

# **The Regime of the South China Sea – The Significance of the Declaration on the Conduct of Parties**

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## **Need for Effective Regimes in the South China Sea**

There is still no effective regime in the South China Sea for cooperative marine management and good order at sea: for the safety and security of shipping; the preservation, protection and conservation of the marine environment; the exploration and exploitation of marine resources; the prevention of illegal activity at sea; and the conduct of marine scientific research. This is despite the obligation of all countries bordering a body of water, such as the South China Sea, to cooperate in accordance with Part IX of the 1982 UN Convention on the Law of the Sea (UNCLOS), to which all the littoral countries are parties (UNCLOS Part IX is attached as the Annex to this paper).<sup>1</sup> The 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) is agreed “soft law” that also invites the littoral countries to cooperate on certain marine activities. The DOC was an important confidence-building measure, but as discussed later in this paper, it is non-binding and falls short of constituting a successful regime for providing security and cooperative marine management in the South China Sea.

The trans-boundary issues in the South China Sea that require cooperation include the five activities identified in the DOC as requiring cooperation pending a comprehensive and durable settlement of the dispute. These are:

- a. marine environmental protection;
- b. marine scientific research;
- c. safety of navigation and communication at sea;
- d. search and rescue operations; and

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<sup>1</sup> The Council for Security Cooperation in the Asia Pacific (CSCAP) has produced Guidelines for Maritime Cooperation in Enclosed and Semi-Enclosed Seas and Similar Sea Areas of the Asia Pacific, CSCAP Memorandum No. 13, June 2008, <http://www.cscap.org/index.php?page=cscap-memoranda>. The guidelines are a set of fundamental, non-binding principles to guide maritime cooperation in the enclosed and semi-enclosed seas of the region, and to help develop a common understanding and approach to maritime issues in the region.

- e. combating national crime, including, but not limited to, trafficking in illegal drugs, piracy and armed robbery at sea, and illegal traffic in arms.<sup>2</sup>

Very little progress has been made with implementing the required cooperation and many of the littoral countries to the South China Sea are still not party to the relevant international conventions that provide the framework for good order at sea.<sup>3</sup> Furthermore, the demands for effective management regimes in the South China Sea will become more acute in the future. Volumes of shipping traffic will continue to increase with greater risks of ship-sourced marine pollution and shipping accidents. There will be increased pressure on the resources of the South China Sea, living and non-living, as well as growing concern for the protection and preservation of the sea's sensitive eco-systems and marine biodiversity.<sup>4</sup>

Regimes provide benefits and reduce costs in a way that no single country acting on its own could achieve.<sup>5</sup> They reduce the risks of “a tragedy of the commons”, where in the short term, individual countries might gain but in the longer term, everyone loses. However, they involve compromises and trade-offs between the different national interests of individual countries. The perceived shorter-term costs of regime participation are often seen as outweighing the longer-term benefits of such participation even though these benefits might greatly outweigh the costs. For example, littoral countries to the South China Sea appear concerned that participation in some maritime regimes might involve a loss of sovereignty and independence, and this outweighs whatever might be the longer-term benefits of regime participation in terms of improved resource management, marine environmental protection, and maritime security.

The lack of an effective regime in the South China Sea is due to the several sovereignty disputes over islands and reefs in the sea and the consequent lack of agreed maritime

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<sup>2</sup> ASEAN – China Declaration on the Conduct of Parties in the South China Sea (2002), Article 6.

<sup>3</sup> Sam Bateman, Joshua Ho and Jane Chan, *Good Order at Sea in Southeast Asia – Policy Recommendations*, S. Rajaratnam School of International Studies, Singapore, April 2009, Table 5, p. 29. The lack of adherence to the International Search and Rescue (SAR) Convention is particularly noteworthy with only China, Singapore and Vietnam, among the littoral countries to the South China Sea, being parties at present.

<sup>4</sup> Yann-Huei Song, ‘The Study of Marine Biodiversity in the South China Sea; Joint Efforts Made in the SCS Workshop Process’, Paper at the international workshop on ‘The South China Sea: Cooperation for Regional Security and Development’, Ho Chi Minh City, November 2010.

<sup>5</sup> Edward L. Miles, “Implementation of International Regimes: A Typology” in David Vidas, and Willy Ostreng.(eds), *Order for the Oceans at the Turn of the Century*, The Hague, Kluwer Law International, 1999, p.327.

jurisdiction. The littoral countries to the South China Sea are committed to a nationalistic approach to their claimed waters and are reluctant to embark on initiatives that may appear to compromise their sovereignty. They are still looking for “fences” in the sea to demarcate the limits of their sovereignty and sovereign rights, and have so far stopped short of effective cooperation or regime building despite the political framework provided by the DOC. Because so many issues of managing ocean space are trans-boundary in nature, fences cannot be established in the sea in the same way as border fences are established on land.

Building effective regimes in the South China Sea has also been hindered by the problems of maritime boundary-making in this area. The geography of the immediate region, with its concave areas of coast (the Gulfs of Thailand and Tonkin), off-lying archipelagos and numerous islands subject to conflicting sovereignty claims, means that conventional straight line maritime boundaries are unlikely in many parts of the area. Many boundaries, or at least their end points or turning points (‘tripoints’) will require agreement of three, or even more, countries. Past experience in Asia and other parts of the world shows that this agreement can be very hard to achieve. Thus it will become increasingly necessary to find some other means of managing the area in dispute and exploiting its resources, which is not based on unilateral jurisdiction and sole ownership of the resources.

### **Current Situation**

The situation in the South China Sea deteriorated during 2010. Three key players contributed to this situation – China, the United States, and Vietnam. China and Vietnam are key players due to the extent of their sovereignty claims, recent assertive actions, and the recurring tensions between them. The claims by China and Vietnam to all the features of the sea are the most intractable aspect of the sovereignty disputes. The claim by Vietnam to all features is a particularly difficult aspect because it includes islands and reefs also claimed by Malaysia, the Philippines or Brunei, and hence handicaps the ability of ASEAN to reach a common position on the disputes, other than in the most general terms.

Both China and Vietnam have embarked on major public relations programmes to promote their interests and bolster support for their claims. These include for example, hosting major

international conferences on the South China Sea.<sup>6</sup> These are important Track Two events that should contribute to confidence building, cooperation and preventive diplomacy in the South China Sea provided they are not too heavily biased towards the views of the host nation. Track Two forums are not to be under-estimated for the role they have played in maintaining peace and stability in the South China Sea since the early 1990s.<sup>7</sup>

The U.S. has emerged as a new key player in the South China Sea. It is in the process of rebuilding its regional interests and has declared a “national interest” in preserving freedoms of navigation through the South China Sea. U.S. Secretary of Defence Gates stated at the 2010 Shangri-La Dialogue in Singapore that the U.S. is not taking sides with the sovereignty claims but opposes any action that threatens freedoms of navigation.<sup>8</sup> U.S. Secretary of State Clinton made a similar statement at the ASEAN Regional Forum meeting in Hanoi in July 2010 that the U.S. had “a national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”<sup>9</sup> As a consequence, China later warned the U.S. not to interfere in the territorial dispute.<sup>10</sup>

After some initial enthusiasm for the U.S. intervention in the affairs of the South China Sea, ASEAN governments became concerned about the risks of escalating tensions between the U.S. and China.<sup>11</sup> Fortunately the situation improved somewhat in the last months of 2010. The tensions between China and the U.S. were defused at the ASEAN Defence Ministers Meeting plus Eight (ADMM+8) in Hanoi in October 2010 with both sides walking back

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<sup>6</sup> The Diplomatic Academy of Vietnam and the Vietnam Lawyers Association have now organized two major international workshops. The last one in Ho Chi Minh City in November 2010 on ‘The South China Sea: Cooperation for Regional Security and Development’ had about 35 speakers from 17 different countries.

<sup>7</sup> Mikael Weissmann, ‘The South China Sea Conflict and Sino-ASEAN Relations: A Study in Conflict Prevention and Peace Building’, *Asian Perspective*, Vol. 34, No. 3, 2101, pp. 35-69.

<sup>8</sup> Ian Storey, ‘Shangri-La Dialogue Highlights Tensions in Sino-U.S. Relations’, Jamestown Foundation, *China Brief*, Volume 10, Issue 13, June 24, 2010; [http://www.jamestown.org/programs/chinabrief/single/?tx\\_ttnews%5Btt\\_news%5D=36532&cHash=cba584235](http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=36532&cHash=cba584235); and Bronson Percival, ‘The South China Sea: An American Perspective’, Paper at the international workshop on ‘The South China Sea: Cooperation for Regional Security and Development’, Ho Chi Minh City, November 2010.

<sup>9</sup> As quoted in Michael Richardson, ‘In knots and tangles over freedom of the sea’, *The Straits Times*, 28 July 2010, <http://www.iseas.edu.sg/viewpoint/mr28jul10.pdf>

<sup>10</sup> Andrew Jacobs, ‘China Warns U.S. to Stay Out of Islands Dispute’, *The New York Times*, 26 July, 2010, <http://www.nytimes.com/2010/07/27/world/asia/27china.html>

<sup>11</sup> Barry Wain, ‘Asean caught in a tight spot’, *The Straits Times*, 16 September 2010, <http://www.iseas.edu.sg/aseanstudiescentre/asco50-10.pdf>

somewhat from their earlier more assertive positions.<sup>12</sup> In an indication of the lack of interest in outside involvement in resolving the South China Sea disputes, that neither ASEAN nor China emerged as being supportive of the U.S. offer to facilitate talks on implementing the DOC. However, the ASEAN-China Summit in Hanoi in November 2010 agreed a Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity (2011-2015), and ASEAN and China were to meet in Kunming, China, in December 2010 to discuss a code of conduct on maritime security in the South China Sea.<sup>13</sup>

Two events helped to “trigger” the deterioration in the situation in the South China Sea during 2010. These are illustrative of the problems with implementing the DOC and building effective regimes in the South China Sea.

The first was the incident in the South China Sea in March 2009 when the United States ocean surveillance vessel USNS *Impeccable* was harassed by Chinese vessels in an area south of Hainan. The U.S. argued strongly that the operations of the *Impeccable* were a legitimate freedom of navigation available to other states in a country’s exclusive economic zone (EEZ).<sup>14</sup> The incident became a catalyst for U.S. direct intervention in the affairs of the South China Sea. The Chinese view was that the U.S. was trying to interpret UNCLOS in its own interests and that the operations of the *Impeccable* were marine scientific research requiring Chinese consent.<sup>15</sup> The problem for effective regime-building is that many Asian countries tacitly support the view that there should be some limitations on military activities conducted by another country in the EEZ of a coastal state.<sup>16</sup>

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<sup>12</sup> Thom Shanker, ‘U.S. and China Soften Tone Over Disputed Seas’, *The New York Times*, 12 October 2010, [www.nytimes.com/2010/10/13/world/asia/13gates.html](http://www.nytimes.com/2010/10/13/world/asia/13gates.html)

<sup>13</sup> Tran Truong Thuy, ‘Recent Developments in the South China Sea; from Declaration to Code of Conduct’, Paper at the international workshop on ‘The South China Sea: Cooperation for Regional Security and Development’, Ho Chi Minh City, November 2010.

<sup>14</sup> Strong defences of the U.S. position might be found in Jonathan G. Odom, ‘The True “lies” of the *Impeccable* Incident: What really happened, who disregarded international law, and why every nation (outside of China) should be concerned’, *Michigan State Journal of International Law*, Vol. 18, No. 3, pp. 1 – 42; and Raul (Pete) Pedrozo, ‘Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China’s Exclusive Economic Zone’, *Chinese Journal of International Law*, Vol. 9, No. 1, March, 2010, pp. 9–29.

<sup>15</sup> The Chinese position is described in: Zhang Haiwen, ‘Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo’s Article on Military Activities in the EEZ’, *Chinese Journal of International Law*, Vol. 9, No. 1, March, 2010, pp. 31-48.

<sup>16</sup> Stein Tonneson, ‘Misperceptions, National Interests, and Law in the South China Sea’, Paper at the international workshop on ‘The South China Sea: Cooperation for Regional Security and Development’, Ho Chi Minh City, November 2010.

This incident became one “trigger” for the present situation because it increased the sensitivity of China to U.S. operations in the South China Sea and alarmed the United States. On the U.S. side, it demonstrated a possible Chinese threat to the freedoms of navigation and overflight. The U.S. interest in these freedoms in the South China Sea is mainly associated with military ships and aircraft and their freedom to conduct certain military research and survey activities in a foreign EEZ. However, there seems little doubt about their availability to commercial shipping. China has stated on several occasions that it respects general freedoms of navigation and overflight in the South China Sea. These are also respected in Article 3 of the DOC.

The second incident leading to the deterioration was the joint submission by Malaysia and Vietnam in May 2009 to the Commission on the Limits of the Continental Shelf (CLCS). This amounted to a claim by these two countries to the seabed resources of the entire southern part of the China Sea to the exclusion of other interested parties, Brunei, China and the Philippines.<sup>17</sup> It might be argued that this submission was contrary to the spirit of Article 5 of the DOC about self-restraint in the conduct of activities that could complicate or escalate disputes.

The area covered by the joint submission is shown in Figure 1. This submission was highly provocative to China. Predictably there was an angry response with China protesting that the submission “seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea”. As the CLCS will not consider submissions relating to an area subject to a sovereignty dispute, the submission by Malaysia and Vietnam may be seen as a political gesture that only served to complicate and escalate the situation.

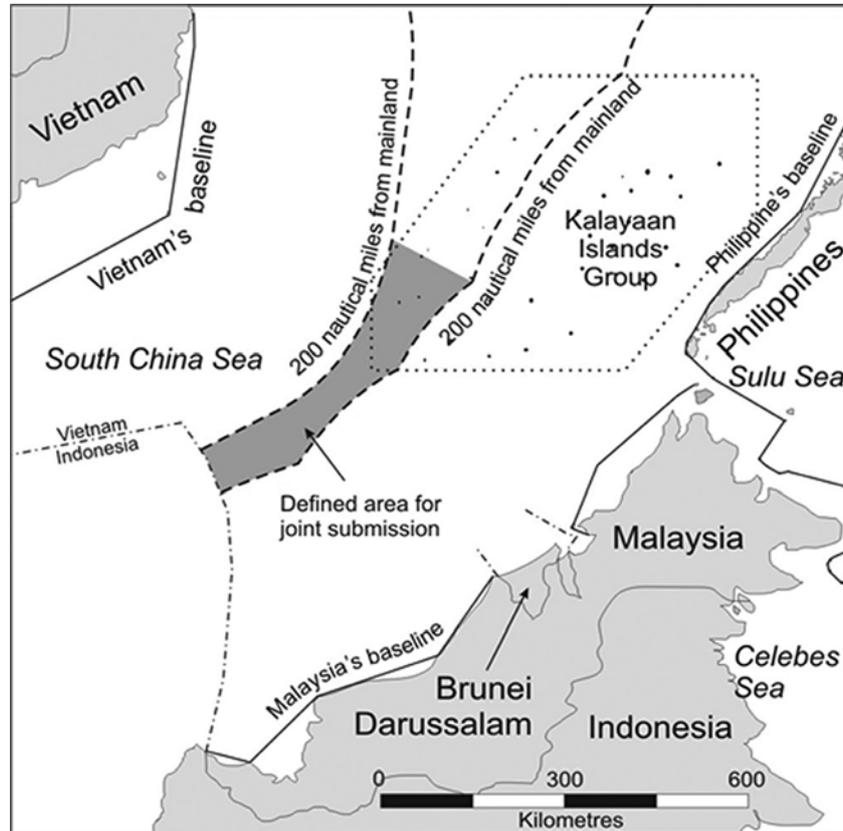
There are other problems with this joint submission. Outer continental shelf areas only exist in the South China Sea if the disputed islands are considered to be “rocks” within the meaning of Article 121(3) of UNCLOS, and are thus prohibited from generating extended maritime claims. If any of the South China Sea islands are capable of generating EEZ and continental shelf rights, no area of potential outer continental shelf beyond 200 nautical miles from the nearest island or mainland baseline exists. This development could arguably

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<sup>17</sup> Sam Bateman and Clive Schofield, ‘Outer Shelf Claims in the South China Sea: New Dimension to Old Disputes’, *RSIS Commentary 65/2009*, Singapore: S. Rajaratnam School of International Studies, 1 July 2009.

jeopardise the positions of Malaysia and Vietnam in particular in future boundary negotiations. Conversely it could also potentially substantially simplify the dispute by minimising the maritime claims associated with the disputed islands.<sup>18</sup>

**Figure 1 – Malaysian and Vietnamese Joint Submission**



### **The Legal Status of the South China Sea**

The South China Sea is a ‘semi-enclosed sea’ within the definition in Article 122 of UNCLOS (see Annex). The last part of this definition that a semi-enclosed sea is one that consists ‘entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States’ is the one that applies to the South China Sea.

Use of the words ‘should co-operate’ and ‘shall endeavour’ in Article 123 (see Annex) of UNCLOS places a strong obligation on the littoral States to co-ordinate their activities as

<sup>18</sup> Robert Beckman, ‘South China Sea: Worsening Dispute or Growing Clarity in Claims?’ *RSIS Commentary 90/2010*, Singapore: S. Rajaratnam School of International Studies, 16 August 2010.

defined in the sub-paragraphs of that article. While resource management, the protection of the marine environment and marine scientific research are mentioned specifically as areas for cooperation, the opening sentence of Article 123 creates a more general obligation to cooperate. That responsibility might be interpreted as including security and safety, including the maintenance of law and order at sea.<sup>19</sup>

The South China Sea is not “international waters”. This has been recognised by a prominent U.S. expert on the law of the sea.<sup>20</sup> Unfortunately, U.S. Secretary of State Hilary Clinton is not of the same view. Ever since the differences she had with her Chinese counterparts at the meeting of the ASEAN Regional Forum (ARF) in Hanoi in July 2010, she has frequently referred to the South China Sea as “international waters”.<sup>21</sup> Clearly they are not international waters; rather they are the EEZ of the several littoral countries, including China, which have significant rights and duties in this sea, as set out in UNCLOS Part V.<sup>22</sup> These rights and duties mean that the South China Sea should not be considered as “international waters”. Other countries must act with due regard to the rights and duties of the coastal state.<sup>23</sup>

While the South China Sea is not ‘international waters’, it is also not ‘historic waters’ or territorial sea of any one country. The Chinese protest in response to the Malaysian and Vietnamese joint submission to the CLCS included a map that showed the notorious U-shaped line (see Figure 2), sometimes referred to in Chinese literature as the “traditional maritime boundary line”, “the southernmost frontier”, “territorial limit”, and so forth. It extends south nearly to Indonesia’s Natuna Islands and encloses even Louisa Reef off Brunei. However, the legal nature of the line has never been clarified, and it has been subject to considerable speculation. Some Western writers have suggested it is a claim to the whole sea as Chinese territorial waters or “historic waters”, but this seems not the case.

### **Figure 2 – The Chinese U-shaped Line**

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<sup>19</sup> CSCAP Memorandum No. 13 - Guidelines for Maritime Cooperation in Enclosed and Semi-Enclosed Seas and Similar Sea Areas of the Asia Pacific,

<sup>20</sup> Pedrozo, “Preserving Navigational Rights and Freedoms”, p. 19.

<sup>21</sup> “Rolling the South China Sea”, *The Japan Times* online, editorial, 5 August 2010, <http://search.japantimes.co.jp/cgi-bin/ed20100805a1.html>

<sup>22</sup> The U.S. use of the term “international waters” goes dangerously close to taking the world back to a pre-UNCLOS era when the U.S. and other maritime powers argued that the extended offshore resources zone (which became the EEZ) should be an extension of the high seas while coastal states tended to see it as an extended territorial sea. The solution was an EEZ that is *sui generis* i.e. a zone all of its own neither high seas nor territorial sea. Using the term “international waters” derogates from the agreed nature of the EEZ.

<sup>23</sup> UNCLOS Article 58(3).



Professor Zhiguo Gao, a leading scholar of China’s marine policies and now a judge of the International Tribunal on the Law of the Sea (ITLOS), has observed that “A careful study of Chinese documents reveals that China never has claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line”, and that “the boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense.”<sup>24</sup>

In effect, China is saying all the islands and reefs within the dotted line are Chinese, and that these then generate maritime zones as allowed by international law. Thus the line is not a full claim to the waters of the South China Sea. This appreciation is compatible with China’s use of the phrases “adjacent waters” and “relevant waters” in its protest in response to the Malaysian and Vietnamese submission. This may be taken as implied recognition of the basic principle that sovereignty and sovereign rights at sea can only be derived from sovereignty over land territory.

This view of the U-shaped line is also supported by the fact that China has never protested the maritime boundaries agreed previously in the area between Indonesia and Malaysia, and Indonesia and Vietnam. These boundaries intrude into the area enclosed by the U-shaped line.

<sup>24</sup> Gao Zhigou, 'The South China Sea: From Conflict to Cooperation', *Ocean Development and International Law*, Vol. 25, 1994, p. 346.

Furthermore, China has never protested the extensive offshore oil and gas exploration and exploitation activities conducted by Brunei, Indonesia and Malaysia in the south-eastern part of the South China Sea within China's U-shaped line.

### **Declaration on Conduct of Parties**

The DOC was the outcome of a long process of negotiation that began in earnest with the 1992 ASEAN Declaration on the South China Sea, which followed in the aftermath of potentially destabilising naval clashes in the Paracels and Spratlys.<sup>25</sup> The Indonesian-sponsored South China Sea Workshops played a key role in facilitating discussion of potential areas of disagreement at an unofficial level.<sup>26</sup> The DOC committed parties to peaceful modes of dispute settlement, the application of international law, the need for building up confidence and trust, and the recognition of the freedom of navigation and overflight in the South China Sea. While it has been successful until recently in containing disputes and tensions in the South China Sea, it has not contributed to cooperative activities in the way that was hoped, or led to appropriate confidence-building measures (CBMs).<sup>27</sup>

The DOC was "a necessary step in the process aiming at establishing and agreeing on a 'code of conduct' in the South China Sea".<sup>28</sup> It was a pragmatic move to put the disputes in the background and bring ASEAN-China economic ties to the fore.<sup>29</sup> Furthermore, it provided an example of solidarity among the ASEAN members. However, it is not a binding code of conduct. It was a political gesture rather than a major step towards conflict management and resolution. However, it would be naïve to believe that because of the DOC, the parties have

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<sup>25</sup> Jay Batongbacal, 'The Long Road to the Code: Assessing Recent Developments in the South China Sea', Paper 12<sup>th</sup> CSCAP Maritime Cooperation Working Group Meeting, Singapore, 9-11 Dec. 2002.

<sup>26</sup> Hasjim Djalal, 'The South China Sea: the long road towards peace and cooperation', in Sam Bateman and Ralf Emmers, eds, *Security and International Politics in the South China Sea: Towards a Cooperative Management Regime*, Abingdon: Routledge, 2009, pp. 175-188.

<sup>27</sup> Ian Storey, 'Implementing CBMs in the 2002 DOC: A Roadmap to Managing the South China Sea Dispute', Paper at the international workshop on 'The South China Sea: Cooperation for Regional Security and Development', Ho Chi Minh City, November 2010.

<sup>28</sup> Nguyen Hong Thao, 'The Declaration on the Conduct of Parties in the South China Sea – A Vietnamese perspective, 2002-2007' in Bateman and Emmers, *Security and International Politics in the South China Sea*, p. 210.

<sup>29</sup> Christopher Chung, 'Southeast Asia and the South China Sea Dispute' in Bateman and Emmers, *Security and International Politics in the South China Sea*, p. 95.

ceased activities that could complicate the situation.<sup>30</sup> A code of conduct that provides a binding obligation to avoid conflict is still required.

### **Developing Regimes for the South China Sea**

It is not hard to identify factors that inhibit progress with implementing the DOC and the development of a cooperative management regime for the South China Sea. The most intractable are the claims to all features in the sea by China, Taiwan and Vietnam. These mean that there are few prospects for resolving sovereignty in the foreseeable future, but even more seriously, they make functional cooperation more difficult. Other “stumbling blocks” include the desire for countries to see maritime boundaries as “fences in the sea” separating areas of sovereign control; growing concerns over energy security and competition for resources; divisions within ASEAN; and the nationalising and militarising of the disputes.

The major players need to mediate their differences and pursue preventive diplomacy initiatives. China and the U.S. should ensure that their differences in Northeast Asia over Taiwan and the Korean Peninsula do not spill over into Southeast Asia. They should more actively pursue dialogue to reach a common understanding on issues of the law of the sea, including a common understanding of the rights and duties of states in an EEZ. Work undertaken by the EEZ Group 21 under the sponsorship of the Ocean Policy Research Foundation (OPRF) of Japan to produce Guidelines for Navigation and Overflight in the EEZ are a useful basis for beginning discussion of this common understanding.<sup>31</sup>

Unfortunately however, a senior U.S. expert on the law of the sea has said that he regards these guidelines as “unacceptable even as a starting point”.<sup>32</sup> This is a most unhelpful attitude. More incidents will occur unless there is greater preparedness to try and resolve the ambiguities and different points of view. Large areas of EEZ exist in the Asia-Pacific and differences over rights and duties in this zone are a serious threat to good order at sea in the region, including in the South China Sea. There should be dialogue to attempt to resolve them

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<sup>30</sup> Thao, ‘The Declaration on the Conduct of Parties in the South China Sea’, p. 211.

<sup>31</sup> Guidelines for Navigation and Overflight in the Exclusive Economic Zone – EEZ Group 21 (Ocean Policy Research Foundation, Tokyo, Japan, 2005) ([nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001/pdf](http://nippon.zaidan.info/seikabutsu/2005/00816/pdf/0001/pdf)).

<sup>32</sup> Pedrozo, “Preserving Navigational Rights and Freedoms”, p. 28.

rather than the unilateral assertion of rights by any party, especially by the U.S., while it is not a party to UNCLOS.<sup>33</sup>

China and Vietnam, as well as other claimant countries, should closely observe the spirit of the DOC and work with other ASEAN members to expand it into a binding code of conduct. China should remove the ambiguity associated with its ubiquitous U-shaped line claim in the area, and clarify just what precisely it claims in the South China Sea.

There is a need to acknowledge that sovereignty claims in the South China Sea and hence maritime boundaries will not be resolved in the foreseeable future. Conventional bilateral maritime boundaries are unlikely in many parts of the sea. A cooperative management regime is the only solution. The only acceptable framework for such a regime would appear to be a web of provisional arrangements covering cooperation for different functions and perhaps even with different areas for each function. The functions to be considered might include development of oil and gas resources, fisheries management, marine safety, law and order at sea, and preservation and protection of the marine environment.

A cooperative management regime is required for the South China Sea based on a functional approach that exploits the common interests of claimant countries. To achieve this outcome, work is required by Track One to promote functional cooperation and joint development. The work involved is not to be under-estimated. It requires identifying the particular function for cooperation; defining the area for joint management; identifying the specific mission of the joint venture; finding a formula to share costs and resources; and establishing a management body. Track Two can provide vital assistance in progressing this work. Rather than establishing new forums, ongoing support is required for the Workshop process hosted by Indonesia. Preventive diplomacy is still very much a requirement in the South China Sea.

### **Summary of Possible Regime-Building Activities**

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<sup>33</sup> B.A. Hamzah, 'ASEAN and China can keep peace in the South China Sea: A personal view', Paper at the international workshop on 'The South China Sea: Cooperation for Regional Security and Development', Ho Chi Minh City, November 2010; and B.A. Hamzah, 'EEZs: US Must Unclench its Fist First', *RSIS Commentary 37/2009*, Singapore: S. Rajaratnam School of International Studies, 9 April 2009.

The following is a summary of the actions and activities that might be undertaken to assist in building an effective maritime regime for the South China Sea;

- A Changed Mindset. A changed mindset among the stakeholders, which focuses on common interests and cooperation rather than on national sovereignty, differences and disputes, is the most fundamental requirement.
- Code of Conduct. Evolving the DOC into a binding Code of Conduct for parties to the South China Sea disputes should be a key objective of ASEAN-China meetings.
- Functional Cooperation. Discussion of modes of functional cooperation in the South China Sea should continue at both Track One and Track Two forums. The claimant countries should fulfil their obligations under both the DOC and UNCLOS Part IX, noting that CSCAP Memorandum No. 13 provides a useful guide to the fulfilment of these obligations.
- China's U-shaped line. China should make a clear statement on what is meant by the U-shaped or "nine-dotted" line.<sup>34</sup>
- Bilateral China – U.S. Relations. These two major players must continue to exercise restraint to ensure that tensions in their bilateral relationship do not spill over into the South China Sea.
- International Conventions. All littoral countries should ratify the relevant international Conventions that provide the framework for cooperation and good order in the South China Sea.
- A Common Understanding of Key Principles of the Law of the Sea. Dialogue should be initiated to reach a common understanding, where possible, of key principles of the law of the sea, especially rights and duties in an EEZ.<sup>35</sup> A possible basis for this discussion is provided by the OPRF Guidelines on Navigation and Overflight in an EEZ, and CSCAP Memorandum No.6 - The Practice of the Law of the Sea in the Asia Pacific.<sup>36</sup>

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<sup>34</sup> Ten points to reconcile China's claim with UNCLOS were identified in Robert Beckman, 'South China Sea: How China Could Clarify its Claims', *RSIS Commentary 116/2010*, Singapore: S. Rajaratnam School of International Studies, 16 September 2010.

<sup>35</sup> The ARF is planning to hold a Workshop on UNCLOS in Manila in February 2011. This is a useful development which the author has called for on several occasions.

<sup>36</sup> CSCAP Memorandum No.6 - The Practice of the Law of the Sea in the Asia Pacific, December 2002, <http://www.cscap.org/index.php?page=cscap-memoranda&start=7>

## **ANNEX**

### **UNCLOS Part 1X – ENCLOSED OR SEMI-ENCLOSED SEAS**

#### **Article 122**

##### *Definition*

For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

#### **Article 123**

##### *Co-operation of States bordering enclosed or semi-enclosed seas*

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.