooperation as a Breakthrough for China-Taiwan Element in the SCS

Taiwan is one of the six parties directly involved in sovereignty and maritime jurisdictional disputes in the SCS. Coast guard personnel from Taiwan are now stationed on the largest island in the Spratly island chain, Taiping-dao (Itu Aba Island), and the Pratas Islands.[939] Despite this fact, Taiwan has been excluded from the discussions on the code of conduct in the SCS, mainly because of China's opposition and the adherence to the 'One China' policy by member states of ASEAN. Taiwan has also been barred by mainland China from participating in the Track One regional security dialogue processes, such as the ASEAN Regional Forum (ARF), which address security issues, including the SCS territorial disputes, confidence building measures (CBMs), and preventive diplomacy in the Asia-Pacific region.[940]

Some Taiwanese scholars claim that Taiwan's being excluded continuously from the regional security dialogue on the SCS issues and the failure of being invited to participate in any of the proposed joint co-operative activities in the disputed areas that are also claimed by Taiwan have the potential to destabilize the overall situation in the SCS.[941] China is holding the key to Taiwan's involvement in the regional security dialogue process on the SCS issues and its participation in any of the proposed co-operative activities in the Spratly area between China and the ASEAN based on the guidelines underlined in the DOC. Song, a Taiwan expert on the SCS, suggested that China should consider the utility of taking a 'win–win–win–WIN' approach to deal with the territorial and jurisdictional disputes in the

[939] In February 2000, the actual control of these two islands was shifted from the Ministry of Defense to the jurisdiction under the Coast Guard Administration (CGA).
[940] E.g., Yann-Huei Song, "Cross–strait interactions on the SCS issues: a need for CBMs", in *Marine Policy* 29 (2005) 265–280, on p.265
[941] Ibid. on p.266

SCS.[942] The cross–strait relations could also be improved.

1.1 Cross–strait Interactions on the SCS Issues

In a background briefing to members of the Legislative Yuan shortly after China and Vietnam engaged in armed conflicts in the waters near the disputed Chigua Jiao (Johnson Reef) of the Spratly Islands in March 1988, Taiwan's Defense Minister Cheng Wei-yuan reportedly said that Taiwan, if asked by China to help defend the islands from a third party attack, would respond affirmatively. His statement was then confirmed by Taiwan's Ministry of Foreign Affairs.[943] It was also reported in December 1988 that the PLA Navy had the intention to co-operate with Taiwan's navy to defend the Spratly Islands.[944] The 1988 naval conflict between China and Vietnam in the Spratly Islands opened the window of opportunity for the cross–strait, nongovernmental dialogue on the SCS issues, in which ideas of cross–strait co-operation in the SCS in areas such as fisheries, marine environmental protection, marine scientific research, drug trafficking, underwater shipwreck salvage, and marine archaeology were proposed and discussed.

The possibility for the cross-strait co-operation in the SCS area was enhanced by a symposium on SCS issues, which was organized by the Ministry of Interiors and National Sun Yet-San University in 1991. One of the major policy recommendations made at the end of the conference was that, based on the common position taken by the Chinese regimes across the two sides of the Taiwan Strait, cross-strait co-operative relationship should be developed to jointly safeguard the sovereignty, jurisdiction, and interests in the SCS.[945] It is believed that the 'One China' principle adhered to by the then KMT government in the early 1990s and Taiwan's proposal to defend jointly the SCS islands with Beijing were the two major reasons that helped explain why China did not oppose Taiwan's participation in the Second SCS Workshop in July 1991.[946] Both Taipei and Beijing agreed to attend the Second

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942 Ibid, p.266. It is believed that China, by adopting the approach, will gain (win), Taiwan likewise (win), and the ASEAN will also benefit from it (win). In the end, all parties concerned and the region as a whole will WIN.

943 Shim Jae Hoon. "Blood thicker than politics: Taiwan indicates a military preparedness to back China.", *Far Eastern Economic Review* 1998; 26; See also report in China times on March 24 1988 (Taipei, in Chinese); For the discussion of the event, Graver JW. "China's push through the South China Sea: the interaction of bureaucratic and national interests." *The China Quarterly* 1992; pp.1008–14.

944 *United Daily* (Taipei, in Chinese), December 17, 1988, p. 3.

945 See *Records of the Symposium on SCS Issues*, January 15, 1991, p. 89.

946 The first Workshop on Managing Potential Conflicts in the SCS, held in Bali, Indonesia, invited scholars and governmental officials only from member states of the ASEAN (Brunei, Malaysia, the Philippines, Singapore, Thailand, and Indonesia) and the so-called resource persons from Canada. The workshop was supported by Canadian International Development Agency (CIDA). Seven Canadian scholars from University of British Columbia, the Oceans Institute of Canada, Simon Fraser University, University of Victoria, and Dalhousie Law School attended the meeting. No scholars or governmental officials from Taiwan, Vietnam and China were invited to attend the first SCS Workshop. However, at the end of the meeting, the possibility of organizing an informal meeting between individuals from ASEAN countries, Vietnam, China, and Taiwan was discussed and believed to do so as soon as possible. See Report of the Workshop on Managing

SCS workshop on the same condition that the question of sovereignty over the islands in the SCS should not be raised at the meeting. In July 1991, seven representatives from China and four from Taiwan attended the Second SCS Workshop. The majority of the Chinese participants were governmental officials, in particular, from the Ministry of Foreign Affairs. Two of the Taiwanese participants were professors teaching at National Taiwan University. The other two came from Taiwan's de-facto embassy "Taipei Economic and Trade Office" in Jakarta.[947] The participants at the workshop agreed to recommend to the relevant governments to explore areas of co-operation in the SCS, which include cooperation to promote safety of navigation and communications, to coordinate search and rescue to combat piracy and armed robbery, to promote the rational utilization of living resources, to protect and preserve the marine environment, to conduct marine scientific research, and to eliminate illicit traffic in drugs in the SCS.[948]

Since July 1991, both Taiwan and China have continued sending representatives to attend the SCS workshop and its relevant meetings on legal matters, marine scientific research, marine environmental protection, shipping and safety of navigation, resource assessment, and others in the SCS. Both Taiwan and China agreed that the workshop process should continue to function to develop and promote co-operation in the SCS. It was also discussed between and among the Taiwanese and Chinese participants at the informal gathering when attending the workshop or its relevant meetings that Taiwan and China should exchange views on the SCS issues or reach understanding before attending the workshop meetings. But it is totally wrong to say that there had no conflicts between Taiwan and China at the SCS workshop. On the contrary, the use of Taiwan's official or preferred names (in particular the Republic of China or Taiwan) and Taiwan's right to host technical working group meetings or group of experts meetings under the Workshop framework have always been the source of conflict between the Taiwanese and Chinese participants over the past 12 years.

The 'One China' problem made it very difficult for the workshop process to be formalized, or for a permanent secretariat to be established. But it should also be noted that the SCS workshop is the only regional dialogue mechanism dealing specifically with SCS

Potential Conflicts in the SCS, Bali, 22–24, January 1990, p. 24.

[947] See Report of the Second Workshop on Managing Potential Conflicts in the SCS, Bandung, Indonesia, 15–18 July 1991, prepared by the Research and Development Agency, Ministry of Foreign Affairs, Republic of Indonesia and the Institute for Southeast Asian studies, Jakarta, Annex B.

[948] See para 1(a),(b) of Statement of the Workshop on Managing Potential Conflicts in the SCS, Bandung, Indonesia, 15–18, July 1991.

issues, where scholars and governmental officials from both Taiwan and China can meet regularly and exchange views on a variety of SCS issues even though in their personal capacity. Given that fact that Taiwan has been excluded from the Track One security dialogue mechanisms in the region that also discuss SCS issues, the SCS Workshop (and its relevant technical/group of experts meetings) has become one of the very few international occasions where Taiwan's voice and its concerns over the SCS issues can be raised and heard.

In addition to the SCS Workshop, scholars and governmental officials from Taiwan and China had also met at a number of cross–strait informal talks on the SCS issues between 1991 and 2009. Taiwanese and Chinese scholars as well as governmental officials met and exchange views on a variety of SCS issues at these academic symposia. The first cross–strait academia symposium on the SCS issues was held in Haikou, China in September 1991. Most of the participants were Chinese scholars, but four representatives from Taiwan were also invited to attend the meeting. Around 38 papers on a variety of issues related to the SCS were presented. Among them, Zhao Enbo, the then Section Chief of Office of Laws and Regulations at the State Oceanic Administration, presented a paper entitled "Prospects for Cross–strait Cooperation in the Spratly Islands" in which he called upon both sides of the Taiwan Strait to promote cooperation in the areas of marine scientific research, marine weather forecasting, marine fisheries, search and rescue at sea, and even military co-operation such as conducting alternative naval patrols in the Spratly archipelago area. He listed three bases for the proposed cross–strait cooperation in the SCS: (1) the consensus on the ownership of the Spratly Islands; (2) common actions taken against other claimants in the SCS; and (3) the efforts made to safeguard the sovereignty of the Spratly Islands.[949] In addition, he stressed that any implementation of the cross–strait co-operation on the SCS issues must be guided by the principle of "peaceful re-unification, and one country two systems".[950] Hu Chizi, a participant from Taiwan, called for cross–strait co-operation to develop fisheries resources in the Spratly Islands by setting up a fisheries base on Itu Aba Island.[951]

In June 1994, the Cross–Strait and Overseas Chinese Academic Symposium was organized by the Chinese International Law Association and held at Soochow University in

949 Song, "Cross–strait interactions on the SCS issues: a need for CBMs", p.271
950 Compilation of the Selected Papers Presented at the Academic Symposium on SCS Islands, 1991 (in Chinese), pp. 215–219.
951 Zhao Enbo. "An analysis of the current situation in the SCS, its prospects", paper delivered at the Hainan, SCS Academic Symposium, Taipei, Taiwan, 16–18 October 1995, p.12.

Taipei. The goal of the symposium, as stated in the invitation letter, was to establish consensus on the SCS issues between the Chinese people who are living in the two sides of the Taiwan Strait, and to help protect their rights in the SCS area. Ten scholars came from Mainland China, each of whom presented a paper on different topics related to the SCS, including China's legal claim, historical evidence, archaeology, marine environmental protection, marine scientific research, research institutions, assessment and exploitation of oil and gas resources, marine fisheries, and shipping and navigation. It was understood that both Taiwan and China at that time considered the need to strengthen the cross–strait co-operation in the SCS area.

Under the Guidelines for National Unification, that was adopted by Taiwan's Executive Yuan Council (Cabinet) on March 14, 1991, the principle of 'one China' should be applied to the cross–strait interactions on the SCS issues. As stated clearly in one of the four principles listed in the Guidelines, "Both the mainland and Taiwan areas are parts of Chinese territory. Helping to bring about national unification should be the common responsibility of all Chinese people".[952] In addition, under Taiwan's SCS Policy Guidelines, adopted in April 1993, one of the policy implementing actions to be taken is to support the Guidelines for National Unification by studying and setting up relevant policy and plans, and studying the matters relevant to the SCS issues that involve both sides of the Taiwan Strait.[953]

At the 1994 Cross–Strait and Oversea Chinese Academic Symposium, Lin Chin-Tz, a senior researcher from Xiamen University, proposed to consider the possibility of cross–strait co-operation on compiling the historical literature in relation to the SCS, inviting scholars to participate in the joint compilation project, and exchange data or research findings/results.[954] Wang Henjei, a professor from the Central National University, called for setting up a general academic structure to be in charge of the responsibility for coordinating the SCS research works done by scholars in Taiwan, China, Macau, and Hong Kong.[955] Du Bilan, the Chinese participant from the State Oceanic Administration, proposed to organize

[952] See III (1) of the Guidelines for National Unification, adopted by the National Unification Council at its third meeting on February 23, 1991, and by the Executive Yuan Council at its 23rd meeting on March 14, 1991. A copy of the Guidelines in English version is available at: http://www.president.gov. tw/2 special/ unification/tw.html.

[953] See Kuan-Ming Sun. Policy of the Republic of China towards the SCS. Appendix 1: policy guidelines for the South China Sea. Marine Policy 1995; 19(5): 408. This mandate was amended in April 1996, which also called for cross–strait co-operation in the SCS on issues related to marine scientific research, fisheries development, oil resources exploration and exploitation, environmental protection, academic exchange, and others.

[954] Lin Chin-Tz. "Thoughts on how to proceed to historical evidence research and compilation on the SCS Islands", Paper presented at the Symposium, 1994. p.4.

[955] Wang Henjei. The SCS sovereign, historical research: archaeological works in the Paracel Islands and Spratly Islands. Paper presented at the Meeting, 1994, p.4.

a cross–strait co-operative research project on environmental and ecological studies in the SCS.[956] Du Shu, a senior engineer from the China National Offshore Oil Corporation (CNOOC), stated at the end of his paper that "the Chinese people of both sides of the Taiwan Strait have common interests and position on the issues related to the Spratly Islands, and therefore can fully co-operate to make contribution in safeguarding the legitimate rights and benefits of the Chinese people in the waters surrounding the Spratly Islands."[957] Yu Mainyu, a research fellow at the Nanhai Aquaculture Research Institute, called for setting up a coordinating mechanism between the two sides of the Taiwan Strait to manage fisheries resources in the SCS.[958] Ideas for cross–strait co-operation in the SCS had also been raised by the Taiwanese participants.

After the then Taiwan President Lee Teng-hui's visit to Cornell University in the United States in June 1995, the cross–strait relations deteriorated. The tension in the Taiwan Strait area was escalated and reached to the peak in March 1996, when China decided to 'test-fire' its missiles in the water areas near Taiwan's two largest sea ports, Keelung in the north and Kaohsiung in the south, to intimidate Taiwan and therefore influence the outcome of the presidential election. The deteriorating relations between Taiwan and China made it impossible for the cross–strait exchange of views on the SCS issues to be continued.[959]

After 4 years of suspension, the cross–strait exchange of views on the SCS issues resumed in November 1999. Surprisingly, the statement on "special state-to-state relations" made by the then Taiwan President Lee in July 1999 to define the cross–strait relations, unlike his trip to the United States in 1995, did not affect the decision of the Chinese State Oceanic Administration and the Hainan SCS Research Institute to hold a cross–strait SCS academic symposium in Haikou, Hainan in November 1999. Several Taiwanese scholars and one former rear admiral were invited to attend the meeting entitled "Academic Symposium: the SCS in the 21st Century: Retrospect and Prospect." These Taiwanese participants are active advocators of cross–strait co-operation in the SCS area. For instance, Zhao Guochai, a professor from National Chengchi University, suggested in his paper that both sides of the Taiwan Strait should not take counteractions to negate other's claim and interests because of

956 Du Bilan. Marine environmental protection, the exploration of cross–strait co-operation. Paper presented at the meeting, 1994, p. 7–9.
957 Du Shu. "Assessment, development and utilization of the oil and gas resources in the Spratly of the SCS." Paper presented at the Meeting, 1994, p.5.
958 Yu Mainyu. "Current situation of fisheries resources in the SCS, prospects for management." Paper presented at the Meeting, 1994, p.4.
959 Song, "Cross–strait interactions on the SCS issues: a need for CBMs", p.273

the same position taken on the SCS issues. Taiwan and China should make every endeavour to safeguard the territorial integrity and legitimate rights in the SCS so that foreign countries would not have the opportunity to take advantage of the conflict between Taipei and Beijing and thus obtain the benefits in the SCS from the cross–strait confrontation.[960]

At the 1999 meeting, the Chinese participants, such as Wang Peiyun, chief-editor of China Offshore Oil Report, and Shu Danfu, deputy secretary-general of Kwangsi Southeast Asian Research Center, called for cross–strait co-operation on the SCS issues. In December 2000, the Cross–Strait Exchange and Co-operation on SCS Issues Academic Symposium, organized by State Oceanic Administration and Hainan SCS Research Institute, was held in Sanya, Hainan. Around 40 scholars and governmental officials attended the meeting, but only three from Taiwan. Gao Zhiguo, director of the Institute of Ocean Development and Strategy Institute, suggested increasing academic exchange and promoting cross–strait co-operation to safeguard rights and interest in the SCS. Wang Peiyun, chief-editor of the Chinese Offshore Oil Report, called for cross–strait joint development of SCS resources, in particular oil and gas.[961]

In December 2001, the Cross–Strait SCS Issues Exchange and Co-operation Academic Dialogue Meeting was held in Tao-Yuan, Taiwan. One of the major issues discussed was cross–strait co-operation on the SCS issues. It was proposed in a paper prepared by Taiwanese participant Chung-Young Chang, Professor at Central Police University, that at the non-governmental level, the two sides of the Taiwan Strait may (1) study the possibility of setting up a permanent, institutional co-operative mechanism and exchange channel to help ordinate those research institutions, universities or graduate schools that are involving in the SCS research; (2) encourage the private research institutions, public interest groups, or professional associations to conduct the SCS-related research; and (3) encourage and assist the relevant industries or private institutions to co-operate and jointly to conduct investigation, exploration, and development of the SCS resources.[962] At the governmental level, he suggested, the agencies of the two sides of the Taiwan Strait in charge of marine affairs and the SCS issues (1) should go through academic units, research institutions or associations to establish the cross–strait linkage, working relations; (2) should

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960 Zhao Guochai. "Analyzing the sovereignty disputes over the Spratly Islands in accordance with the modern law of the sea." Paper presented at the Meeting, 1999 (in Chinese).

961 Gao Zhiguo. "The situation, mission in the SCS at the turn of the century." Papers presented at the Meeting (in Chinese); Wang Peiyun. "Promote ocean culture, consolidate the cross–strait joint power." Papers presented at the Meeting, 2000 (in Chinese).

962 Chung-Young Chang. "To establish a cross–strait co-operative, exchange mechanism and fixed channel on the SCS issues." Paper presented at the Meeting, 2001. p.5 (in Chinese).

consider establishing a joint patrol mechanism in the SCS to help maintain safety of navigation at sea, maintain fisheries order, protect marine ecological conservation, and prevent smuggling, drug trafficking, and illegal activities at sea; and (3) should provide funds, through foundations or academic institutions, to support and encourage the proceeding of the cross–strait co-operative project on the SCS issues and to help increase the awareness of the people on the importance of the SCS issues.[963] Some other scholars from both sides made the similar remarks at the meeting. However, before setting up the co-operative mechanism, Lee Guochang suggested, the two sides of the Taiwan should consider the areas and scope of the co-operation and exchange of views. The scientific research and economic development areas should be included in the cross–strait co-operation. But more importantly, communication is first needed.[964] Chen Hungyu pointed out that at this current stage, there are difficulties for the cross–strait co-operation on the SCS issues at the governmental level.[965]

The consensus reached at the 2001 Cross-Strait SCS Issues Exchange and Co-operation Academic Dialogue Meeting on the possibility of setting up a cross–strait SCS forum was further discussed at a special meeting held in Haikou, China on October 28, 2002. It is clear that the idea of setting up a cross–strait SCS forum had been approved before by the Chinese government, since a copy of draft by-law for the cross–strait SCS forum was prepared for discussions at the special meeting. In fact, the main purpose of the meeting, as decided by the host Hainan SCS Research Institute, was to adopt the by-law that will govern the operation of the cross–strait SCS forum if established. Under the by-law, the official name of the forum is "Cross–Strait Non-Governmental Academic Forum on the SCS Issues," abbreviated as "Cross–Strait SCS Forum". The goal of the forum is "to safeguard the territorial integrity and maritime interests of the Chinese people in the SCS, to integrate, develop and expand the power of the cross–strait in studying the SCS issues, to promote the cross–strait academic exchange and cooperation, to increase the depth and width of the research on safeguarding SCS rights and interests, and to co-ordinate the positions and claims of the academic institutions against foreign countries on the SCS issues.[966] A secretariat will be set up, respectively, in Taiwan and China to be responsible for

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963 Chung-Young Chang, "To establish a cross–strait co-operative, exchange mechanism and fixed channel on the SCS issues." Paper presented at the Meeting, 2001. p. 5 (in Chinese). P.6

964 Lee Guochang. "Taiwan and SCS Islands over the past 50 years. Paper presented at the Meeting", 2001. pp. 7–8 (in Chinese).

965 Chen Hungyu. "Possible direction and areas for the cross–strait cooperation on the SCS issues." Paper presented at the Meeting, 2001. p. 3 (in Chinese).

966 Article 3 of the draft.

communication matters between the two sides. The secretariat is also in charge of issuing news release, organizing the forum's preparatory meetings, coordinating with the counter secretariat across the strait to draft or amend the by-law, and to raise funds for the forum activities.[967] The forum meetings will be held alternatively in Hainan and Taiwan without fixed dates. The two secretariats, after obtaining the permission from the authors, could either respectively or jointly publish the papers delivered at the meeting.[968] The two secretariats of the forum may accept financial support from contributors to cover the expenses for daily administrative works and hosting of academic symposia, but no conditions considered inconsistent with the goals of setting up the Cross–Strait SCS Forum should be attached for the financial contributions.[969] Due to the fact that the two Taiwanese representatives were not instructed to talk about the adoption of the by-law, in addition to several political and administrative concerns raised by Taiwan's counter-institute, National Chengchi University thereafter, the idea for setting up the cross–strait SCS forum remains a matter to be discussed between the two sides of the Taiwan Strait at other meetings.[970] This annual forum from 2005 to 2009 were focussed on cross-strait cooperation, which covered discussion along 'opportunity and direction', 'fields and channels', 'new opportunities and challenges' respectively.

1.2 Areas for Cooperation and Obstacles for Implementation

Over the past 12 years, as mentioned in the review done earlier, quite a few new and old ideas that advocated the cross–strait co-operation on the SCS issues have indeed been raised by scholars from Taiwan and China, in particular, at the cross–strait SCS academic symposia held in two sides of the Taiwan Strait. However, it is noticed that most of the recommended items for the co-operation fall in the category of 'low politics', which call for cross–strait cooperation in the areas of marine scientific research, marine environmental protection, combating piracy, armed robbery, and illegal activities at sea, exploration and development of natural resources, and other technical and functional matters.

The Taiwanese scholars and governmental officials have been asking for participation in the regional Track One security dialogue mechanisms that also deal with the SCS issues.

[967] Articles 5 and 6
[968] Article 8.
[969] Article 9.
[970] At the time of this writing, it had been proposed to organize a cross–strait SCS meeting to be held in Hainan in January 2004.

But China insists on the exclusion of Taiwan from the process because of the concern over the risk of helping upgrade Taiwan's international status. China, for instance, has been blocking Taiwan's involvement in the process of developing a regional code of conduct in the SCS. Even though it is a Track Two dialogue mechanism, China has been adopting the same strategy to block Taiwan's proposal for hosting technical or group of expert meetings on technical matters such as shipping and safety of navigation in the SCS. In fact, Taiwan is the only participating party in the SCS Workshop process that has never had the chance to host TWG or GEM meetings. Why so? Again, because China is worried about the risk of upgrading or strengthening the diplomatic relations between Taiwan and member states of the ASEAN, which is interpreted by the policy makers in Beijing as a violation of the principle of 'One China'. There is no possibility for the proposed areas of SCS co-operation being accepted if they are considered not abiding by the principle of 'One Country, Two Systems' or 'One China, Joint Development'.

Indeed there exist several major obstacles to the implementation of the cross–strait cooperation in the SCS, which are unlikely to be overcome in the near future. As pointed out by Professor Steven Kuan-Tshy Yu, the insistence on the principle of 'One China' by China and Taiwan's being forced to adopt a strategy of 'pragmatic diplomacy' to counter China's diplomatic blockade are the main barriers to any ideas of cross–strait co-operation in the SCS.[971] From the perspective of Taiwan, if Taipei co-operates closely with Beijing government in the SCS, its foreign policy goal of improving diplomatic relations with member states of the ASEAN would then be jeopardized. Professor Hung-Yu Chen listed a number of obstacles to the improvement of cross–strait relations and the implementation of co-operative projects in the SCS area, which include: (1) ideological differences between the two sides; (2) limitation on contact between the Taiwanese and Chinese officials; (3) China's political and military intervention in Taiwan's domestic politics and presidential election; (4) China's misinterpretation of the consensus reached between Beijing and Taipei in Singapore in 1991; (5) China's successful attempt to prevent Taiwan from attending the APEC summit held in Shanghai in October 2001; (6) the co-operation on SCS issues involving the sensitive issue of sovereignty; and (7) actions taken by China to prevent Taiwan

[971] Kuan-Tshy Yu S. Case study of pragmatic diplomacy, the cross–strait relations: comparing the position and policy taken by the two sides of the Taiwan Strait on the sovereignty issues in the SCS. Paper presented at the Symposium on Pragmatic Diplomacy and Cross–Strait Relations, organized by the Department of Political Science, National Taiwan University, and sponsored by the Mainland Affairs Council, College of Social Science, National Taiwan University, Taipei, May 26, 1994. p.14.

from participating in the regional and international security dialogues.[972] Chung-Young Chang also stated in his paper presented at the 2001 Cross-trait SCS Issues Exchange and Co-operation Academic Dialogue Meeting that if Taiwan adopts a position identical with China's, it would not only alienate its bilateral diplomatic relations from the member states of the ASEAN, but also imply Taiwan's acquiesce in the principle of 'One China', which, as a result, would make its sovereign status and independent entity subject to doubt.[973] Wen-Chen Lin argued that China's military threat against Taiwan is the major obstacle to the cross–strait co-operation in the SCS. China's diplomatic suppression also makes it impossible for Taiwan to trust China on the SCS issues. How can Taiwan co-operate with China if Beijing continues to impose embargos against Taiwan's proposal to host TWG or GE meetings within the Track Two framework of SCS Workshop?[974] Kuen-Chen Fu called for a cross–strait cooperation on the SCS issues based on equality and listed the following difficulties in the cross–strait co-operation on the SCS issues: (1) shortage of financial support from the governments in Taiwan and China; (2) Taiwan's being discriminated against by China without fair treatment; and (3) both Taiwan and China are concerned about the reaction of the member states of ASEAN to the cross–strait co-operation in the SCS.[975] The KMT won both the legislative and presidential elections in 2008. Current President Ma Ying-jeou has taken a decidedly more conciliatory approach; shortly after taking office he declared a 'diplomatic truce' with China. Since then, Taiwan's relations with the mainland have improved.

1.3 CBMs in Cross–strait Relations on the SCS

Some Taiwan scholars argue that the shift from a direct and indirect confrontation to co-operation between China and member states of the ASEAN on the SCS issues has the potential to alleviate Taiwan's concern that its move toward a closer cross–strait co-operation in the SCS area would jeopardize its foreign policy goal of improving bilateral relations with the member states of the ASEAN and the association as a whole. But, on the contrary, it can be argued that the development of a closer cross–strait co-operative relationship between

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972 Hung-Yu Chen, "Possible co-operative direction, areas of the cross–strait in the SCS Issues." Prepared for the 2001 Dialogue and Co-operation of the Cross–Strait on the SCS Issues, Tao-Yuan, Taiwan, November 14–15, 2001, pp.1–2.

973 Chung-young Chang, "Possible co-operative direction and areas of the cross–strait in the SCS Issues", Prepared for the 2001 Dialogue and Co-operation of the Cross–Strait on the SCS Issues. Tao-Yuan, Taiwan, November 14–15, 2001, pp. 2.

974 Wen-Chen Chen, "Possible co-operative direction and areas of the cross–strait in the SCS Issues.", prepared for the 2001 Dialogue and Co-operation of the Cross–Strait on the SCS Issues. Tao-Yuan, Taiwan, November 14–15, 2001, p. 8.

975 Kuen-Chen Fu, "The legal status of the SCS and the possibility of cross–strait co-operation on equal footing." Paper presented at the 1995 Hainan and Nanhai Academic Symposium, Taipei, October 6–17, 1995 (in Chinese).

Taipei and Beijing could also help improve Taiwan's bilateral relations with the member states of the ASEAN.[976] As a result of improvement of the cross–strait relations in the SCS, Taiwan might be invited to participate in the proposed joint projects between China and member states of the ASEAN based on the guidelines underlined in the 2002 DOC, provided that flexible arrangements are found and accepted by the parties concerned. In addition, the rising power and influence of China in the international affairs in general and in the SCS area in particular would have the impact of discouraging member states of the ASEAN to take actions that challenge the principle of 'One China'. As a result, it would become less necessary for China to apply the 'One China' principle to the cross–strait relations and its foreign relations with member states of the ASEAN in a rigid manner as it did before. In short, a win–win–win–WIN approach should be considered seriously for adoption by the Chinese policy makers, in particular if the cross–strait co-operation in the SCS are at issues. Flexible arrangements and other creative measures, reflected in the practice of international governmental organizations such as APEC, WTO, WCPFC, and others, could be followed to help promote cross–strait co-operation in the SCS area.

As a matter of fact, Taipei and Beijing has been cooperating on the issue of oil and gas exploration in the Taiwan Strait and northern part of the SCS area since the early 1990s. In December 1992, for instance, authorities in Hainan province of China proposed joint exploitation of natural resources in the SCS with Taiwan. In addition, some investors from Taiwan also proposed the establishment of a "SCS Development Funds" for joint fishing and crude oil exploration in the area of the sea not involved in sovereignty disputes with Vietnam and other member states of the ASEAN.[977] In October 1994, two state-run oil companies from China and Taiwan met in Singapore to discuss the possibility of joint oil exploration in the East China Sea and SCS.[978] In July 1996, Taiwan and China finally agreed their first ever upstream joint venture with the signing in Taipei of a 2-year exploration and surveying accord for acreage in the SCS.[979] In 1998, it was also reported that China National Offshore Oil Corporation (CNOOC) and Taiwan's Chinese Petroleum Corporation (CPC)

[976] Song, "Cross–strait interactions on the SCS issues: a need for CBMs".
[977] "Hainan Proposes Economic Cooperation with ROC," *Central News Agency*, December 9, 1992 (LexisNexis on-line search, page number not available).
[978] "Cross–strait cooperation 'A long way off' after China–Taiwan talks," BBC Summary of World Broadcasts," November 1, 1994 (LexisNexis on-line search, page number not available).
[979] Connors K. China, Taiwan plan to explore S. China Sea. Journal of Commerce 1996; p. 9C; Connors K. Taiwan and China sign historic upstream deal. Platt's Oilgram News 1996; 74(139):3.

would begin a joint oil exploration project in the SCS in August of that year.[980] In May 2003, Taiwan's CPC and China's CNOOC agreed to postpone their joint wildcat drilling program in the SCS block as severe acute respiratory syndrome (SARS) continued to ravage the Greater China region.[981] In addition to the cross–strait co-operation on oil exploration, the two sides have also been co-operating on the maritime safety measures. In November 1997, the Taipei-based China Rescue Association and its mainland counterpart, the China Marine Rescue Center, agreed to set up a hotline to facilitate marine rescue work in the Taiwan Strait. Under the agreement, when marine accidents occur, involving vessels from Taiwan and China, the vessels in distress and the rescuing vessels may use the hotline to ask for help and request permission to enter the waters and harbors of the other side.[982] It was also reported in February 1998 that the border defense corps of Fujian Province of China would explore channels with Taiwan for jointly maintaining cross–strait security and co-operation.[983]

Allen, a senior associate in the Confidence Building Measure (CBM) project at the Henry L. Stimson Center, concluded in his study of military CBMs across the Taiwan Strait that "it is unlikely there will be any significant movement toward military CBMs across the Taiwan Strait until there is movement on political issues".[984] This is also true for the movement of cross–strait co-operation in the SCS area. As pointed out by Allen, two of the most important CBMs in the cross–strait relations are: (1) the unilateral declaration made by Beijing, promising not to use force to reunify Taiwan with the mainland; and (2) the announcement made by Taiwan not to declare independence.[985] Song listed the following declaration, communications, transparency, and constraint CBMs for consideration by the policy makers in Beijing and Taipei:[986]

> **Exchange of visits by scholars and retired military officer to the occupied Pratas Islands (Taiwan), Paracel Islands (China), and Spratly Islands (Taiwan and China) in the SCS.*
> ** Declaration of not use of force or not threat to use force against each either in the SCS area.*
> ** Exchange of monitoring information on activities taken by other claimants in the area of the sea in the SCS that are also claimed by Taiwan and China.*
> ** Setting up hotlines or notification mechanism to assist stationed military and coast guard personnel in the occupied islands and fishermen operating in the claimed waters in maritime*

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[980] ASIA Briefs, Asian Wall Strait Journal, June 8, 1998, section A, p.17.
[981] Winnie Lee. China, Taiwan postpone drilling JV on SARS fears. Platt's Oilgram News 2003; 81(90):5.
[982] "Hotline To Facilitate Rescue Work in Taiwan Strait," Taiwan Central News Agency in English (FBIS-ChI-97-329, November 25, 1997).
[983] "Fujian Seeks Taiean Coopearation on Fighting Crimes at Sea,"Beijing Zhongguo Xinwen She in Chinese (FBIS-ChI-98-040, February 6, 1998).
[984] Allen KW. Military confidence-building measures across the Taiwan Strait. In: Singh RK, editor. Investigating Confidence-Building Measures in the Asia-Pacific Region. Report 28, HenryL. Stimson Center, Washington, D.C., USA. May 1999. p. 130.
[985] Allen KW. Military confidence-building measures across the Taiwan Strait. In: Singh RK, editor. Investigating Confidence-Building Measures in the Asia-Pacific Region. Report 28, Henry L. Stimson Center, Washington, D.C., USA. May 1999, p. 131
[986] Song, "Cross–strait interactions on the SCS issues: a need for CBMs", p.279

rescue.
** Pre-notification, on voluntary basis, of the military exercises to be conducted in the SCS area.*
** Avoidance of entering the waters or flying over the zones in the SCS, that are considered by each other as sensitive in terms of security and military defense.*
** Inviting national security academics and retired military personnel to attend the cross–strait SCS conferences held either in Taiwan or China for discussions on SCS issues.*
** Dispatching national security academics and military personnel to attend international meetings on the SCS issues.*
** Setting up a cross–strait SCS academic forum that is based on the principle of equality.*
** Organizing friendship sports games on the occupied Spratly Islands in the SCS.*
** Conducting cross–strait anti-piracy, anti-maritime terrorism, and search and rescue joint exercises in the SCS areas.*
** Encouraging member states of the ASEAN to invite Taiwanese scholars and governmental officials to attend regional Track One or Track Two SCS dialogues; at the same time, discouraging Taiwan's attempt to take advantage of the chance to participate to achieve other political and diplomatic goals.*
** Making a flexible arrangement to allow Taiwan to participate in the process of developing a regional code of conduct in the SCS.*
** Finding a way to enable Taiwan to participate in the joint projects to be implemented in the SCS in accordance with the guidelines underlined in the 2002 SCSCOP.*

The DOC contains several important CBMs, including: holding dialogues and exchange of views between defense and military officials; ensuring just and humane treatment of all persons who are either in danger of in distress; and notifying on a voluntary basis other parties concerned of any impending joint/combined military exercises conducted in the Spratly/SCS region.[987] In addition, China and member states of the ASEAN agreed to explore or undertake cooperative activities in the SCS area, which may include marine environment protection, marine scientific research, safety of navigation and communication at sea, search and rescue operation, and combating transnational crimes.[988]

It is possible for Taiwan and China to move toward strengthening the cross–strait co-operation on the SCS issues. The cooperative actions taken in the SCS area could enhance mutual trust between the two sides of the Taiwan Strait. If China and member states of the ASEAN can reach agreements to move from confrontation to co-operation in the SCS area, there are more reasons to believe that Taiwan and China can do the same thing. Song pointed out that CBMs are welcomed to be considered seriously by the policy makers of the two sides of the Taiwan Strait. It is believed that the adoption of the proposed CBMs will not only help improve the cross–strait relations, but also assist in maintaining stability and peace in the Taiwan Strait and the SCS areas. All of the people in the region would benefit

[987] Paragraph 5 of the Declaration.
[988] Paragraph 6 of the Declaration.

from the adoption of the proposed "win–win–win–WIN approach" by China.

2. Environmental Security as a Driving Force of Cooperation in SCS

This section addresses the usefulness of the concept 'environmental security' in relation to political perception of environmental interdependence in the SCS. In general, environmental interdependence is both a source of conflict and a potential for international cooperation. If the political actors address serious environmental problems as security matters, they are more likely to put them at the top of the agenda and deal with them in satisfactory manners, i.e. to cooperate and find solutions that are acceptable to all parties involved. The direction of the development, i.e. whether it leads to conflict or cooperation, is to a large degree a question of how the decision-makers perceive the situation.

2.1 Securitizing Environment in the SCS

The SCS produces fish, seagrass and other living and non-living resources for one of the most populous regions in the world. In the Southeast Asian region alone more than 70% of the population live in coastal areas, and their dependency on the sea for resources and a means of transportation is high. Fisheries in the Southeast Asian region represented 23 % of the total catch in Asia, and about 10% of the total world catch in 1992. At the same time, high economic growth is overshadowing environmental problems like overfishing, destructive fishing methods, habitat devastation and marine pollution. The environmental security aspect is therefore pertinent in the SCS.

The regional scientific community of maritime experts had succeeded in initiating, suggesting and formulating policy choices in the UNEP-case as well as the SCS Workshop case.[989] Unfortunately, governments of the region have prevented the attempts from leading to real political action.[990] Environmental knowledge has reached most countries of the region. Environmental ministries are in place, environmental laws and regulations formulated, environmental NGOs and IGOs undertake numerous projects, and environmental experts are allowed to meet on a free basis across borders, particularly within ASEAN.[991] However, even though governments talk and act environment-friendly, marine environmental

[989] See discussion in Chapter 5 on maritime environment protection.
[990] Tom Næss, "Environment and security in the SCS region", at http://www.duo.uio.no/sok/work.html?WORKID=5092
[991] See discussion in Chapter 5 on maritime environment protection.

problems are still not dealt with efficiently. Fishermen catch less fish along the coasts, coral reefs and mangroves are destroyed throughout the region, pollution from traffic at sea, from land based industries and from the growing cities of the region keep flowing untreated into coastal waters, etc.[992] The environmental experts try to inform their governments about risks and challenges, but so far the governments of the region have not been prepared to prioritize management and protection of the marine environment. So why don't governments of the region follow expert advice? First, during the last decade a situation has emerged where China is facing its Southeast Asian counterparts in a contest for natural resources and sovereignty to islands. Latent conflicts have been brought to the surface, and threaten to destabilize the region. Thus, high politics, vital state interests, are at stake. Approaches emphasizing narrow state interests and power politics score rather high in describing state interaction in this region, whereas explanations emphasizing co-operation and the influence of non-governmental actors make a rather low score in comparison.[993] But this is not to say that environmental experts have no influence at all, it is rather that their influence is limited to agenda setting and the framing of issues raised for discussion. Marine scientists have been influential in attracting the interest and attention of governments and decision makers, and also in promoting knowledge about the environmental situation, but still this knowledge is not reflected in state policies of various reasons.[994] Second, domestic conditions also prevent governments from taking part in regional environmental initiatives. These domestic factors are closely related to the level of economic development. As experienced in relation to the 'Indonesian haze,'[995] economic and administrative inadequacies prevent government policies from being effective. Indonesia's neighbours also remain reluctant to express 'enough is enough'. The 'Asian Way' of interacting within the ASEAN community implies that all members have to refrain from commenting on internal affairs in a neighboring country. The 'Asian Way' allows the ASEAN countries, as well as other Asian nations clinging to the 'Asian Way', to give priority to short-sighted national interests even though it may harm the interests of neighboring countries.

The Copenhagen School claims that any specific matter can be non-politicized, politicized and securitized. An issue is non-politicized when the state does not address it and

[992] Tom Næss, "Environment and security in the SCS region", at http://www.duo.uio.no/sok/work.html?WORKID=5092
[993] Ibid.
[994] Ibid.
[995] The haze, caused by forest fires burning in Indonesia's Kalimantan and Sumatra islands, has caused health problems across the region, dented tourism, hurt precious wildlife and damaged food sources in affected areas. Indonesia is viewed as the main culprit in this environmental crisis, but the transboundary problem holds lessons as well for neighboring countries preoccupied with fast-paced growth

when it is not included the public debate. An issue becomes politicized when it 'is part of public policy, requiring government decision and resource allocations or, more rarely, some other form of communal governance'.[996] Finally, a political concern can be securitized through an act of securitization. The latter refers to a process in which "an issue is framed as a security problem".[997] Securitization "is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics" and it "can thus be seen as a more extreme version of politicization".[998] De-securitization, on the other hand, refers to the reverse process. It involves the "shifting of issues out of emergency mode and into the normal bargaining processes of the political sphere".[999]

Most researchers studying the environmental situation in the SCS region point to the necessity of regional cooperation to come to grips with a growing problem. So far, however, regionalism has not come too far in dealing with the international environmental problems. The most obvious institution to do so is ASEAN, which has already cooperated on environmental issues for many years. However, the impression is that the association does not put the environmental issues at the top of its agenda. Besides, environmental laws enacted by most Southeast Asian countries during this period of economic growth and industrialization have, with some exceptions, been ineffective.[1000] This is due to a number of factors. Namely the lack of political will (although the power existed) of the environmental and other agencies in the respective states to implement new law; the lack of an effective funding strategy to carry out their duties; the lack of hard evidence, such as non-point sources of pollution; the absence of significant penalties for offenders; and the lack of coordination between agencies and departments.[1001] Also, what constituted a severe penalty was open to debate. It is difficult to quantify the terms of the penalty that should be imposed if the damage is assessed in only monetary terms and not on the degradation of the natural environment.

In general, marine environment problem is not at the top of the agenda of most SCS

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[996] Ibid, p.23
[997] Ibid. p.75
[998] Ibid, p23
[999] Ibid, p4
[1000] L.S. Chia (ed.) *Environmental Management in Southeast Asia: Directions and Current Status*, (Faculty of Science, National University of Singapore, 1987). p.151; Surin Setamanit, "Thailand" in Chia (ed.) p.187; V.R.Villavicencio, "Philippines" p.107; Ong and others, "Malaysia" in Chia (ed.); Partoatmodjo, "Indonesia" in Chia, Gomez and others, "Coastal Zone Management", *SEAPOL Conference* (Chiang Mai, 1990)
[1001] Vivian Louis Forbes, *Conflict and cooperation in managing maritime space in semi-enclosed seas* (Singapore: Singapore University Press, 2001), p.244

countries. Based on securitization theory of Copenhagen School, environmental problem should be now securitized if we wish to put it at the top of the agenda among the SCS countries and address it in an effective manner. If serious environmental problems were defined by the political actors as security matters, then they would most certainly be put higher up on the agenda. Then environmental security issues can be used as a driving force of cooperation in SCS. This driving force could be strengthened as the link between the oceans and climate change is receiving greater international attention. At the opening of World Ocean Conference (WOC) in May 2009, the Inter-governmental Panel on Climate Change (IPCC) and other scientific sources have highlighted ocean changes associated with climates confronting small island and coastal communities, such as ocean warming, sea level rise, and changes to ocean circulations.[1002] The gradual awareness of the critical link between marine environment and climate change thus highlights the importance of securitizing marine environment in the SCS.

2.2 Environment Security as a Driving Force to Stimulate Cooperation in SCS

How can security considerations function as driving forces for regional cooperation? One very important aspect related to this is that driving forces cannot function as such without being perceived by the political actors as high politics. Hence the concept must be related to the general perceptions of the politicians. The actors must recognize and perceive the link between their high politics concern and marine environment security in the SCS. Let us see whether environmental security issues have the potential of being driving forces in integration and cooperation between the countries around the SCS.

To a large degree, one may say that security questions have been a driving force for continued regional integration in Southeast Asia.[1003] In the future, questions of environmental security may be playing the same role. The states around the SCS are to a large degree interdependent when it comes to questions of the marine environment. They are interdependent to the degree that if they fail to find common solutions to environmental problems they may end up in violent conflict against each other.

It is issues of politico-military security that are likely to generate calls for closer

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[1002] Sam Bateman and Mary Ann Palma, "Coming to the rescue of the Oceans: The Climate Change Imperative", *RSIS Commentaries*, August, 2009.

[1003] Karin Dokken, "Environment, security and regionalism in the Asia-Pacific: is environmental security a useful concept?" *The Pacific Review;* Vol. 14 No. 4 2001: 509–530, p.509

international cooperation in the SCS. Increasingly, problems of environmental security will do the same. Regional environmental problems may be considered in terms of shared hazards and shared resources: both categories are now poised to acquire significant integrative potential. The problems are growing, and so are the potential gains of cooperation.[1004] It is therefore necessary to ask whether there are signs of epistemic communities playing such a role in relation to marine environmental cooperation in the SCS region. Studies on the role of experts in relation to environment, security and international cooperation in the SCS region are as yet limited. Around the Mediterranean and Baltic authoritative regional communities of scientists have emerged and these communities were influential in establishing ocean governance systems for those seas.[1005] Generally, authoritative expertise and data are a vital basis for any community or group of policy-makers dealing with the environment. Scientists who have the ability to think ecologically and in broad terms can play an important role in the development of ocean governance systems.[1006] The impact of scientific advice is more likely in situations where decision-makers are uncertain about environmental problems.[1007] This is the case with the SCS. There is a general lack of qualified information on the sea and its resources. There are, however, several factors impeding a possible scientific impact on environmental policies in the SCS. At the outset, heavy emphasis on vital state interests and national sovereignty does not leave much room for independent scientific advice on how to formulate environmental policies in the region. For the time being, the climate is dominated by high politics. This obviously hampers the influence of expert advice, the way it works today.

The dependency on the sea for its resources, as means of transportation and foreign exchange earnings, from fishing and tourism etc., and the fact that the states around the SCS are heavily interdependent in relation to the use of the resources, should imply that international cooperation is the only sensible policy alternative in the future. However, knowing that today there is a perceived contradiction between environmental considerations and international cooperation on the one hand and the emphasis on vital state interests and

[1004] Ibid, p.523

[1005] Peter Haas, *Saving the Mediterranean: the politics of international environmental cooperation* (New York: Colombia University Press,1990); Ronnie Hjorth, "Baltic Sea environmental cooperation: the role of epistemic communities and the politics of regime change", (1994) *Cooperation and Conflict* 29(1), pp. 11–31; Næss, Tom (1999) "Environment and security in the South China Sea region: the role of experts, non-governmental actors and governments in regime building processes", Final thesis in political science, University of Oslo. Available electronically at http://www.sum.uio.no/southchinasea/.

[1006] Karin Dokken, "Environment, security and regionalism in the Asia-Pacific: is environmental security a useful concept?", p.523

[1007] Peter Haas, (1992) 'Introduction: epistemic community and international policy coordination', *International Organization* 46(1), pp. 1–37

national sovereignty on the other, what does it take to make the political actors feel forced to cooperate? The concept of 'environmental security' may be part of the answer.

According to this concept there is no contradiction between international environmental regimes and vital national interests. Rather, international cooperation on environmental resources is the only way to secure vital national resources for the future. Dealing with environmental problems will normally require some pooling of state sovereignty on behalf of common ecological security. The linkage between political/military security and environmental security arises from the fact that we are living in an interdependent world. In our days the destinies of nations are becoming intertwined in ever more complex ways. Sensitivity and vulnerability are two key concepts related to the phenomenon of interdependence. In general, the sensitivity and vulnerability of states in an interdependent world create a need for policy coordination to reduce the effects of vulnerability and regain control. So far, this has been of importance primarily in relation to political/military security. However, the conceptualization is equally valuable where environmental security is concerned. A trans-border ecosystem out of control creates the need to create between states so as to reduce further vulnerability and regain control.[1008]

On environmental security matters, states never have been, nor will they ever become fully sovereign. This is particularly evident when it comes to international policy on pollution. Trans-boundary pollution of waterways raises the question of whether polluting activities within the boundaries of one state should remain the exclusive jurisdiction of its government. Alternatively, is the sovereignty of a state compromised when its environment is degraded by pollutants emanating from neighbouring countries?[1009] These are among the points that need to be emphasized by the scientific experts when asked for advice by the policy-makers in the SCS region. It all points in the direction of the need for further international cooperation.[1010]

Now let's turn to the main question—whether common marine environmental problems could be a driving force for further cooperation in the SCS, within ASEAN and between ASEAN, China and Taiwan. The recognition of strong environmental interdependence is one of the strongest driving forces for regional cooperation and

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[1008] Ibid, p.524

[1009] Karin Dokken *Environment, Security and Regional Integration in West Africa* (Oslo: Unipub, 1997), p.89; Marvin S. Soroos, *Beyond Sovereignty: The Challenge of Global Policy*, (South Carolina: University of South Carolina Press,1986). (See Dokken 1997: 89; Soroos 1986.) at Environment, security, regionalism…p.524

[1010] Dokken, "Environment, security and regionalism in the Asia-Pacific: is environmental security a useful concept?" p.524

integration outside Europe today. We know that in organizations like ASEAN, and between ASEAN and China, pragmatic interests are not sufficient for the cooperation process to move forward. A driving force is needed. It is possible that, if defined as security matters, grave regional marine environmental problems could be the necessary driving force for the SCS cooperation in the future. For the political leaders of the SCS States to perceive environmental problems as security matters, they must learn that they are. Teaching the political actors about the relationship between environment and security in the SCS region may therefore be an important task for the epistemic communities of concerned scientists in the region.

3. Fisheries Cooperation as a Start of SCS Disputes Resolution

This section examines how stability can be achieved through joint cooperation undertaken at the lowest levels of contact in the SCS, even as major political disagreements remain unresolved. A prime example of joint cooperation can be found in the field of fisheries management, an area in which cooperation among the littoral states is encouraged. Fisheries cooperation might be one practical option to avert outright conflict in a region that seems perpetually on the edge of hostilities.

The SCS meets the criteria set out in Article 122 of the LOSC defining the term 'semi-enclosed sea':

> *'[E]nclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.*

Because the SCS is semi-enclosed, any change in the ecosystem of the semi-enclosed sea will have significant impact on the whole area. It is generally recognized that the living resources in the SCS area migrate from one EEZ to another, particularly those highly migratory species, such as tuna and other shared stocks. It is interesting to note that most of the fishery resources in the SCS region are either shared stocks such as scads and mackerels that migrate across the EEZs of more than one coastal state, or highly migratory species, especially tuna, whose migratory patterns sometimes cover a vast area of the ocean. Common stocks of scads and mackerels are believed to occur along the coasts of the Gulf

of Thailand and the eastern region of the SCS. [1011]

Each country may already have its own assessment of its living resources in its EEZ, assuming that the definition and delineation of each EEZ is clear. The problem is that many of those EEZ boundaries are not well defined or mutually agreed upon by the relevant parties. Likewise, there are various conflicting claims to islands that complicate and defer the determination of the EEZ boundaries. For this reason, many experts and scholars are convinced of the need to cooperate on the assessment of the living resources in the SCS area without regard to jurisdictional boundaries.

Article 123 of the LOSC regarding enclosed and semi-enclosed seas provides:

> *States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organisation.*

Therefore, all parties concerned should be aware that fish are migratory and fishery resources are exhaustible, so that rational use of the SCS and the preservation of its marine environment are important to all parties. Thus, cooperation among littoral states in the region is essential. In order to avoid overfishing or depletion of resources, conservation measures have to be taken. Such measures are not possible without regional cooperation and require close coordination among the parties concerned especially in a semi-enclosed sea.

As Kuen-chen FU puts it, conservation and management of the SCS fishery resources is a complicated issue, which is not possible for a single State among the SCS countries to resolve alone.[1012] A joint effort is thus essential, particularly in consideration that the state of the SCS fisheries gets worsened but the demand for fisheries has escalated. He suggests that there is an urgent need of a more effective regional cooperation scheme for fishery resources conservation and management. Wang argues that fishery cooperation could be the most feasible course of action for the littoral states since, through cooperation, fishery resources could be properly conserved and managed such that economic waste and over-exploitation may be avoided.[1013] Without affecting jurisdictional boundaries as laid down in the LOSC, it is certainly possible to have regional joint fishery management in the SCS as the starting point for further cooperation. If all states in this region treat cooperation

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[1011] Kuan-Hsiung Wang, "Bridge over troubled waters: fisheries cooperation as a resolution to the SCS conflicts", *The Pacific Review*, Vol. 14 No. 4 2001: 531–551, at p.536

[1012] Fu Kuen-chen, "Regional Cooperation for Conservation and Management of Fishery Resources in the South China Sea", *China-Asean Relations Economic and Legal Dimension*s, pp. 219-243.

[1013] Kuan-Hsiung Wang, "Bridge over troubled waters: fisheries cooperation as a resolution to the SCS conflicts", at p.536 and 542

as a key step towards achieving mutual benefit, then the future for such a regional cooperation mechanism is assured.

It is obvious that some fishery resources of the SCS are still under-exploited, most are heavily exploited. Therefore, fisheries development should be accompanied by a rational resource management mechanism. To date, however, no single resource management method has emerged that would work efficiently in the whole area. Even within the zones of each littoral state's jurisdiction, rational resource management mechanisms are not apparent. One of the reasons for this is the problem of overlapping claims among the littoral states. The other reason is that none of the littoral states has sufficient stock assessment data available to support a rational resource management Mechanism.[1014]

Wang suggests that, in view of the situation with respect to living resources in the SCS, cooperation towards management and conservation of fishery resources should start with defining and minimizing disputed areas; [1015] then a joint committee could be established to manage the fishing-related issues.[1016] In the meantime, definition and determination of fish stocks and allowable catch of living resources in the region should proceed.

In the SCS region, it is not difficult to locate opportunities for cooperation. Military cooperation, joint development on hydrocarbon resources, marine scientific research, marine environmental protection and fisheries cooperation are all options. To date, however, disputes surrounding possible hydrocarbon resources in the area and actions in favour of conservation and management of fishery resources have been delayed. Nevertheless, conservation and management of fishery resources could be the starting point for cooperation in this area and could have a 'spillover effect' on other areas of cooperation. Accordingly, the next step depends on littoral states' political will and determination to pursue cooperation in this matter.

In this respect, cooperating to manage and conserve fisheries resources is especially significant because fish are migratory, and often highly migratory. Moreover, overfishing is a serious and pressing problem in the region. In this regard, a maritime boundary cannot entirely protect a state's fishery resources from encroachment, because fishery resources can migrate beyond the state's territorial or fishing zones, and overfishing beyond its borders can

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[1014] A. Dwiponggo, "Project proposal on regional fisheries stock assessment in the South China Sea", Paper presented at the Second Working Group Meeting on Resource Assessment and Ways of Development in the South China Sea, Jakarta, Indonesia, 5–6 July.1993, pp.1–2

[1015] Valencia, Van Dyke and Ludwig, *Sharing the Resources of the SCS*, pp. 205–206

[1016] Kuan-Hsiung Wang, "Bridge over troubled waters: fisheries cooperation as a resolution to the SCS conflicts", p544

also affect the fish stocks within its territorial boundaries. Therefore, a proper management mechanism, subject to natural conditions, is necessary for the coastal states to keep stocks at sustainable levels. This is especially important for the littoral states around the SCS. Because this region is a semi-enclosed sea, any change in the fishery policy-making could have far-reaching effects on the fishery resources in this area.

4. UNCLOS as a Framework for Ocean Governance in the SCS

UNCLOS provides an integrated legal framework on which to build sound and effective regulations to the different uses of the ocean. Whether or not we choose to call the LOS Convention regime a constitution for the ocean, it does articulate a system of ocean governance.[1017] It does not specify in detail when and how fishers can harvest living resources in the EEZs of coastal States or what the terms of leases for deep seabed mining will be. What it does do, however, is to create (sometimes contentious) procedures for arriving at collective decisions about such matters. This is precisely what we expect a constitution or constitutive agreement about governance to do. Rainer Lagoni argues that the Convention is no constitution in the sense of the usual terminology of the law of States. Notwithstanding this, it is the principal legal instrument that provides the framework for the public order of the oceans and seas.[1018] This function has to be taken into account during its interpretation and application by the State Parties. Moreover it determines its systematic role for the integration of all international treaties relating to the oceans and seas into such an international public order.

A constitutional perspective suggests that UNCLOS was not intended to be comprehensive to the extent that there would be no need to create further law.[1019] This means that, although the Convention made use of 'vagueness, ambiguity, and silence' at certain points and in respect of certain controversial matters,[1020] the LOS Convention could be regarded as legally effective to the extent that it provides clearly for a system within which to address substantive issues as they arise. The goal of a constitution is to provide for a system of governance rather than to deal with all substantive matters. The LOS Convention

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1017 Oran Young, "Commentary on Shirley V. Scott "The LOS Convention as a Constitutional Regime for the Ocean"", p.42

1018 Rainer Lagoni, "Commentary", in Elferink, *Stability and Change in The Law of the Sea*, p.51

1019 J.R. Stevenson and B.H. Oxman, "The Future of the United Nations Convention on the Law of the Sea" (1994) 88 *AJIL*, pp.488-499, at p.492

1020 A. Pardo "The New Law of the Sea and Some of its Implications" (1987) 4 *Journal of Law and the Environment pp.*3-15, at p.13

refers in almost seventy provisions to the possibility that the subject in question may be governed by another international instrument, bilateral or multilateral, anterior or posterior.[1021]

In "Ocean governance: sustainable development of the Seas," UNCLOS was highly praised as follows:

> *In considering the extent to which existing international institutions are adequate to the task of making a reality of the concept of sustainable development in the field of marine resources, the obvious starting point is the 1982 UN Convention on the Law of the Sea. Designed to reflect elements of the "New International Economic Order" and to establish the legal content of the concept of the "common heritage of mankind," the Convention gives expression precisely to those elements of universal participation, equity and balanced reciprocal obligation, transference of funds, science and technology to the developing countries, and regulation of access to shared natural resources, that are also inherent in the concept of sustainable development.*[1022]

Through the discussion (in chapter III) on the three groups of core issues in the SCS and the applicability of Part XV in these respective issues, I argue that although the LOS Convention may be perceived to have certain shortcomings, it is comparatively effective in the SCS in terms of its internal coherence. UNCLOS, rather as a compulsory channel to settle the disputes, sees itself more as a framework within which regional ocean governance seems to be an approach to address issues in the SCS.

A regional system of ocean governance — which presupposes some concept of shared, rather than self-centered, sovereign authority, in this sense, would mean not only more intensive and transparent consultations among ASEAN members and China on a full range of ocean issues, but also a more ready willingness on their part to accept and institutionalize a strategic notion of regional security based on a comprehensive system of ocean security. By 'regional ocean governance' is simply meant that the comprehensive process of sustainable development of and for the oceans at the regional level. Its underlying premise reiterates the core principle of UNCLOS that "the problems of ocean space in a region are closely interrelated and need to be considered as a whole."[1023] Like ocean governance at the global level, regional ocean governance has two prerequisites: sustainable development norms and sustainable development institutions. While in the SCS there is no an overall policy on ocean governance *per se*, it could be said that the building

[1021] R. Wolfrum, "The Legal Order for the Seas and Oceans" in M.H. Nordquist and J.Norton Moore (eds) *Entry into Force of the Law of the Sea Convention* (Martinus Nijhoff Publishers, The Hague, 1997) *1 Max Planck Yearbook of United Nations Law*, pp.1-33, at p.190

[1022] Peter Bautista Payoyo (ed.), *Ocean governance: sustainable development of the Seas* (The United Nations University, 1994)

[1023] UNCLOS, Premise.

blocks for this policy are already in place. A consideration of the normative framework for ocean sustainable development in the region would show that the regime of comprehensive security envisioned by UNLCOS process can find support in the ocean management regimes of ASEAN and China — enhancing, directly or indirectly, the substantive framework of sustainable development and/or comprehensive security embodies in UNCLOS. The elements of a regional regime of ocean governance consist of the several distinct strands of ocean management norms and standards which have become integral to the international law of ASEAN and China. Mention may be made, firstly, of DOC, which may be considered as setting forth the broad framework of regional cooperation which could very well be extended to the oceans, or applied in the context of expanded and integrated ASEAN+1 programme on marine affairs.[1024] The norms and standards elaborated under these agreements specify the concrete aims and the various forms of regional cooperation, as well as the norms and conflict-avoidance and peaceful settlement of disputes.

As Desilva points out, the first step to ocean governance is to draw up a Framework Agreement which will contain elements of the general principles and policies, of the special programmes and sub-regional and bi-lateral agreements.[1025] It should be functional and effective in resolving environmental problems and fostering strong regional cooperation and coordination of appropriate cost effective actions. The framework instrument must include, among others: a) The use of sound science incorporated into policy making processes to foster ecological and economic soundness; b) Laws, policies and actions that are effective in terms of ecological improvements. Ecological ineffectiveness also results in waste of scarce financial resources. Ecologically effective actions must be based on sound science and not on perceptions or political considerations; c)cost effective actions; d) Economic valuation of environmental goods and services as a tool for sound development planning; e) Decision-making after gathering all relevant knowledge/information for the purpose. This improves the effectiveness of decisions and it also improves cooperation; f) Promoting and building a base on consensual knowledge. This is particularly true where progress on regional cooperation is stalled or slowed due to complexities or uncertainty surrounding the issue; g) Good communication both vertical and horizontal for effective cooperation; h) Periodic

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[1024] The 1995 Bangkos Summit Declaration asserts that "cooperative peace and shared prosperity are the fundamental goals of the ASEAN".

[1025] Vice Admiral John C Desilva, Pvsm, Avsm. (Retd), "Conflict Management And Environmental Cooperation In The South China Sea", at the 8th Science Council Of Asia Conference Joint Project: "Security Of Ocean In Asia" , 29 May 2008, Qingdao, China, p.7

assessment and review and revision of actions as required ensuring that they are effective. Where assessments indicate problems, they need to be revised; and i) Flexible approach that allows for the inclusion of new information.[1026]

DOC may be cited as such a Framework Agreement on ocean management in the region. The consistency with which it has been invoked in ASEAN and China does make it an authoritative basis for conflict avoidance and cooperation in the region: in addition to its call for restraint and a peaceful resolution of the overlapping territorial claims, the declaration invites all parties involved "to explore the possibility of cooperation in the SCS relating to the safety of maritime navigation and communication, protection against pollution of the marine environment, coordination of search and rescue operations, efforts towards combating piracy and armed robbery, as well as collaboration in the campaign against illicit trafficking in drugs".[1027] More recently, the ASEAN members pledged to "seek an early, peaceful resolution" of the dispute and to "explore ways and means to prevent conflict and enhance cooperation in the South China Sea consistent with the Treaty of Amity and Cooperation, the ASEAN Declaration on the South China Sea of 1992, as well as international law, including the UN Convention on the law of the Sea".[1028]

5. Transformation of Ways of Thinking as a Foundation to Lead Policy and Research Direction

Rethinking the problem-solving orientation starts by questioning the premise that conflicts need to be viewed as problems in the first place.[1029] A different premise would suggest that disputes can be viewed not as problems at all but as opportunities for moral growth and transformation. This different view is the transformative orientation to conflict.

In this transformative orientation, a conflict is first and foremost a potential occasion for growth in two critical and interrelated dimensions of human morality. The first dimension involves strengthening the self. This occurs through realizing and strengthening one's inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action. The second dimension involves reaching beyond the self to relate to others. This occurs through realizing and strengthening

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[1026] Ibid.

[1027] Dong Manh Nguyen, "Settlement of disputes under the 1982 United Nations Convention on the Law of the Sea The case of the South China Sea dispute", Fellowship on the Law of the Sea New York, December 2005.

[1028] 1995 ASEAN Summit Declaration, (Bangkok) 15 Dec 1995.

[1029] "The Mediation Movement: Four Diverging Views", in, Robert A. Baruch Bush, *the Promise of Mediation: the Transformative Approach to Conflict* (San Francisco: Jossey-Bass, c2005.) p. 81.

one's inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is 'different' from one's own.[1030]

Conflict affords people the opportunity to develop and exercise both self-determination and self-reliance.[1031] Moreover, the emergence of conflict confronts each party with a differently situated other who holds a contrary viewpoint. This encounter presents each party with an opportunity for acknowledging the perspectives of others. It gives the individual the chance to feel and express some degree of understanding and concern for another, despite diversity and disagreement. Conflict thus gives people the occasion to develop and exercise respect and consideration for others. In sum, conflicts embody valuable opportunities for both dimensions of moral growth, perhaps to a greater degree than most other human experiences. This may be why the Chinese have a tradition of using identical characters to depict crisis and opportunity.

In the transformative orientation, the ideal response to a conflict is not to solve 'the problem'.[1032] Instead, it is to help transform the individuals involved, in both dimensions of moral growth. Responding to conflicts productively means utilizing the opportunities they present to change and transform the parties as human beings. It means encouraging and helping the parties to use the conflict to realize and actualize their inherent capacities both for strength of self and for relating to others. It means bringing out the intrinsic goodness that lies within the parties as human beings. If this is done, then the response to conflict itself helps transform individuals from fearful, defensive, or self-centred beings into confident, responsive, and caring ones, ultimately transforming society as well. Conflicts are seen as rich opportunities for growth, and mediation represents a way to take full advantage of this opportunism.

The philosophy in the conflict transformation approach is that in disputes there are invariably causes or reasons more fundamental than the ones that are expressed at the level of the disputes. Often, disagreements caused by economic, political, identity or discursive structures give rise to concrete disputes, which then escalate into armed conflicts. Here, economic structures deal with questions of the distribution of income and accumulation of wealth in economic interaction between agents of a different sort. Political structures are similarly related to the distribution of power resources. Identity structures refer to how

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1030 Ibid.
1031 Ibid. p.82
1032 "Changing People, Not Just Situations: A Transformative View of Conflict and Mediation", in *The Promise of Mediation*, p.82.

people perceive groups and relations between groups; they are important because they construct the potential sides in conflict. Very much related to identity structures are discursive structures, which define the bases and limits for civilized verbal argumentation in societies. The way in which different groups perceive norms and interpretations of the reality, which is relevant to a dispute/conflict, is crucially important from the point of view of conflicts. In a peaceful discursive structure there are some generally accepted bases for argumentation in politics; moreover, there are no groups that lack common grounds for debate and argumentation or there are interlinking groups – groups that would find some elements of the argumentative basis of both groups legitimate.[1033]

Patriotism and nationalism play a critical role in the SCS dispute development. The disputant states in the SCS are more or less indulged in national pride or nationalism sentiment. There are major 'stumbling blocks' that inhibit progress with functional cooperation and joint development in the SCS. Michael notes most of these, especially the strong element of nationalism that pervades the disputes.[1034] Nationalism can become a strong 'stumbling block' to the resolution of disputes, and even functional cooperation. Public expressions of nationalism destroy political will and militate against cooperation and Geoffrey Till has observed previously that "claims to the sovereignty of islands can be important symbolically, perhaps especially in times of national difficulty".[1035] The unrest in the Philippines over the Joint Maritime Seismic Undertaking (JMSU), because it appeared to weaken Philippine sovereignty claims, is a clear manifestation of nationalism at work.[1036] The popular demonstrations of support in the Philippines for the Baselines Bill are another example.[1037]

Those who interpret China's claims in the SCS as a threat to the regional stability and the potential to use her increased military power to achieve her objectives in open conflict with its neighbours should read Chinese nationalism sentiment carefully before jumping to the conclusion. Some western scholars claim that, as China's reform policy has reduced the appeal of Marxism-Leninism as a legitimating device for the Chinese regime, the CCP

1033 Timo Kivimaki, Liselotte Odgaard and Stein Tonnesson, "What Could be Done?", in Timo Kivimaki (ed.) *War or Peace in the South China Sea* (Nais Press, 2002), p.133

1034 Michael Richardson, see Sam Bateman, "Commentary on Energy and Geopolitics in the South China Sea by Michael Richardson", at http://www.iseas.edu.sg/aseanstudiescentre/ascdf2c1.pdf

1035 Geoffrey Till, "The South China Sea Dispute: An International history", in Bateman and Emmers, *Security and International Politics in the South China Sea,* p. 38.

1036 Mak Joon Num, "Sovereignty in ASEAN", p. 121

1037 T.J. Burgonia and Joel Quinto, "Arroyo signs controversial baselines bill", *Philippine Daily Inquirer,* 12 March 2009, http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090312-193661/Arroyo-signscontroversial-baselines-bill (accessed 13 March 2009).

increasingly uses nationalism to fill the void.[1038] According to Stephen Levine, nationalism is the most prominent *informal* ideology in China today.[1039] Advocates of the 'China threat' theory often argue that China's Spratly policy is driven by a nationalist ambition to re-establish hegemonic power in the region. This link is also suggested by Mark Valencia when he states that: "…China's actions in the South China Sea is the result of a rising tide of nationalism that seems to be replacing socialism as the preferred societal glue."[1040] Gerald Segal also stresses this point when stating that "the Chinese regime copes with the internal consequences of reform by taking a tough stand on nationalist issues, hence Beijing's active and vigorous pursuit of claims in the SCS."[1041] Nationalist sentiments no doubt influence the formulation of China's foreign policy. This does not necessarily mean, however, that the PRC's SCS policy must be similarly affected by nationalism. How potent is China's 'Nansha rhetoric' domestically? Is the lack of control of these unfriendly reefs so far from the mainland as painful to the national psyche as the separation of the motherland across the Taiwan Strait? Is the regime willing to pay any price in order to gain control over these remote islets? Or can the sovereignty dispute in the southern part of the SCS be detached from the nationalist agenda, so the regime can be left in a position to formulate a more pragmatic policy towards the conflict?

In order to approach an understanding of how domestic discourses relate to China's actual policies in the SCS, I tried to explore the rhetoric used in some domestic media.[1042] By analysing their discourse, I tried to reveal to what extent China's SCS policy is likely to be affected by aggressive nationalism. My main source of information is articles in public newspapers and research journals. The newspaper articles should be considered as propaganda, and may reveal the extent to which the regime uses the Spratly conflict as a legitimating device. How aggressively nationalistic is the regime's domestic rhetoric? The research journal articles aim at a more limited audience, and may be considered as means of communication within China's educated elite. The research environment in China can be said to function as an *interpretative prism* for policy makers in China, trying out new ideas and

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[1038] Sam Bateman, "Commentary on Energy and Geopolitics in the South China Sea by Michael Richardson", at http://www.iseas.edu.sg/aseanstudiescentre/ascdf2c1.pdf (accessed on June 5th 2009)

[1039] Stephen Levine, 'Perception and ideology,' in Robinson and Shambaugh. *Chinese Foreign policy. Theory and Practice.* Oxford: Clarendon Press, 1994, pp.30-46.

[1040] Mark J. Valencia, 'China and the South China Sea Dispute: Conflicting Claims and Potential Solutions in the South China Sea.' Adelphi Paper, no. 298. Oxford: Oxford University Press, 1995

[1041] Gerald Segal, "Tying China to the International system," *Survival,* vol. 37, no. 2 (Summer 1995), pp. 60–73

[1042] Similar approach of research, see also Leni Stenseth, "The Imagined China Threat in the South China Sea", at http://www.southchinasea.org/docs/Stenseth.pdf; and Leni Stenseth, *Nationalism and Foreign Policy: the Case of China's* Nansha *Rhetoric.* Cand. polit. thesis, University of Oslo, Department of Political Science, 1998.

holding firmly on to views that must not be allowed to change. The views held in research journal articles may reveal the extent to which the perceptions of the policy making elite is influenced by nationalist attitudes.[1043]

Nationalism is often associated with something *negative*. However, nationalism may take less negative forms. Allen S. Whiting has suggested a tripartite typology that is useful in order to distinguish different forms of nationalism.[1044] According to Whiting:

1) *affirmative nationalism* centres exclusively on 'us' as a positive in-group with pride in attributes and achievements.

2) Assertive nationalism, on the other hand, adds 'them' as a negative group outside the nation. This group challenges the in-group's interests and, possibly, identity.

3) *aggressive nationalism,* finally, identifies a specific foreign enemy as a serious threat that requires action to defend vital interests.

Affirmative nationalism fosters patriotism, while aggressive nationalism entails anger and mobilises action. According to Whiting, the implication for foreign policy is minimal in the first case, but potentially major in the second. Assertive nationalism shares some common features with both, and the potential effects of this type of nationalism depend on its intensity. Using Whiting's tripartite typology, three tentative conclusions may be drawn from the analysis of the Chinese discourse on the SCS: First, it is not likely that the Chinese regime will be willing to give up its overall claim to sovereignty in the major part of the SCS, certainly including the Spratly area. China's extensive territorial claim does not seem to be based on a rational calculation of needs for oil and gas. It is grounded in emotions and ideology. The idea that China's sovereignty is indisputable seems to be a part of Chinese national identity, such as it has developed in the 20th century. The Spratlys are considered an inseparable part of the motherland, and occupation by others is interpreted as encroachments on Chinese territory. All relevant articles, both in the newspapers and journals, affirmed that this sacred territory is an inviolable part of China. China's leaders will

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[1043] In his book *Beautiful Imperialist: China Perceives America, 1972–1990*. Princeton: Princeton University Press, 1991, David Shambaugh elaborates on the mechanisms through which perceptions or belief system of individual decision makers inform policy decisions. He formulates a model where belief systems of individual decision makers are included as intervening variables between the independent variable of external stimuli (information) and the dependent variable (policy output). If one uses Shambaugh's model as a point of departure, and assumes that articles in research journals serve as interpretative prisms for Chinese policy makers, the message communicated through these journals could provide us with important information about the driving forces behind China's South China Sea policy. It should be noted, however, that it is difficult to establish the degree to which scholarly writings reflect and influence official thinking. A systematic analysis comparing official views and scholarly analysis is certainly called for, but that has not been within the scope of this article. However, given what we know about the regime, it is not likely that there is a radical difference between scholarly and official analyses.

[1044] Allan S. Whiting, 'Chinese Nationalism and Foreign Policy after Deng,' *The China Quarterly,* vol. 142, June 1995, pp. 297–315

therefore find it extremely difficult to give up or modify the principle of Chinese sovereignty.

The second conclusion to be drawn is that there is little in the press and research journals that smacks of aggressive nationalism. The articles are generally written in a language that to some extent either uses or stimulates nationalist sentiments, but most of them conform with Whiting's description of *affirmative* or *assertive* nationalism. Only a few articles carry a language resembling what he calls aggressive nationalism. Besides, the articles do not appear often. In order to have the potential to 'trap' the regime, the Spratly issue should be high on the political agenda. The fact that the major newspapers *Renmin Ribao* and *Jiefang Junbao* only rarely print articles about the *Nansha* issue also indicates that Beijing has been careful not to use the *Nanshas* as a nationalist legitimating device. Rather than using the conflict rhetorically to boost its domestic legitimacy, the regime seems to keep a low profile domestically when it comes to the *Nansha* issue. This might enable the regime to combine the general principle of Chinese sovereignty with political pragmatism.

Most of the more aggressive articles appear in military journals. An article entitled 'Our Second homeland' *(Women di er guo tu)* in the military journal *Guofang* in 1994 is a good example: "...other countries have invaded and partitioned our waters, and grabbed our resources. Our maritime rights have been violated so severely that it has rarely happened to any country in history. The mortifying history and the harsh facts ring an alarm bell for the Chinese people: either we rise in the contest for the sea, or we fail again." In this passage, the author calls for action to defend vital national interests against foreign powers.

In contrast to the aggressive attitude in some of the military journals, the civilian publications take a more pragmatic view. As *Nan Yang Wenti Yan Jiu* stated in 1991: "…under this condition, the advantage of using force will be less than the disadvantage. China's main duty is still focused on economic development. A military conflict would damage the opportunity for co-operation between China and the countries of Southeast Asia."[1045]

The difference between the civilian and military publications leads us to the third conclusion: there could be a rivalry between different factions in China when it comes to the formulation of China's policy in the SCS. Lee Lai To's point about a disagreement between

[1045] This is in line with Ji Guoxing's argument in 'China Versus South China Sea Security', *Security Dialogue,* vol. 29, no. 1, March 1998, pp. 101–112.

the People's Liberation Army (PLA) and the Ministry of Foreign Affairs in Beijing supports this conclusion and suggests that inter-ministerial controversies could explain some of the variation in China's policy towards the conflict over the last few years. The construction of installations on Mischief Reef that most probably are military, could result from PLA initiatives that receive only lukewarm support, or perhaps even resistance, from other decision-makers in Beijing. It is also possible, however, that the Chinese Foreign Ministry has wished to test the response from ASEAN in a low-risk situation, while at the same time accommodating domestic pressures for a more active policy to defend China's sacred maritime territory. The dilemma China is facing in the SCS was well described in *Shi Jie Jingji Shibao* in 1994: "…the important challenge that currently confronts Chinese diplomacy is how to protect our sovereignty in the Nansha islands, and at the same time not incite destructive effects on the political relationship between China and ASEAN."

National humiliation[1046] is a common and recurring theme in Chinese public culture. The discourse takes many forms: public histories, textbooks, museums, mass movements, romance novels, popular songs, prose poems, feature films, national holidays, and atlases. All these are part of a modernist narrative in its most basic sense of a linear progressive history that prescribes the unity and homogeneity of the nation-state. In the PRC, national-humiliation discourse is produced in the last refuge of one of the major institutions of modernity the Chinese Communist Party; but it is important to note that its Central propaganda Department is now concerned with promoting nationalist history. National humiliation seems to be a purely domestic discourse, but its notions of 'the rightful place of China on the world stage' continually inform Chinese foreign policy in both elite and popular discussions. Though national humiliation is considered in Western discussions of Chinese victimization that needs to be overcome for China to be a responsible member of international society, Chinese sources, on the other hand, stress how the outside world, particularly the prosperous West, needs to understand China's particular suffering.

Transformation of ways of thinking theory can be applied in pushing for positive utilization of China's nationalism in the SCS. In order to avoid triggering Chinese nationalism sentiment which might lead to the escalation of the SCS dispute and, Chinese government should carefully direct the trend of its nationalism movement, trying to lead to

[1046] See William A. Callahan, "National Insecurities: Humiliation, Salvation, and Chinese Nationalism", at http://www.humiliationstudies.org/documents/CallahanChina.pdf

the affirmative nationalism, rather than aggressive nationalism. On the other hand, other disputant states in the SCS should also change their way of thinking — understand positively China's nationalism movement, and express sympathy for China's bitter history of "century humiliation",[1047] since most SCS states had gone through similar experience of being invaded or colonized. Outsiders, such as U.S., should also play an objective role in the SCS dispute, rather than propagandising the 'China threat theory'.

China is not the only country whose foreign policy is affected by nationalism sentiment. Vietnam and China have much in common. They share a Sinitic cultural background, communist parties that came to power in rural revolutions, and current commitments (China since 1978, Vietnam since 1986) to market-based economic reforms.[1048] Vietnamese, in their entire schooling, have been taught that Hoàng Sa (Paracel Islands), and Trường Sa (Spratly Islands) belong to Quảng Ngãi District. There are two famous museums in Vietnam, one of which is War Moemorial Museum to memorize the Vietnamese War, the other is titled as "Hoàng Sa and Trường Sa: Vietnames Islands". This museum obviously intends to enhance the 'national land awareness' among Vietnamese, especially the younger generation. Incidents in the SCS do not now lead to the public confrontations that occurred even in the 1990s, but they are watched closely as signs of possible encroachment. More seriously, moves by China in 2007 to enforce its claim to sole sovereignty of the Paracel and Spratly Islands led to rare public demonstrations in Hanoi and Ho Chi Minh City.[1049] Similarly China's development of a submarine base in Hainan stirred Hanoi to contract in April 2009 for six Russian submarines at an estimated cost of $1.8 billion.[1050] These tensions in the relationship are magnified in the international media and by anti-regime activists among the overseas Vietnamese, but they do express a common uneasiness about vulnerability to China and a suspicion about China's motives.

I suggest that 'transformation of ways of thinking theory' should be introduced to the policy makers and scholars on the SCS as a foundation to lead their policy and research direction. Diplomatic communities and academics need to change their tunes and reinterpret the situation at hand. Presently, there is not much research pending on the SCS disputes. The

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[1047] A major theme about 19th century Chinese history is humiliation. China was in great strife-external and internal. Externally China was humiliated by Western powers, as the Chinese were forced to sign unequal treaties. Internally the moribund Qing dynasty was ridden with corruption, intrigues and violence.

[1048] Brantly Womack, "Vietnam and China in an Era of Economic Uncertainty", at http://www.japanfocus.org/-Brantly-Womack/3214

[1049] In November 2007, an informal news exposes that China will set up a county-level administrative unit in Hainan with responsibilities for its territories in the South China Sea. There was a demonstration in Hanoi on December 9, prompting a public remonstrance from China, which was followed by a second demonstration on December 15.

[1050] "Vietnam Reportedly Set to Buy Russian Kilo Class Subs," *Defense Industry Daily*, April 28 2009.

vast majority of material published either has as its purpose of glorifying (or vilifying) ASEAN efforts to manage the conflict or arguing whether China constitutes a threat to the rest of Southeast Asia. Owing to all the flaws, spins, and shortcomings present in both the Transformative Conflict Theory（TCT）and its scholastic adversaries, it is necessary to reconstruct the model on more solid foundations. It might also help if those involved were able to turn out a few more realistic options for settlement.[1051]

On the policy line, I recommend that ASEAN and China step up their efforts to resolve their maritime border conflicts. In the past four years the two have signed the long-awaited DOC and China has largely settled its boundary disputes with Vietnam in the Gulf of Tonkin. The change in Chinese leadership and the relative economic and political stability of the region presents a window of opportunity for renewed attempts at a final solution. This need not and should not indicate the sort of ultimatum negotiations that would drive China and others away from the bargaining table. The solution to this impasse is to transcend and include these malformed interpretations into a more integral model which takes account of the historical record and connections made by dispassionate common sense, just as much as it extracts the truths from within and without the prevailing theories. At the same time, claimants need to be motivated to move forward with negotiations, both by the production of resolution options springing from new conflict interpretations and by the launching of high-level, informal. In this manner the negotiations for the SCS disputes can progress at the pace of the ASEAN+1 Way while still keeping an eye to the long term goal of complete conflict resolution.

In terms of research, my first recommendation is that academics and diplomats step back and reinterpret the conflict at hand. Re-examine the SCS conflict, its origins and evolution, the roles of military confrontations and ASEAN multilateralism in that evolution, and behaviors and rhetoric of the countries involved. Most importantly, get the context straight on all levels.[1052] Develop the new interpretations integrally so that the illustration is vivid and intelligible. Though it may seem counterintuitive, it can be quite helpful to dispose of theoretical and academic frameworks while injecting dispassionate common sense. By stepping away from the conflict with the freedom to sculpt opinions, new connections can be discovered and one can get a better glimpse of the big picture. By disassociating from the

[1051] Xiang, Lanxin. "Introduction to the Spratly Islands Conflict." *Interview*. 21 March 2003.

[1052] Ibid, p.121

partisan viewpoints of the transformed conflict theory and its scholastic adversaries, the creative researcher can escape the trappings of a conflict unable to transform any further. In many ways, the misinterpretations inherent in today's prevailing theories are the very reasons for a lack of proposed solutions. Therefore, my second recommendation to researchers is to exploit these new interpretations for all they are worth to see if any windows for resolution can be found. When they are found, and I am convinced they will be, publish detailed plans of how to get there. Once a number of solutions become available, the disputants will break from their romance with the status quo. As that begins to happen, the prospects for resolution will finally come into view.

First steps for the research side of recommendations are much more subjective and therefore internal in nature. The crux of the matter is that academics and diplomats need to synthesize more integral interpretations of the SCS disputes. This process can begin most simply by employing the historical record to find the flaws, spin, and shortcomings inherent in the predominant theories. As this is materializing, experts at universities and in research institutions should bolster their recruiting efforts to bring fresh minds into the fold. Research projects focused on redefining the SCS disputes in terms not prefabricated by theoretical framework will open up new interpretations as well as generate new ideas for resolution. In a conflict steeped in the status quo of conflict prevention and 'good neighbor policy', a few new ideas might be just the thing needed to stir things up and make progress towards resolution.

Law and politics are interrelated in the stage of SCS. It is the dynamic evolution of ocean governance institutions where the combined operation of the 'UNCLOS process' may be considered as truly path-breaking in international law and international relations.[1053] Not only is the greater part of the planet, the oceans — covering at least two-thirds of the Earth's surface — being increasingly governed by specific norms and binding regimes that are universally accepted. More importantly, the comprehensive treaty system of ocean governance envisioned by UNCLOS is being implemented through operational institutions that in turn become an essential component of the new legal order of the oceans. If it is conceded that UNCLOS, in its substance, is the most advanced 'sustainable-development' instrument in existence[1054] — integrating the principles of development, disarmament, and

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1053 EM borgese, "UNCLOS, UNCED, and the Restructuring of the United nations", in RstJ Macfonald (ed.), *Essays in Honor of Wang Tieya* (the Hague: Martinus Nijoff, 1994), pp.67-77

1054 See e.g., P.B. Payoyo (ed.), Ocean Governance: Sustainable Development of the Seas (UNU Press, 1994); LA Kimball, "The United

environmental protection into a harmonious normative unity[1055] — tangible and comprehensive human security may in fact be realized sooner at sea than on land (or more feasibly and profitably, through marine-oriented rather than terrestrial-oriented institutional approaches).[1056] In this sense, the Convention truly proves to be of great "strategic importance for national, regional, and global action in the marine sector".[1057]

Though relatively few disputes between States are ever brought before courts or tribunals, international law would seem to be a factor in virtually every dispute. How States resolve disputes, and why they choose different mechanisms in different situations, are issues involving considerations that are both political and legal in character.[1058] Thus, a detailed examination of the interaction of IR and IL may be called for in this context. Just as Schoenbaum proclaims, a new paradigm of international relations is needed to be created "based on international law",[1059] I also hold a belief that successful approaches to many contemporary problems, such as the SCS dispute, require both political knowledge and legal tools. There should be an interdisciplinary collaborated research agenda to address SCS dispute and potential regional ocean governance in this troublesome semi-closed sea.

Nations on the Law of the Sea: A Framework for Marine Conservation" in IUCN, Law of the Sea: Priorities and Responsibilities in Implementing the Convention Part I (Gland, 1995)

[1055] The 1982 Convention on the Law of the Sea provides "the indispensable common underpinning for the three Agenda" – the Agenda for Peace, the Agenda for Development, and the Agenda 21. Para. 58, Law of the Sea: Report of the Secretary General, UN Doc. A/49/631 (16 Nov. 1994)

[1056] See EM Borgese, "Perstroika and the Law of the Sea", *Ocean yearbook* (1991), vol.9, pp.1-27

[1057] Preamble, UNGA Res. 49/28. The UN Secretary General describles the entry into force of the convention as "one of the greatest achievements of the century." *UN Information Office Press Release*, Doc. SEA/1452 (17 Nov. 1994)

[1058] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press: 1999), p215

[1059] Thomas. J. Schoenbaum, *International Relations-The Path Not Taken: Using International Law to Promote World Peace and Security*, 2006

Conclusion

This dissertation evaluates the applicability and effectiveness of UNCLOS as a settlement mechanism to address the SCS dispute, and seeks to answer the following questions: 1. Does UNCLOS create a constitution for the ocean? (Is UNCLOS Regime effective; Can UNCLOS Regime adapt to changing circumstances); 2. Is UNCLOS successful in preventing or managing conflicts pertaining to marine resources? (Is UNCLOS playing a positive role in addressing the SCS dispute; To what extent do the States involved in the SCS recognize the connection and relevance of UNCLOS and the settlement of the disputes in this region); 3. What is the implication of the SCS dispute settlement for the interdisciplinary cooperation of International Relations (IR) and International Law (IL)?

1. Constitutionality of UNCLOS

With regard to the constitutional nature of UNCLOS, after reviewing the internal coherence of UNCLOS regimes in Chapter III, a conclusion may be drawn from there. For many of those involved in UNCLOS III, the aim was to devise no less than a 'constitution for oceans', the goal of which was building a 'comprehensive' law of the sea regime and establishing a legal order for the oceans. UNCLOS provides an integrated legal framework on which to build sound and effective regulations to the different uses of the ocean. Whether or not we choose to call the UNCLOS regime a constitution for the ocean, it does articulate a system of ocean governance. It does not specify in detail when and how fishers can harvest living resources in the EEZs of coastal States or what the terms of leases for deep seabed mining will be. What it does do, however, is to create procedures for arriving at collective decisions about such matters.[1060] This is precisely what we expect a constitution or constitutive agreement about governance to do. A constitutional perspective suggests that UNCLOS was not intended to be comprehensive to the extent that there would be no need to create further law. This means that, although the Convention made use of vagueness, ambiguity, and silence at certain points and in respect of certain controversial matters, the LOS Convention could be regarded as legally effective to the extent that it provides clearly for a system within which to address substantive issues as they arise. The goal of a constitution is to provide for a system of governance rather than to deal with all substantive matters. The

[1060] Scott, "The LOS Convention as a Constitutional Regime for the Ocean", p.42

LOS Convention refers in almost seventy provisions to the possibility that the subject in question may be governed by another international instrument, bilateral or multilateral, anterior or posterior.

So is UNCLOS an effective international regime? Let's review both the 'Actual regime solution — No-regime counterfactual' model and the 'hypothesized configuration of scores for effective regimes' suggested in Introduction part and try to define the effectiveness of UNCLOS. The 'Actual regime solution-No-regime counterfactual' model suggests that the actual performance of a regime can be compared against a reference — the hypothetical state of affairs that would have come about had the regime not existed. The development of the SCS dispute has gone through different periods, such as ancient time, the colonial period, World War I, World War II, Cold War, UNCLOS III (1973-82), and post-UNCLOS. The chronological historic events in the SCS summarized in Table I.1 shows the military or conflict nature of the SCS in the pre-UNCLOS periods. Through small scare conflicts occur occasionally in the SCS after UNLCOS were ratified by the SCS states and came into force, the general trend of moving the SCS dispute from military confrontation to self-constraint and cooperation indicates the significance of UNCLOS in directing the dispute to a peaceful settlement potential. Multilateral or bilateral agreements on maritime security, more and more comprehensive marine legislations within the framework of UNLCOS helps enhance the argument that UNCLOS regime matters.

Any attempt at measuring regime effectiveness involves causal inference requiring that we separate changes that can be attributed to the existence and operation of the regime itself from those that have been brought about by other factors. This is by no means a trivial exercise. The effective regime will be characterized by particular configurations of scores on the set of independent variables listed in the 'hypothesized configuration of scores for effective regimes' (see Table Introduction.1), namely 'type of problem', 'problem-solving capacity' and 'political context.' The nature of the SCS dispute is multifaceted. Historical context on sovereignty, contention on energy, significance of the geographic location, threat to maritime security, overlapping maritime claim caused by the new established maritime regime authorized by UNCLOS are all sources of the SCS dispute. With regard to 'problem-solving capacity', we can look at both the legal and political capacity. Legally, a central factor to enhance the effectiveness of UNCLOS raises the question: Does growing

international independence require and create opportunities for the strengthening of mechanisms for peaceful settlement of international disputes through obligatory third party intervention? The focus on an obligatory role for a third party in dispute settlement enables an assessment on the basis of empirical observation of the degree to which states are willing to accept the international legal system as the basis for their behavior. It is extremely difficult to draw the line between, on the one hand, obedience to international law for sovereignty, and, on the other hand, subjection to international legal obligations as the consequence of the acceptance of the existence of a supranational order which necessarily poses certain limits on national sovereignty. The acceptance of third party dispute settlement procedures, and their application in practice, can serve as a more or less objective criterion for the extent to which states are prepared to subject themselves to the rule of international law. Improving compulsory international third party dispute settlement is not an aim in itself. It is the reflection of the acceptance of the rule of law in international relations. Improving third party dispute settlement therefore is an element of all attempts to create a safer and better world. Neither international dispute settlement procedures, nor international law can achieve this on their own. It is only within the context of a common effort, induced by a pragmatic assessment of the global situation, that improvements can be realized. The steps that are taken and will be taken in the future will be small, but the perspectives for change in this era of transition have never been better since the end of the Second World War. The third-party compulsory practice in the SCS dispute settlement shows that most SCS states are not ready for this forum, despite the fact the there are many areas in which the settlement regime of UNLCOS can play a positive role.

As Scott suggests, beyond legal effectiveness, assessing the political effectiveness of UNCLOS regime in ordering maritime relations shouldn't be underestimated so as to prevent conflicts and address differences.[1061] A constitution does not distribute rights and responsibilities simply for the sake of doing so, but in order to facilitate harmonious interactions amongst members of the society. It could therefore be said the legal goal of the UNCLOS — of providing a constitutional framework — corresponded with a political goal of establishing an international order for the oceans by which to ensure peaceful maritime relationships. What a constitution says and what happens in practice may, of course, be two very different things. While the constitution is a multilateral treaty, the Convention needs, as

[1061] Scott, "The LOS Convention as a Constitutional Regime for the Ocean"p.25

a minimum, to be ratified by a significant proportion of the society. Secondly, for a constitutional treaty to be politically effective States must implement and abide by its provisions. There appears to have been widespread acceptance of the zone limits incorporated in the Convention, most fundamentally the territorial sea, although some analysts have asserted that the expansion of coastal State jurisdiction created or intensified certain conflicts.[1062] Subsequent to the conclusion of UNCLOS, many treaties and protocols to treaties on maritime boundary delimitation have been concluded and several boundary disputes have been settled by the ICJ or arbitral tribunals, although this still leaves a number of unresolved issues relating to sovereignty and overlapping maritime claims. The SCS states, no doubt have done a good job by setting up a comprehensive marine legal system within the framework of UNCLOS, as we can see from the discussion in chapter III.

The political status in SCS, including China and ASEAN member states, especially since 1990s, sets a solid foundation for conflict prevention and maritime cooperation in this region. Both China and ASEAN list economic development as the priority of their political agenda, which determines that a harmonious environment is highly necessary in this region. Resource scarcity, especially oil and gas, in order to maintain its growing economy wipes off the obstacles and concern for joint development in the energy sector, though implementation is one factor to be addressed. Mutual concerns for non-traditional security also pave the way for ASEAN+China cooperation in many areas, such as tackling piracy and maritime terrorism, improving marine environment and biodiversity cooperation.

The question whether UNCLOS Regime can adapt to changing circumstances concerns the capacity of the prevailing system of ocean governance to adapt not only to the intensification of existing uses of marine resources but also the emergency of new uses of marine system. Of course, UNCLOS contains formal provisions dealing with dispute settlement and the adoption of amendments to the convention itself. Article 312, for instance, allows States parties to propose specific amendments and to call for a conference to consider such amendments after the Convention has been in force for a period of ten years. It calls for efforts to achieve consensus regarding such matters, and envisions the prospect of proceeding via some sort of voting in the event that efforts to arrive at consensus fail. But these provisions, like their counterparts in many other international

[1062] M.A. Brown, "The Law of the Sea Convention and US Policy" (CRS Issue Brief for Congress, Updated 2 June 2004 and received through the CRS Web).

regimes, are formal and formulaic. They have proved unworkable in practice. Before dismissing this governance system as inflexible, however, it is well to bear in mind the role of adaptive measures like the 1994 Agreement and the 1995 Agreement as well as the more informal processes through which social practices evolve as mechanisms for adjusting the prevailing system of ocean governance in the light of changing circumstances.

Interestingly, coastal States rather than the LOS Convention regime itself, argued by Scott, must assume a large share of the responsibility for responding to the most pressing problems of ocean governance confronting us at this time.[1063] Because the most severe problems involve issues centered in areas under the jurisdiction of coastal States and because the LOS Convention regime grants far-reaching authority to coastal States to handle matters arising within their EEZs, there is no escaping the conclusion that the burden of confronting many problems of ocean governance rests squarely with the relevant coastal States. Whether we are talking about achieving sustained yields from living resources, adjudicating the conflicting claims of fishers and developers of hydrocarbons on the continental shelves or finding ways to operationalize the increasingly popular concept of ecosystem-based management (EBM), the authority— as well as the obligation — to deal with these matters rests with coastal States. After all, the LOS Convention regime encompasses constitutive arrangements that feature the devolution of authority from the center to the individual coastal States with regard to events occurring in the EEZs. There are certainly merits to this argument, and there is every reason to maintain as much pressure as possible on individual coastal States to take the initiative in finding ways to adjust prevailing institutional arrangements to confront these problems. Even so, it is pertinent to enquire as well whether there is a need to revisit the overarching governance system articulated in the provisions of UNCLOS in the light of shifting patterns of human/ocean interaction. One response to this enquiry points to the difficulties of seeking to revise or amend UNCLOS itself. This approach stresses the usefulness of adopting supplementary agreements to address specific problems of ocean governance and of making use of even more informal processes to adjust the rules in use in this domain in contrast to the rules on paper. An alternative approach would be to activate the provisions of article 312 of UNCLOS to convene a review conference to assess and reconsider the provisions of the existing system of ocean governance. However, I argue that renegotiation of the Convention in all

[1063] Scott, "The LOS Convention as a Constitutional Regime for the Ocean".

probability would be a time consuming process, the outcome of which is highly uncertain. Such a process would almost certainly negatively impact upon international cooperation in the management of ocean space as it is bound to lead to uncertainty and conflict over the applicable legal regime. It is the states' responsibility to follow up with the implementation and improvement of UNCLOS in various forms, such as national marine legislation, ocean governance system, and state practice in ocean dispute settlement.

2. Applicability of UNCLOS as an Ocean Settlement Regime

To answer whether UNCLOS is successful in preventing or managing conflicts pertaining to marine resources, it is necessary to break down the question into two specific ones in this case study— 1) Is UNCLOS playing a positive role in addressing the SCS dispute, and 2) To what extent do the States involved in the SCS recognize the connection and relevance of UNCLOS and the settlement of the disputes in this region? Many SCS scholars, particularly Chinese, are skeptical about the role of UNCLOS and blame that many of the provisions of UNLCOS lead to the complexity of the SCS dispute, such as the historic water concept vs. EEZ regime, fierce competition on occupying the features in the SCS. However, in using 'Actual regime solution – No-regime counterfactual' model, I argue that UNCLOS does provide a positive role in maintaining the ocean order in the SCS. To testify my argument, I break the SCS dispute into five categories in which the Dispute Settlement Regime of UNCLOS is applied accordingly throughout the analysis. The LOS Convention may be perceived to have certain shortcomings, such as the lack of definition of 'historic water' regime, the vague provision on the status of an 'island' and 'rock', lack of clear provision on the legitimacy of military activities in a foreign country's EEZ, the limitation and exclusion of third party compulsory dispute settlement which makes many disputes in a difficult position to be addressed in a timely manner. However, there is room for a third party forum to play its assumed role. First of all, article 121 (3) of UNCLOS does give the court or tribunal a role to play in this whole picture. Neither article 297 nor 298 excludes the disputes related to the definition and determination of a feature to be an island or a rock from the compulsory dispute settlement mechanism. Secondly, by reading closely the provisions of the LOS Convention, it is fair to claim that the court or tribunal has a role to play in many issues, such as prompt release and environment. Thirdly, a third party forum, upon request,

can determine the nature of a specific military activities, hence to provide a guidance on whether these activities are legitimate in a foreign country's EEZ, which to a large extent reduce the potential military conflict in this regard.

All the States involved in the SCS disputes have developed a comparatively comprehensive marine legal system under the framework of UNCLOS. These legislations provide a legal framework to deal with many maritime issues in a domestic context. Nevertheless, in the situation where multiple issues interrelate with each other, such as the SCS, a theoretically sound legal system does not always do the good job in many fields, such as maritime delimitation, overlapping maritime jurisdiction claims, fishing disputes, trans-boundary marine environmental pollution, etc. Hence, a third party compulsory dispute settlement regime needs to play its desired role. China, Vietnam and Indonesia are opponent of international litigation, and in all occasions insist on the merit of negotiation, while the Philippines is more willing to bring an extra party to the stage of SCS. Nevertheless, as some Chinese scholars in recent years bring to the table for discussion, China should be encouraged to place more weight on the third party dispute settlement mechanism, given its desired responsibilities in many contemporary global issues and its role in international organizations.

As I put forward in the introduction, the external relationship between the LOS Convention and other 'regime' is a matter of fundamental importance, and until such relationships are better understood and defined with greater certainty, then any analysis of the internal constitutionality of the LOS Convention would appear to remain incomplete or vulnerable. Chapter V explores the relations between UNCLOS and other regimes and institutions in the SCS regions. In the area of maritime security cooperation, marine environmental protection, joint development and ASEAN+1 political model, UNCLOS plays a critical but not comprehensive role in providing legal regulations and rules. Without the supplementary support of other regimes and institutions, UNCLOS won't be able to function as desired. First, with regard to maritime security, the piracy regime contained in the UNCLOS does not impose on the state any obligation to prosecute and punish the offenders and dispose of the properties. The SUA regulations represent a first step in what should be an ongoing effort on the part of the international community to build a network of legal mechanisms designed to facilitate the effective prevention and control by states of

acts of maritime terrorism. However, the SUA Convention does not address all possible situations of maritime terrorism, and not even the most important ones that may affect maritime security in a substantial way. Recent developments — the 2005 SUA Protocols and the PSI Interdiction Principles make some progress in terms of measures to counter maritime terrorism regarding boarding of vessels of flag states, but the problem of consent from flag states still remains a problem. Increasingly, coastal state governments and major user states recognize that they have shared interests in ensuring the resources and sea-lanes of the SCS being used effectively and sustainably. But they differ markedly on the means for achieving them. Littoral states are insistent that the process of achieving regional maritime security should be locally initiated and led. The international user states themselves have divergent priorities and activities. Despite that, there are quite a lot of achievements in international and regional level of cooperation in fighting piracy and maritime terrorism. Second, in the area of marine environmental protection, in the quest for a cleaner environment and regional marine environmental cooperation in the highly complex situation of the SCS, international and regional institutions have taken a lead by launching a serial of programmes such as SCS Large Marine Ecosystem, UNEP/GEF Project and UNEP/Action Plan. An important strategy is to de-politicize environmental cooperation in the region, and to build a 'neutral' and 'independent' in the eyes of ASEAN countries and China, which has made marine environmental cooperation a convenient and relatively easy issue area for initiating and forging substantive inter-governmental cooperation. Third, 'joint development regime' has been proposed as *ad hoc* solution to the SCS dispute, without dressing the sovereignty claims and maritime delimitation. China initiated to 'shelve disputes and go for joint development' in the SCS in 1990s, which is welcomed by other disputant parties. However, obstacles exist in the process of implementation, such as lack of clear definition of China's 'joint development' proposal, difficulty to define the zone for joint development and involvement of external players. Fourth, as two major actors on the SCS stage, the ASEAN-China relationship develops parallel with the evolution of the SCS dispute. Moving from rival to good neighbors, ASEAN and China have made great achievement in many fields in the first decade of the new century, including cooperation on the SCS issues. China's attitude on the SCS dispute settlement process softens by gradually accepting a multilateral approach, compared to its consistent position of 'bilateral negotiation'. Among the various ASEAN+China interactions in the SCS process, two important events—DOC

and Informal Workshop should be not ignored in pushing for the cooperation of the SCS. The adoption of DOC laid a political foundation for future possible commercial cooperation between China and ASEAN countries as well as the long-term peace and stability in the region. A series of workshops on "Managing Potential Conflicts in the SCS" have been convened to explore ways to engender cooperation among the nations bordering on the SCS. In promoting the idea of cooperation, the workshops had aimed to move states from engaging in forceful exchanges to cooperation in various fields such as marine scientific research, resource assessment, shipping, navigation and communications, marine environmental protection, hydrographic data exchange, marine database information exchange, and marine ecosystem monitoring.

3. Policy Recommendations

Apart from assessing UNCLOS as a successful regime to address maritime dispute, the dissertation bears another important mandate — seeking a pragmatic settlement regime for the SCS dispute. In this dissertation, building on literature reviews on efforts by other scholars, and the analysis in Chapter II, III and IV, I put forward in Chapter V a model which is composed of five steps, 1) Cross-Strait Cooperation as a Breakthrough for China-Taiwan Element in the SCS; 2) Environmental Security as a Driving Force of Cooperation in SCS; 3) Fisheries Cooperation as a Start of SCS Disputes Resolution; 4) UNCLOS as a Framework for Ocean Governance in the SCS; 5) Transformation of Ways of Thinking as a Foundation to Lead Policy and Research Direction. First of all, it is possible for Taiwan and China to move toward strengthening the cross–strait co-operation on the SCS issues. The cooperative actions taken in the SCS area could enhance mutual trust between the two sides of the Taiwan Strait. It is believed that the adoption of the proposed CBMs will not only help improve the cross–strait relations, but also assist in maintaining stability and peace in the Taiwan Strait and the SCS areas. Second, the recognition of strong environmental interdependence is one of the strongest driving forces for regional cooperation and integration outside Europe today. Teaching the political actors about the relationship between environment and security in the SCS region may therefore be an important task for the epistemic communities of concerned scientists in the region. Third, in the SCS region, it is not difficult to locate opportunities for cooperation. To date, however,

disputes surrounding possible hydrocarbon resources in the area and actions in favour of conservation and management of fishery resources have been delayed. Nevertheless, conservation and management of fishery resources could be the starting point for cooperation in this area and could have a 'spillover effect' on other areas of cooperation. Fisheries cooperation might be one practical option to avert outright conflict in a region that seems perpetually on the edge of hostilities. Fourth, UNCLOS provides an integrated legal framework on which to build sound and effective regulations to the different uses of the ocean. UNCLOS, rather as a compulsory channel to settle the disputes, should see itself more as a framework within which regional ocean governance seems to be an approach to address issues in the SCS. Fifth, 'transformation of ways of thinking theory' should be introduced to the policy makers and scholars on the SCS as a foundation to lead their policy and research direction. Academics and diplomats should step back and reinterpret the conflict at hand, and re-examine the SCS conflict, its origins and evolution, the roles of military confrontations and ASEAN multilateralism in that evolution, and behaviors and rhetoric of the countries involved. Just as Schoenbaum proclaims, a new paradigm of international relations is needed to be created "based on international law",[1064] I also hold a belief that successful approaches to address many contemporary problems, such as the SCS dispute, require both political knowledge and legal tools. The settlement of SCS dispute needs a detailed examination of the interaction of IR and IL in this context. There should be an interdisciplinary collaborated research agenda to address SCS dispute and potential regional ocean governance in this troublesome semi-closed sea.

4. Future Research

As I argue in this dissertation, the settlement of SCS dispute needs a detailed examination of the interaction of IR and IL, and there is a need to call for interdisciplinary cooperation. Acknowledging the benefits of interdisciplinary collaboration, further questions are raised. Who are the most apt interdisciplinarians? What are the research agendas for the interdisciplinary collaboration? Beck, Slaughter, Tulumello and Wood offers some insights to these raised questions.[1065] However, to provide adequate answers to these questions require

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[1064] Thomas. J. Schoenbaum, *International Relations-The Path Not Taken: Using International Law to Promote World Peace and Security*, 2006
[1065] Beck, Robert J., & Anthony Clark Arend, & Robert D. Vander Lugt, *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1996), pp.19-20; Slaughter, Anne-Marie, Andrew S. Tulumello

substantive research and it will be the framework of my further research focus.

Furthermore, I will also follow closely the future research trend conducted by the SCS scholars and other academics working in this field. My long-term research goal is to focus on Non-traditional Security (NTS) in Asia-Pacific. Increasingly, conflict and instability are being generated in Southeast Asia by non-traditional or human security challenges such as failures in governance, health crises, and environmental degradation. Increasing globalization and technological change are magnifying the potential security-related impact of many of these failures. My future research will focus on the following aspects:

1. **Maritime Security**: maritime boundary disputes, security of sea lanes and ports, maritime terrorism, piracy, armed robbery and arms smuggling, maritime force developments, maritime safety and marine environmental protection, and confidence building measures.

2. Environmental security: environment degradation, poverty and regional security; globalization and environmental challenge, etc.

3. Energy security: energy dependence of East Asia and its effect on foreign policies; climate change and energy demand (How do we significantly reduce greenhouse gas emissions while still meeting the growing energy needs of developing countries? How to we reduce the vulnerability of communities to the impacts of a changing climate? How do we do this on an urgent basis?)

4. Human security: economic impact of HIV/AIDS in Southeast Asia and on the extent and impacts of regional trafficking of drugs and people.

I will also observe the implication of this dissertation for ocean affairs in general, such as the international cooperation and governance in Arctic region. I have been invited to participate in a research project, co-sponsored by both Canadian and Chinese Ocean think-tanks, which explores and analyzes China's Arctic policy from an interdisciplinary perspective that draws theoretical and policy implication from international relations and the international law of the sea. The Arctic states are very concerned about China’s position on Arctic status and are questing for China’s pursuing interest in this region. However, there is

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and Stepan Wood, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship”, in *America Journal of International Law*, vol. 92, 1998, pp. 383-93.

precious little scholarship examining how China might be looking at the Arctic in the short, medium and long-terms. Arctic shares many similar features of the SCS dispute, e.g., historical context on sovereignty, contention on energy, significance of the geographic location, threat to maritime security and overlapping maritime claim. China's position on the SCS has a significant implication for developing its Arctic policy. To sum up, to examine China's Arctic policy needs a research team drawing interdisciplinary efforts of political scientist and international law scholars. That is where I situate myself in the academic world, working on bridging the 'International Law-International Relations' divide and seeking for a cross-disciplinary tool for research and teaching.

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Appendix

1: SCS claimant States' Declaration under UNCLOS

Source:
http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=1&id=458&chapter=21&lang=en#Participants

China12,13,14

Declaration:

1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.
2. The People's Republic of China will effect, through consultations, the delimitation of boundary of the maritime jurisdiction with the states with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the equitable principle.
3. The People's Republic of China reaffirms its sovereignty over all its archipelagoes and islands as listed in article 2 of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone which was promulgated on 25 February 1992.
4. The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state.

25 August 2006

Declaration under article 298:

The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.

Malaysia

Declarations:

"1. The Malaysian Government is not bound by any domestic legislation or by any declaration issued by other States upon signature or ratification of this Convention. Malaysia reserves the right to state its positions concerning all such legislations or declarations at the appropriate time, in particular the maritime claims of any other State having signed or ratified the Convention, where such claims are inconsistent with the relevant principles of international laws and the provisions of the Convention on the Law of the Sea and which are prejudicial to the sovereign rights and jurisdiction of Malaysia in its maritime areas.

2. The Malaysian Government understands that the provisions of article 301 prohibiting `any threat or use of force against the territorial integrity of any State, or in other manner inconsistent with the principles of international law embodied in the Charter of the United Nations' apply in particular to the maritime areas under the sovereignty or jurisdiction of the coastal state.

3. The Malaysian Government also understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapon or explosives in the exclusive economic zone without the consent of the coastal state.

4. In view of the inherent danger entailed in the passage of nuclear-powered vessels or vessels carrying nuclear material or other material of a similar nature and in view of the provision of article 22, paragraph 2, of the Convention on the Law of the Sea concerning the right of the coastal State to confine the passage of such vessels to sea lanes designated by the State within its territorial sea, as well as that of article 23 of the Convention, which requires such vessels to carry documents and observe special precautionary measures as specified by international agreements, the Malaysian Government, with all of the above in mind, requires the aforesaid vessels to obtain prior authorization of passage before entering the territorial sea of Malaysia until such time as the international agreements referred to in article 23 are concluded and Malaysia becomes a party thereto. Under all circumstances, the flag State of such vessels shall assume all responsibility for any loss or damage resulting from the passage of such vessels within the territorial sea of Malaysia.

5. The Malaysian Government also wishes to reiterate the statement relating to article 233 of the Convention in its application to the Straits of Malacca and Singapore which has been annexed to a letter dated 28th April 1982 transmitted to the President of UNCLOS III and

as contained in Document A/CONF.62/L 145, UNCLOS III Off.Rec., vol. XVI, p. 250-251.

6. The ratification of the Convention by the Malaysian Government shall not in any manner affect its rights and obligations under any agreements and treaties on maritime matters entered into to which the Malaysian Governrment is a party.

7. The Malaysian Government interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of Malaysia and of such other States is measured.

Malaysia is also of the view that in accordance with the provisions of the Convention, namely article 56 and article 76, if the maritime area is less or to a distance of 200 nautical miles from the baselines, the boundary for continental shelf and exclusive economic zone shall be on the same line (identical).

8. The Malaysian Government declares, without prejudice to article 303 of the Convention of the Law of the Sea, that any objects of an archeological and historical nature found within the maritime areas over which it exerts sovereignty or jurisdiction shall not be removed, without its prior notification and consent."

Philippines [12, 19]

Philippines12,19

Understanding made upon signature and confirmed upon ratification:

"1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines;

2. Such signing shall not in any manner affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of December 10, 1898, and the Treaty of Washington between the United States of America and Great Britain of

January 2, 1930;

3. Such signing shall not diminish or in any manner affect the rights and obligations of the contracting parties under the Mutual Defense Treaty between the Philippines and the United States of America of August 30, 1951, and its related interpretative instruments; nor those under any other pertinent bilateral or multilateral treaty or agreement to which the Philippines is a party;

4. Such signing shall not in any manner impair or prejudice the sovereignty of the Republic of the Philippines over any territory over which it exercises sovereign authority, such as the Kalayaan Islands, and the waters appurtenant thereto;

5. The Convention shall not be construed as amending in any manner any pertinent laws and Presidential Decrees or Proclamations of the Republic of the Philippines; the Government of the Republic of the Philippines maintains and reserves the right and authority to make any amendments to such laws, decrees or proclamations pursuant to the provisions of the Philippine Constitution;

6. The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic state over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security;

7. The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation;

8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty."

Viet Nam [12, 13, 14]

Declarations:

The Socialist Republic of Vietnam, by ratifying the 1982 UN Convention on the Law of the Sea, expresses its determination to join the international community in the establishment of an equitable legal order and in the promotion of maritime development and cooperation.

The National Assembly reaffirms the sovereignty of the Socialist Republic of Vietnam over

its internal waters and territorial sea; the sovereign rights and jurisdiction in the contiguous zone, the exclusive economic zone and the continental shelf of Vietnam, based on the provisions of the Convention and principles of international law and calls on other countries to respect the above-said rights of Vietnam.

The National Assembly reiterates Vietnam's sovereignty over the Hoang Sa and Truong Sa archipelagoes and its position to settle those disputes relating to territorial claims as well as other disputes in the Eastern Sea through peaceful negotiations in the spirit of equality, mutual respect and understanding, and with due respect of international law, particularly the 1982 UN Convention on the Law of the Sea, and of the sovereign rights and jurisdiction of the coastal states over their respective continental shelves and exclusive economic zones; the concerned parties should, while exerting active efforts to promote negotiations for a fundamental and long-term solution, maintain stability on the basis of the status quo, refrain from any act that may further complicate the situation and from the use of force or threat of force.

The National Assembly emphasizes that it is necessary to identify between the settlement of dispute over the Hoang Sa and Truong Sa archipelagoes and the defense of the continental shelf and maritime zones falling under Vietnam's sovereignty, rights and jurisdiction, based on the principles and standards and specified in the 1982 UN Convention on the Law of the Sea.

The National Assembly entitles the National Assembly's Standing Committee and the Government to review all relevant national legislation to consider necessary amendments in conformity with the 1982 UN Convention on the Law of the Sea, and to safeguard the interest of Vietnam. The National Assembly authorizes the Government to undertake effective measures for the management and defense of the continental shelf and maritime zones of Vietnam.

2. Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China

(Source: http://www.asianlii.org/cn/legis/cen/laws/loteezatcsotproc790/)

Adopted at the 3rd Meeting of the Standing Committee of the Ninth National People's Congress on June 26, 1998 and promulgated by Order No. 6 of the President of the People's Republic of China on June 26, 1998)

Article 1 This Law is enacted to ensure that the People's Republic of China exercises its sovereign rights and jurisdiction over its exclusive economic zone and its continental shelf and to safeguard its national maritime rights and interests.

Article 2 The exclusive economic zone of the People's Republic of China covers the area beyond and adjacent to the territorial sea of the People's Republic of China, extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The continental shelf of the People's Republic of China comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The People's Republic of China shall determine the delimitation of its exclusive economic zone and continental shelf in respect of the overlapping claims by agreement with the states with opposite or adjacent coasts, in accordance with the equitable principle and on the basis of international law.

Article 3 The People's Republic of China exercises its sovereign rights over the exclusive economic zone for the purpose of exploring, exploiting, conserving and managing the natural resources of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and in its other activities for economic exploitation and exploration of the zone, such as production of energy from water, currents and winds.

The People's Republic of China exercises jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment in the exclusive economic zone.

The natural resources in the exclusive economic zone referred to in this Law consist of living and non-living resources.

Article 4 The People's Republic of China exercises its sovereign rights over the continental

shelf for the purpose of exploring it and exploiting its natural resources.

The People's Republic of China exercises jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment on the continental shelf.

The People's Republic of China has the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

The natural resources of the continental shelf referred to in this Law consist of the mineral and other non-living resources of the sea-bed and subsoil, and the living organisms that belong to sedentary species--- organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 5 All international organizations, foreign organizations or individuals that wish to enter the exclusive economic zone of the People's Republic of China for fishing shall be subject to approval of the competent authorities of the People's Republic of China and shall comply with its laws and regulations as well as the accords and agreements it has signed with the states concerned.

The competent authorities of the People's Republic of China shall have the right to take all necessary conservation and management measures to ensure that the living resources in the exclusive economic zone are protected from the danger of over-exploitation.

Article 6 The competent authorities of the People's Republic of China shall have the right to conserve and manage straddling species, highly migratory species, marine mammals, anadromous stocks that originate in the rivers of the People's Republic of China, and catadromous species that spend the greater part of their life cycle in the waters of the People's Republic of China.

The People's Republic of China enjoys the primary interests in the anadromous stocks that originate in its rivers. Article 7 All international organizations, foreign organizations or individuals that wish to explore the exclusive economic zone of the People's Republic of China or exploit the natural resources on its continental shelf or for any purpose to drill on the continental shelf shall be subject to approval of the competent authorities of the People's Republic of China and shall comply with the laws and regulations of the People's Republic of China.

Article 8 The People's Republic of China has the exclusive right to construct and to authorize and regulate the construction, operation and use of the artificial islands, installations and structures in its exclusive economic zone and on its continental shelf.

The People's Republic of China exercises exclusive jurisdiction over the artificial islands, installations and structures in its exclusive economic zone and on its continental shelf, including jurisdiction with regard to customs, fiscal, health and safety laws and regulations, and laws and regulations governing entry into and exit from the territory of the People's

Republic of China.

The competent authorities of the People's Republic of China shall have the right to establish safety belts around the artificial islands, installations and structures in the exclusive economic zone and on the continental shelf and may take appropriate measures in these belts to ensure safety both of navigation and of the artificial islands, installations and structures.

Article 9 All international organizations, foreign organizations or individuals that wish to conduct marine scientific research in the exclusive economic zone or on the continental shelf of the People's Republic of China shall be subject to approval of the competent authorities of the People's Republic of China and shall comply with the laws and regulations of the People's Republic of China.

Article 10 The competent authorities of the People's Republic of China shall have the right to take all necessary measures to prevent, reduce and control pollution of the marine environment for the protection and preservation of the marine environment in the exclusive economic zone and on the continental shelf.

Article 11 All states shall, on the premise that they comply with international law and the laws and regulations of the People's Republic of China, enjoy the freedom of navigation in and flight over its exclusive economic zone, the freedom to lay submarine cables and pipelines and the convenience of other lawful uses of the sea related to the freedoms mentioned above in the exclusive economic zone and on the continental shelf of the People's Republic of China. The routes for the submarine cables and pipelines shall be subject to consent of the competent authorities of the People's Republic of China.

Article 12 The People's Republic of China may, in the exercise of its sovereign rights to explore its exclusive economic zone and to exploit, conserve and manage the living resources there, take such necessary measures as visit, inspection, arrest, detention and judicial proceedings in order to ensure that the laws and regulations of the People's Republic of China are complied with.

The People's Republic of China has the right to take necessary measures against violations of its laws and regulations in its exclusive economic zone and on its continental shelf and to investigate for legal responsibility according to law, and may exercise the right of hot pursuit.

Article 13 The People's Republic of China exercises, in accordance with international law and other relevant laws and regulations of the People's Republic of China, the rights in its exclusive economic zone and on its continental shelf that are not provided for in this Law.

Article 14 The provisions in this Law shall not affect the rights that the People's Republic of China has been enjoying ever since the days of the past.

Article 15 The Government of the People's Republic of China may formulate relevant regulations on the basis of this Law. Article 16 This Law shall go into effect as of the date of promulgation.

3. Declaration on the Conduct of the Parties in the South China Sea

Source: http://www.aseansec.org/13163.htm

**DECLARATION ON THE CONDUCT OF PARTIES
IN THE SOUTH CHINA SEA**

The Governments of the Member States of ASEAN and the Government of the People's Republic of China,

REAFFIRMING their determination to consolidate and develop the friendship and cooperation existing between their people and governments with the view to promoting a 21st century-oriented partnership of good neighbourliness and mutual trust;

COGNIZANT of the need to promote a peaceful, friendly and harmonious environment in the South China Sea between ASEAN and China for the enhancement of peace, stability, economic growth and prosperity in the region;

COMMITTED to enhancing the principles and objectives of the 1997 Joint Statement of the Meeting of the Heads of State/Government of the Member States of ASEAN and President of the People's Republic of China;

DESIRING to enhance favourable conditions for a peaceful and durable solution of differences and disputes among countries concerned;

HEREBY DECLARE the following:

1. The Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing state-to-state relations;

2. The Parties are committed to exploring ways for building trust and confidence in accordance with the above-mentioned principles and on the basis of equality and mutual respect;

3. The Parties reaffirm their respect for and commitment to the freedom of navigation in and overflight above the South China Sea as provided for by the universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

a. holding dialogues and exchange of views as appropriate between their defense and military officials;

b. ensuring just and humane treatment of all persons who are either in danger or in distress;

c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and

d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

a. marine environmental protection;
b. marine scientific research;
c. safety of navigation and communication at sea;
d. search and rescue operation; and
e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them;

8. The Parties undertake to respect the provisions of this Declaration and take actions consistent therewith;

9. The Parties encourage other countries to respect the principles contained in this Declaration;

10. The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.