

# **China, ASEAN in the South China Sea: Issues, Developments and the Role of US**

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The paper will examine the developments in the South China Sea in China-ASEAN relations in recent years and the role the US plays. ; analyze its implications for evolution of positions of concerned parties regarding to some key issues of South China Sea disputes. The first part of the paper will assess the overall positions and policy of China and Southeast Asia's claimant states as well as ASEAN with regard to the South China Sea. The second part analyzes the developments in the South China Sea in recent years and its implications to positions of parties, with special focus on recent 2-3 years with more tense situation and involvement of other powers, especially the US. The third session looks at possible settlements, especially on the future of the DOC implementation and prospects for a Code of Conduct to effectively manage the disputes.

## **Positions and Policy of Claimant States**

### ***China's comprehensive policy***

As the most powerful country among the claimant states, China has set the tone for the disputes in the South China Sea. The Declaration on the Conduct of Parties in the South China Sea was reached between China and ASEAN in 2002 as Beijing was adopting an accommodating stance in the South China Sea disputes. Since 2007-2008, however, as Beijing began to take on a more assertive approach, the situation has been tense again.

To achieve de-factor control of the South China Sea set by the U-shaped claim, China has significantly increased its presence within the line with a comprehensive approach, expanding not only military but also paramilitary and civilian activities in the area.

Militarily, China is accelerating military build-up, especially naval modernization with the construction of a naval base in Sanya that serves as a gateway to the South China Sea. To send messages of deterrence to other claimants in the South China Sea, the Chinese navy has also increased the frequency and level of coordination in conducting naval exercises in the South China Sea. The most significant event happened in July 2010 when the PLA navy for the first time

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mobilized at least a dozen modern warships from three fleets (the North Fleet, the East Fleet, and the South Fleet) to conduct a large-scale joint naval exercise in the South China Sea.<sup>2</sup>

Paramilitarily, China has deployed patrol vessels and boats from various Chinese maritime law enforcement agencies to the South China Sea.<sup>3</sup> During the period of its unilaterally declared fishing ban between May and August (imposed annually since 1999), Chinese maritime security forces have repeatedly detained Vietnamese fishermen, confiscated fishing boats and demanded several fines of US \$8,000 to \$10,000 for the release of the fishermen. In early April 2010, Beijing even announced the dispatch of two large fishery patrol vessels to the Spratly Islands to protect Chinese fishing vessels, which were increasing in number and going further to the south. It was the first time China had done so outside the period of its unilateral fishing ban.<sup>4</sup> On June 23, 2010, the Chinese fishery administration vessel Yuzheng 311 pointed a large-caliber machine gun to an Indonesian ship and threatened to attack the ship when a Chinese fishing boat was seized by Indonesian forces in the area within Indonesia's exclusive economic zones in the Natuna Islands.<sup>5</sup>

On the diplomatic front, China's strategy with regard to the South China Sea issues has centered on the insistence on bilateral negotiations with smaller claimant states and the prevention of any efforts to multilateralize and internationalize the issues and especially any US involvement

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<sup>2</sup> "China's three-point naval strategy", Strategic Comment, Volume 16, Comment 37 – October 2010, The International Institute For Strategic Studies (IISS),

<http://www.iiss.org/publications стратегic-comments/past-issues/volume-16-2010/october/chinas-three-point-naval-strategy/>

<sup>3</sup> For maritime law enforcement, China has at least five agencies: The China Coast Guard is the maritime branch of the Public Security Border Troops, a paramilitary police force under the leadership of the Ministry of Public Security; The China Maritime Safety Administration, part of the Ministry of Transport, is for coordinating maritime search and rescue; The China Marine Surveillance (CMS), a paramilitary maritime law enforcement agency under the auspices of the State Oceanic Administration; The China Fisheries Law Enforcement Command (FLEC) (an organ of the Fisheries Management Bureau under the Ministry of Agriculture) is responsible for the enforcement of laws concerning fishing and maritime resources; and the General Administration of Customs operates a maritime anti-smuggling force. Every agency has their own patrol vessels and operates independently and uncoordinatedly with each others. For a comprehensive analysis, see: Lyle J. Goldstein, *Five Dragons Stirring Up the Sea: Challenge and Opportunity in China's Improving Maritime Enforcement Capabilities*, U.S. Naval War College, China Maritime Study 5, April 2010. [http://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/CMSI\\_No5\\_web1.pdf](http://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/CMSI_No5_web1.pdf)

<sup>4</sup> [Ian Storey](#), China's "Charm Offensive" Loses Momentum in Southeast Asia, China Brief Volume: 10 Issue: 9, April 29, 2010.

[http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=36324&tx\\_ttnews\[backPid\]=7&cHash=897d20a7fa](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=36324&tx_ttnews[backPid]=7&cHash=897d20a7fa)

<sup>5</sup> "China flexes muscles in South China Sea", Mainichi Shimbun, 27 July 2010

attempts. Chinese Foreign Minister once warned that turning the South China Sea issues into international or multilateral ones will “only ma[d]e matters worse and the resolution more difficult”.<sup>6</sup>

With regard to the issue of energy development in the South China Sea, beginning in the summer of 2007, China has threatened a number of foreign oil and gas companies to stop joint exploration operations in the sea with their Vietnamese partners or face unestimated consequences in their business dealings with China.<sup>7</sup> While protesting against energy development activities undertaken by other countries in the area within the U-shaped claim, China has on the other hand advocated the idea of joint energy resources development within that claim in the South China Sea.

Several factors contribute to explain why China has returned to an assertive approach in the South China Sea in recent years. First, China for decades of continuous remarkable economic growth has accumulated its economic and military power to a level that allows it to become increasingly assertive in conducting external behaviors, especially during and after the 2008-2009 global financial crisis. Second, relative stability in China-Taiwan relations in recent years has enabled China to shift its priorities, capability and resources to other external issues, most notably to the South China Sea. Third, rising nationalism and increasing role and activities of the PLA as well as growing competition between various interest groups within Chinese domestic politics (law enforcements agencies, energy corporations, coastal provinces,...) have served to complicate the process of policy formulation and implementation with regard to the South China Sea issues in China. Fourth, other claimants’ actions in the South China Sea have also forced China to react and Beijing has overly reacted. Fifth, the lack of an effective mechanism for managing the disputes in the South China Sea, especially for regulating the conduct of the parties including China has given China much leeway to pursue its bold stance.

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<sup>6</sup> Foreign Minister Yang Jiechi Refutes Fallacies On the South China Sea Issue,

<http://www.fmprc.gov.cn/eng/zxxx/t719460.htm>

<sup>7</sup> Scot Marciel, “Maritime Issues and Sovereignty Disputes in East Asia” Testimony before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, July 15, 2009. [http://foreign.senate.gov/hearings/hearing/20090715\\_2/](http://foreign.senate.gov/hearings/hearing/20090715_2/)

For Summary of leaked US diplomatic cables released by WikiLeaks on China's protests against international oil firms signing exploration deals with Vietnam in the South China Sea, see Greg Torode, “Beijing pressure intense in South China Sea row”, South China Morning Post, Sep 23, 2011. <http://topics scmp.com/news/china-news-watch/article/Beijing-pressure-intense-in-South-China-Sea-row>

## ***Southeast Asia's Responses***

Facing with increasing China's assertive activities in the South China Sea, ASEAN claimants, particularly the Philippines and Vietnam, applied a comprehensive policy to defend their national interest while preserving external peaceful environment. This policy is a combination of using the international law, especially the UNCLOS, to defend their maritime claims; opposing joint development with China in the areas within their internationally recognized maritime zones; bringing up the South China Sea issue to regional forums for discussion with involvement of other external powers, especially the US; working with other members of ASEAN in engaging China in DOC implementation and in working for a new code of conduct; and negotiating directly with China to defuse tensions and to settle remaining bilateral issues.

### *UNCLOS as an Instrument for Pursuing National Interest*

Dealing China's ambiguous U-shaped claim in the South China Sea, ASEAN claimants are trying to separate their exclusive economic zones and continental shelves measured from mainland (or from near-shore undisputed islands) and disputed area in the South China Sea. To minimize the area of dispute, ASEAN claimants prefer to interpret the UNCLOS, specifically the Article 121 of "regime of island" in a strict way.<sup>8</sup>

The submissions of outer limit of continental shelf to the UN Commission CLCS by Malaysia and Vietnam in 2009 had clarified the borders of their exclusive economic zones and continental shelf claims.<sup>9</sup> Vietnam and Malaysia also interpreted "regime of island" in the South China Sea by not considering any features in the Spratly Islands (and the Paracel Islands, in the case of Vietnam's submission) to be islands, as defined in Article 121 of UNCLOS.

Brunei also share the view of other concerned countries in ASEAN. In preliminary information concerning the outer limits of its continental shelf, Brunei stated that its forthcoming full submission to the commission "will show that the edge of the continental margin, lying at the transition between

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<sup>8</sup> UNCLOS provides for two categories of feature under Article 121 governing the "regime of islands": islands that are capable of generating the full suite of maritime zones, including the exclusive economic zone and the continental shelf, and "rocks which cannot sustain human habitation or economic life of their own" and "shall have no exclusive economic zone or continental shelf."

<sup>9</sup> "Submissions to the Commission: Joint Submission by Malaysia and the Socialist Republic of Viet Nam," Commission on the Limits of the Continental Shelf (CLCS), UN Division for Ocean Affairs and the Law of the Sea, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).

"Submissions to the Commission: Submission by the Socialist Republic of Viet Nam," Commission on the Limits of the Continental Shelf (CLCS), UN Division for Ocean Affairs and the Law of the Sea, [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_vnm\\_37\\_2009.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm).

the Dangerous Grounds and the deep ocean floor of the South China Sea, is situated beyond 200 nautical miles from the baselines from which Brunei's territorial sea is measured.”<sup>10</sup> This suggests that Brunei will fix the outer limit of its extended continental shelf beyond two hundred nautical miles from the baseline of land territory without taking consideration of claimed islands in the Spratly Islands.

Concerning the Indonesian position, in a note sent to the UN CLCS on July 8, 2010, Indonesia stated that “those remote or very small features in the South China Sea do not deserve exclusive economic zone or continental shelf of their own”.<sup>11</sup>

Regarding the position of the Philippines, under the Archipelagic Baselines Law passed on March 10, 2009, the disputed Kalayaan Islands and Scarborough Shoal remain part of Philippine territory but under a “regime of islands,” per UNCLOS.<sup>12</sup> On April 5, 2011, the Philippines sent a note verbale to CLCS to protest against China’s nine-dotted line.<sup>13</sup> Following Vietnam, Malaysia and Indonesia,<sup>14</sup> the Philippines rejected the historical basis, if any, of China’s nine-dotted line. The Note states that China’s claim of the areas outside the “geological features” in the Kalayan group and their “adjacent water” has no basis under international law, specifically under the UNCLOS and that “with respect to these areas, sovereignty, and jurisdiction and sovereign rights...appertain or belong to the appropriate coastal or archipelagic state”. The extent of “adjacent” water to relevant “geological features” are clearly defined under the provisions of UNCLOS, specifically Article 121 which elaborates on the regime of islands.<sup>15</sup> Henry Bensurto, Philippine Department of Foreign Affairs, elaborated this position in a conference in Kuala-Lumpur in December, 2011 that “extent of adjacent waters” of relevant features are “measurable” and maximally given 12 nautical miles of territorial sea.<sup>16</sup>

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<sup>10</sup> Brunei Darussalam, “Brunei Darussalam’s Preliminary Submission Concerning the Outer Limits of Its Continental Shelf,” [www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/brn2009preliminaryinformation.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf).

<sup>11</sup> Permanent Mission of Indonesia to the United Nations, “Communication dated 8 July 2009,” Commission on the Limits of the Continental Shelf (CLCS), UN Division for Ocean Affairs and the Law of the Sea, [www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/idn\\_2010re\\_mys\\_vnm\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf).

<sup>12</sup> “PGMA signs baselines bill into law”, Press Release by Philippine Information Agency on March 12, 2009. <http://www.pia.gov.ph/?m=12&sec=reader&rp=1&fi=p090312.htm&no=8&date=03/12/2009>

<sup>13</sup> See Philippine Note at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf)

<sup>14</sup> The first round of diplomatic protesting notes in 2009,2010

<sup>15</sup> See Philippine Note at [http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/phl\\_re\\_chn\\_2011.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf)

<sup>16</sup> Remarks of Henry Bensurto at MIMA conference on South China Sea: Recent Developments and Implications Towards Peaceful Dispute Resolution, 12- 13 December 2011.

This simplified and solution-oriented interpretation of ASEAN claimants on “regime of features” of the Spratlys was not shared by China. As a strongest claimant, China wants to maximize the area of dispute in the South China Sea by keeping ambiguity of U-shaped claim and by interpreting article 121 on “regime of island” in a liberal way. In responding to Philippine note, China sent Note to CLCS and declared that “Under the relevant provisions of the 1982 UNCLOS, as well as the Law of the People’s Republic of China on Territorial Sea and Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the PRC (1998), *China’s Nansha Islands is fully entitled to Territorial Sea, EEZ and Continental Shelf*<sup>17</sup> (emphasis added).<sup>18</sup>

### *Joint Development*

Response to China’s proposal of joint development, in principle, other claimants do not oppose concept of joint development, ASEAN claimants even signed some joint development arrangements in the South China Sea and Gulf of Thailand; however, the question of how to define an acceptable area in the disputed waters in the South China Sea to launch joint development projects remains one of the most intractable issues in putting the idea into practice. ASEAN claimant states would certainly not accept any Chinese proposals for joint development arrangements in the areas within their claimed EEZ and continental shelves, which sometimes are five to seven hundreds nautical miles far from Hainan Island. ASEAN claimants are ready to work with foreign—including Chinese—partners only on the condition that their sovereign rights are fully respected.<sup>19</sup> As has been demonstrated in the case of the Agreement for Joint Marine Seismic Undertaking in the South China Sea in 2005 between national petroleum corporations of China, the Philippines and Vietnam, the Philippines had to postpone the renewal of the agreement due to mounting domestic opposition, which condemned the government of compromising Philippine sovereignty by allowing the area of the joint development project to overlap with the country’s exclusive economic zone.

### ***US’s Involvement and China’s Softened Approach***

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<sup>17</sup> See China’s Note at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2011\\_re\\_phl\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf)

<sup>18</sup> [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/vnm\\_2011\\_re\\_phlchn.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/vnm_2011_re_phlchn.pdf)

<sup>19</sup> “Vietnam Signals It Wants ExxonMobil Deal Despite China Warning,” Agence France-Presse, July 24, 2008, <http://afp.google.com/article/ALeqM5heDDtUDkdvnfpdxGI91DdmaxA7aw>.

As China's increasing assertiveness in the South China Sea in recent years has deepened ASEAN countries' concerns, it has created opportunities for the United States to "come back" to Asia. In 2010, for the first time in an official meeting of the ASEAN Regional Forum (ARF), U.S. Secretary of State Hillary Clinton delivered a long statement articulating on US position on the South China Sea issues. The statement reads, among other things, that the US has a national interest in the freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea.<sup>20</sup>

Increasing involvement of the United States in the South China Sea and accelerating US cooperation with ASEAN countries after the ARF-17 meeting in July 2010 in Hanoi seem to have affected China's calculations. Notably, the forcefulness of Clinton's statement and echoing responses from many other countries at ARF-17 has created a domestic debate in China about the wisdom of elevating the "South China Sea" to the rank of China's "core interest". Some Chinese military strategists and scholars believe that incorporating the South China Sea into the package of China's core national interests is, at least for now, "not a wise move". They considered that the claim would "upset and enrage the US" and could "strike a nerve with China's neighboring countries".<sup>21</sup> As the largest country of East Asia, so the argument runs, China has the responsibility to reduce divergence and build consensus in the region.<sup>22</sup> As a result, in November 4, 2010, Chinese Assistant Foreign Minister Hu Zhengyue declared that China was making efforts to establish a new security concept in which China would remain committed to playing "a constructive role" in addressing important regional and international issues, and that China would attempt to resolve peacefully its existing territorial and maritime disputes through friendly negotiations with neighboring countries.<sup>23</sup>

China's softened tone on the diplomatic front seemingly corresponded with its activities in the South China Sea the last several months of 2010. Just before the ADMM Plus meeting in Hanoi in October 2010 and after a number of diplomatic protests from Vietnam, China informed Vietnam that it would unconditionally release the trawler and nine fishermen detained near the Paracel Islands more than a month ago. On August 17, 2010, U.S. Deputy Assistant Secretary of Defense Robert

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<sup>20</sup> Remarks at Press Availability, Hillary Rodham Clinton, Secretary of State, Hanoi, Vietnam, July 23, 2010. <http://www.state.gov/secretary/rm/2010/07/145095.htm>

<sup>21</sup> Li Hongmei, "Unwise to elevate "South China Sea" to be core interest ?"  
<http://english.peopledaily.com.cn/90002/96417/7119874.html>

<sup>22</sup> "Road map toward China's maritime peace". <http://opinion.globaltimes.cn/editorial/2010-07/556148.html>

<sup>23</sup> China voices commitment to "constructive role" to address regional, international issues. [http://news.xinhuanet.com/english2010/china/2010-11/04/c\\_13591585.htm](http://news.xinhuanet.com/english2010/china/2010-11/04/c_13591585.htm)

Scher said in a press conference in Hanoi that the Pentagon had not seen any “recent” Chinese intimidation of global oil and gas companies operating in the South China Sea.<sup>24</sup>

### New Round of Tension in the first half of 2011

China’s softened tone after ARF 17 in Hanoi, however, only reflects tactical changes in its dealing with the South China Sea issues. In the first half of 2011 China once again hardened its approach toward South China Sea with more assertive behaviors.

#### *Incidents at Sea*

Several incidents in this period underscored China’s continued assertive approach in the South China Sea. The Aquino administration has protested against at least six incidents provoked by China this year, including the Reed Bank incident which involved alleged Chinese intrusion into waters within the Philippines 200-nautical mile exclusive economic zone.<sup>25</sup> Another serious incident was reported by the Philippine military in June 2011, in which case a Chinese surveillance vessel and navy ships were seen unloading building materials and erecting posts in the vicinity of Iroquois Reef and Amy Douglas Bank – an uninhabited undersea hill claimed by the Philippines about 230 kilometers from southwestern Palawan province.<sup>26</sup> If the report of the Philippine military is correct, it is clear that China has seriously violated the 2002 DOC, especially with regard to Article 5 of the DOC which states that “The Parties [shall] 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.”<sup>27</sup> (emphasis added)

Regarding Philippine energy development activities, on March 2, 2011, two Chinese patrol boats aggressively harassed a seismic survey vessel working for the company Energy Forum, which had been granted a contract by the Philippine government to conduct exploration operations in the

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<sup>24</sup> U.S. Sees No ‘Recent’ China Pressure on Global Oil Companies in South Sea

<http://www.bloomberg.com/news/2010-08-18/u-s-sees-no-recent-china-pressure-on-global-oil-companies-in-south-sea.html>

<sup>25</sup> Philippines accuses China of ‘serious violations’ in South China Sea

<http://globalnation.inquirer.net/3205/philippines-accuses-china-of-%E2%80%98serious-violations%E2%80%99-in-spratlys>

<sup>26</sup> Ibid

<sup>27</sup> <http://www.asean.org/13163.htm>

gas field located inside the Reed Bank, an area 80 miles west of Palawan.<sup>28</sup> Before that, China had launched several diplomatic protests when the Philippines granted a service contract to Forum Energy in the areas also covered by the expired Tripartite Joint Marine Seismic Undertaking signed by the national oil and gas companies of China, Vietnam and Philippines in 2005.<sup>29</sup> Forum Energy considers the area under its contract, which covers some 880,000 hectares within the Reed Bank basin, to be situated outside the Spratly Islands.<sup>30</sup> Subsequently, Philippine Energy Secretary Angelo T. Reyes explained that the area was within the 200 mile EEZ of the Philippines and that “if it’s within the EEZ, [the Philippine] government has the authority to engage in the exploration, development and utilization of natural resources and enter into an arrangement.”<sup>31</sup>

On May 26, 2011, another incident took place in an area just about 80 miles off the south-central coast of Vietnam, within Vietnam’s exclusive economic zone. This time, three Chinese patrol boats accosted and harassed the Vietnamese ship Binh Minh 02, which was conducting oil exploration surveys in the South China Sea. The Chinese boats then cut the seismic survey cable of the Binh Minh 02 and warned the ship that it was trespassing Chinese territory.<sup>32</sup> Vietnam’s MOFA spokesperson, however, made it clear in a press conference on May 29, 2010 that the area where the Binh Minh 02 was conducting exploration activities entirely falls within the exclusive economic zone and 200-nautical mile continental shelf of Viet Nam and it is neither a disputed area nor an area “managed by China”.<sup>33</sup>

Another similar incident occurred on June 9, 2011, when a Chinese fishing boat, with support from Chinese fishing patrol vessels, rammed the survey cables of the PetroVietnam ship Viking II,

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<sup>28</sup> “Philippine Oil Vessel Confronted By China, Spurring New Dispute”, World Street Journal, March 4, 2011  
<http://online.wsj.com/article/SB10001424052748703300904576178161531819874.html>

<sup>29</sup> “Confirmation of New Contract Name and Clarification Regarding Press Speculation,” Press Release, February 17, 2010, <http://www.forumenergyplc.com/news/confirmation-of-new-contract-name-and-clarification-regarding-press-speculation.aspx>.

<sup>30</sup> “Confirmation of New Contract Name and Clarification Regarding Press Speculation,” Press Release, February 17, 2010, <http://www.forumenergyplc.com/news/confirmation-of-new-contract-name-and-clarification-regarding-press-speculation.aspx>.

<sup>31</sup> Amy R. Remo, “Spratlys Deal with UK Firm within RP’s Economic Zone—Reyes,” *Philippine Daily Inquirer*, February 21, 2010, <http://newsinfo.inquirer.net/breakingnews/nation/view/20100221-254558/Spratlys-deal-with-UK-firm-within-RPs-economic-zone---Reyes>.

<sup>32</sup> [Vietnam accuses China of threatening boat researching oil-drilling sites in South China Sea](#), AP May 27, 2011,  
<http://www.google.com/hostednews/canadianpress/article/ALeqM5hL8uj6abJ4M4dgA94pptkulWv6w?docId=6972004>

<sup>33</sup> Press Conference on Chinese maritime surveillance vessel's cutting exploration cable of PetroViet Nam Seismic Vessel. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns110530220030#1JLxTTgwqAy2](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110530220030#1JLxTTgwqAy2)

which was conducting a seismic survey in Block 136-03, an area within 200-nautical mile exclusive economic zone of Vietnam and more than 622 miles from China's Hainan Island. Vietnam's MOFA spokesperson Nguyen Phuong Nga stated that “[the] acts are tailored in a very systematic way by the Chinese side with an aim to turn undisputed areas into disputed areas”<sup>34</sup>.

It is unclear whether the cable-cut incidents were undertaken according to a coordinated policy plan in Beijing or whether they just resulted from actions initiated by Chinese maritime law enforcement forces at the local level. In a meeting on June 3, 2011 at the sideline of the Shangri-La Dialogue in Singapore, China's Defence Minister Liang Guanglie reassured his Vietnamese counterpart Phung Quang Thanh that the two countries' armies needed to strengthen cooperation to avoid similar incidents in future and expounded that the Chinese People's Liberation Army “did not get involved in the recent incident”.<sup>35</sup> It should be noted that the Viking II incident took place only four days after the Shangri-la Dialogue in Singapore where Chinese Defense Minister Liang Guanglie reassured China's neighbors that China was to pose no threat and Vietnam Defense Minister Phung Quang Thanh stressed that there must be no repetition of the May 26 cable-cut incident.<sup>36</sup> Given the contour of things, it seems that perhaps the Chinese Defense Ministry was not involved in the decision making process of the incident.

With regard to the Foreign Ministry of China, much time and effort of the Chinese MOFA in this period had to be devoted to preparing for the ARF-18 and other meetings with ASEAN counterparts in Indonesia in July 2011. Logically speaking, therefore, it would have been bound to avoid the occurrence of any incidents that could lead to the repetition of the ARF-17 scenario in Hanoi in 2010, in which China was extremely isolated diplomatically.

After the first cable-cut incident with Vietnam in May 2011, China also for the first time publicly using the argument of “historic right” in its assertion of the U-shaped claim. It is possible that China has realized that attempting to clarify its claim in line with the UNCLOS in Note sent to CLCS in April 2011 would not serve its ambitious interest. It is hard for China to justify its actions because the area where the first cable-cut incident occurred is located not only within 200 nautical miles of Vietnamese exclusive economic zones but also on the western side of any equidistant lines

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<sup>34</sup> [Foreign Ministry Spokesperson Nguyen Phuong Nga at the Press Conference June 9th 2011](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110610100618#kyKoH1NekSr9), [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns110610100618#kyKoH1NekSr9](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110610100618#kyKoH1NekSr9)

<sup>35</sup> “Vietnam Defence Minister meets with Chinese counterpart”, QĐND, June 04, 2011. <http://www.qdnd.vn/qdndsite/en-US/75/72/183/161/163/150182/Default.aspx>

<sup>36</sup> See speeches of Liang Guanglie and Phung Quang Thanh at <http://www.iiss.org/conferences/the-shangri-la-dialogue/shangri-la-dialogue-2011/>

between the Vietnamese mainland and the Paracel and Spratly Islands. Consequently, the area of incident was not on maritime zone of features of Paracel or Spratly even in case these features are given maximal effect in generating exclusive economic zones. China therefore simply came back to the argument of “historic right” in its assertion of the U-shaped claim, which is not in conformity with the UNCLOS. In his remarks at the ARF 18 in July 2011 in Indonesia, China’s Foreign Minister Yang Jiechi for the first time officially stated that “the dotted line was formally announced by the Chinese government in 1948” and that “China's sovereignty, *rights* and claims in the South China Sea were established and developed in the long course of history”<sup>37</sup> (emphasis added). On September 15, 2011, in response to questions from the media of whether China's claim in the South China Sea violates the UNCLOS, Chinese MOFA Spokesperson also said that “China's sovereignty, *rights* and relevant claims over the South China Sea have been formed in the long course of history” and “the UNCLOS …does not restrain or deny a country's right which is formed in history and abidingly upheld.”<sup>38</sup>(emphasis added). The Philippines's challenge to China's claim by suggesting China to bring the issue to the ITLOS has met with no response from the Chinese side.

### **Second Half of 2011: Intensified Diplomatic Negotiations**

#### ***Bilateral Talks***

Two consecutive cable-cut incidents in May and June 2011 provoked anti-Chinese demonstrations in Hanoi and deteriorated the overall relationship between Vietnam and China. To defuse the tension, on June 26, Vietnam sent Deputy Foreign Minister Ho Xuan Son as a special envoy to China to hold discussions with his counterpart Zhang Zhijun, and, more importantly, to meet with China's State Councillor Dai Bingguo. “The two sides emphasized the necessity to … peacefully solving the two countries' disputes at sea through negotiation and friendly consultation; employing effective measures and working together to maintain peace and stability in the East Sea”.<sup>39</sup>

It should be noted that although Vietnam has been actively engaged in negotiations with China on the South China Sea issues, from Vietnam's point of view, there are many bilateral, multilateral

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<sup>37</sup> Remarks by Foreign Minister Yang Jiechi at the ARF Foreign Ministers' Meeting. <http://www.fmprc.gov.cn/eng/zxxx/t842183.htm>

<sup>38</sup> Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011 <http://www.fmprc.gov.cn/eng/xwfw/s2510/t860126.htm>

<sup>39</sup> “Viet Nam-China joint press release,” June 26, 2011. <http://www.nhandan.com.vn/cmlink/nhandan-online/homepage/politics/external-relations/vietnam-china-joint-press-release-1.301599#7Avedd04sN9T>

and international issues in the pool of issues in the South China Sea. On June 10' Vietnam MOFA's Spokesperson elaborated the country's positions that "issues related only to two countries, such as the issues between Vietnam and China like the entrance of the Gulf of Tonkin, the Hoàng Sa archipelago – the Paracel, shall be settled bilaterally between the countries directly concerned. Issues related to countries and other parties concerned, such as the issue of Trường Sa archipelago - the Spatly, shall be settled between the parties concerned. Issues not only related to the East Sea coastal countries but also related to the countries outside the region, such as security and safety of navigation, etc. shall be settled with the participation of parties concerned."<sup>40</sup> Vietnamese delegates also held onto this position in the nine rounds of negotiations with China on the Agreement on Basic Principles Guiding the Settlement of Sea Issues, which was finally signed on October 11 during the visit of the Vietnamese Communist Party's Secretary General Nguyen Phu Trong to China. According to the Agreement, Vietnam and China will "pursue friendly talks and negotiations to properly settle sea-related issues", and "discuss transitional and temporary measures that do not affect the stances and policies of the two sides" according to international law including the UNCLOS and the 2002 DOC. Significantly, Article 3 of the Agreement states that "for sea-related disputes between Vietnam and China, the two sides shall solve them through friendly talks and negotiations", and "for *disputes relating to other countries* shall be settled through *negotiations with other concerned parties*". Both sides are also committed to "speed[ing] up the demarcation of *territorial waters off the Tonkin Gulf* and actively *discussing co-operation* for mutual development on *these waters*".<sup>41</sup> (emphasis added)

The South China Sea issue was also discussed by Chinese President Hu Jintao and Philippine President Benigno S. Aquino III during the visit of Aquino to China from 30 August to 3 September 2011. According to the "Joint statement of the the Philippines and China", the two leaders have "exchanged views on the maritime disputes and agreed not to let the maritime disputes affect the broader picture of friendship and cooperation between the two countries", reiterated their commitment to addressing the disputes through peaceful dialogue, to maintain continued regional peace, security, stability and an environment conducive to economic progress. They have also

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<sup>40</sup> Foreign Ministry's Spokeswoman Nguyen Phuong Nga answers questions from the media on June 10th, 2011. [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns110611180531#Ogf5HtOp8JJ](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110611180531#Ogf5HtOp8JJ)

<sup>41</sup> "VN-China basic principles on settlement of sea issues". <http://en.vietnamplus.vn/Home/VNChina-basic-principles-on-settlement-of-sea-issues/201110/21524.vnplus>

reaffirmed their commitments to respect and abide by the Declaration on the Conduct of Parties in the South China Sea signed by China and the ASEAN member countries in 2002.<sup>42</sup>

### ***Regional Forums***

Similar to the situation before the ARF 17 meeting in Hanoi in 2010, serious incidents in the South China Sea between China and Vietnam and between China and the Philippines have troubled ASEAN countries and other regional stakeholders.

On July 18, 2011, ASEAN Foreign Ministers spent much of the time at their meeting debating efforts to resolve dispute in the South China Sea.<sup>43</sup> They also expressed “serious concern” about the recent incidents in the South China Sea.<sup>44</sup> The Philippines also put forward a proposal for establishing a Zone of Peace, Freedom, Friendship and Cooperation in the South China Sea (ZoPFF/C) by “enclaving” the disputed maritime zone in the South China Sea in order to separate these areas from non-disputed area and “pave the way for effective and meaningful cooperation among the claimant countries... in the South China Sea.”<sup>45</sup> The ASEAN ministers took note of this proposal and referred it to a subsequent meeting of ASEAN Senior Officials and legal experts for consideration.<sup>46</sup>

At the ARF 18 meeting in Bali in July 2011, several participating Foreign Ministers voiced their concern about the situation. In particular, US Secretary Hilary Clinton said that “The United States is concerned that recent incidents in the South China Sea threaten the peace and stability” and that claimant states in the South China Sea “should exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability”<sup>47</sup>.

Regional and international diplomatic pressures have seemingly resulted in softening China’s activities in second half of 2011. Although China continued to declare its unilateral fishing ban in the area north of 12 degrees latitude of the South China Sea from 16 May to 1 August 2011, which

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<sup>42</sup> “Joint statement of the Philippines and China” <http://globalnation.inquirer.net/11819/joint-statement-of-the-philippines-and-china>

<sup>43</sup> “ASEAN Foreign Ministers Discuss South China Sea Dispute”, <http://www.voanews.com/english/news/asia/ASEAN-Foreign-Ministers-Discuss-South-China-Sea-Dispute-125816578.html>

<sup>44</sup> Joint Communiqué of the 44th ASEAN Foreign Ministers Meeting, Bali, <http://www.asean.org/documents/JC44thAMM19JUL2011.pdf>

<sup>45</sup> “DFA to propose ‘enclaving’ of disputed areas in South China Sea,” <http://www.gmanews.tv/story/233028/nation/dfa-to-propose-enclaving-of-disputed-areas-in-south-china-sea>

<sup>46</sup> Legal experts from ASEAN countries, except from Laos and Cambodia, met only for one time until now in September 22-23 in Manila to discuss the Proposal of ZoPFF/C.

<sup>47</sup> “The South China Sea”, Press Statement by Hillary Rodham Clinton, July 22, 2011. <http://www.state.gov/secretary/rm/2011/07/168989.htm>

Vietnam has protested as a violation of Vietnamese sovereign rights,<sup>48</sup> there were no reports on arrests of Vietnamese fishermen or confiscations of Vietnamese fishing boats as in previous years. Vietnam and the Philippines have also continued oil and gas exploration activities in some areas within the U-shaped line without harassment from the Chinese side. China has only limited its response to diplomatic protests and warning words on newspapers. In September, China's MOFA spokesperson warned India's Oil and Natural Gas Corporation (ONGC) Videsh from entering into any deal with Vietnamese firms on exploring oil and gas in the South China Sea.<sup>49</sup> The influential Global Time newspaper reads that 'every means possible' should be used to stop ONGC Videsh engaging in exploration projects in the South China Sea.<sup>50</sup> Most recently, on October 31, when asked whether China planned to demand Exxon Mobil to withdraw from its oil and gas deal with Vietnam after this company said it had discovered hydrocarbons in blocks 117, 118 and 119 off the coast of Danang at a regular briefing, Chinese Foreign Ministry spokesman Hong Lei reassured that "China has indisputable sovereignty over the Spratly Islands and adjacent waters,".<sup>51</sup>

This conciliatory tone also has also been manifested through the adoption of the Guidelines for the DOC implementation between ASEAN and China after 9 years of negotiation.

### ***Guidelines for DOC Implementation***

Regarding ASEAN-China negotiation on the South China Sea, after signing the DOC in 2002, ASEAN and China established a joint working group (JWG) to study and recommend confidence-building measures to foster the DOC into implementation.<sup>52</sup> The ASEAN-China JWG is tasked with formulating guidelines, gathering experts, and organizing workshops focusing on the South China Sea.<sup>53</sup>

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<sup>48</sup> "Chinese unilateral fishing ban in the East Sea is a violation of Vietnamese sovereignty". [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns110516112044#Q9866xMQkrnn](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110516112044#Q9866xMQkrnn)

<sup>49</sup> Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011. <http://www.fmprc.gov.cn/eng/xwfw/s2510/t860126.htm>

<sup>50</sup> Jason Miks, "India's South China Sea Warning", <http://the-diplomat.com/china-power/2011/09/18/indias-south-china-sea-warning/>

<sup>51</sup> "China again warns foreign oil firms on South China Sea exploration". <http://www.reuters.com/article/2011/10/31/china-vietnam-exxon-idUSL4E7LV0QM20111031>

<sup>52</sup> "ASEAN-China Senior Officials Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea," ASEAN, Press Release, December 7, 2004, <http://www.aseansec.org/16888.htm>.

<sup>53</sup> Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea," ASEAN website, <http://www.aseansec.org/16885.htm>.

At the working group's first meeting in Manila on August 4–5, 2005, ASEAN proposed a seven-point Guideline for the implementation of the DOC. At the second meeting of the ASEAN-China JWG held in Hainan, China, on February 8–9, 2006, both sides agreed to execute six cooperation projects in less sensitive areas in the South China Sea, including joint search and rescue exercises and a series of workshops to facilitate environmental research and exchange.<sup>54</sup> In addition, the second ASEAN-China SOM on the implementation of the DOC in May 2006 approved six other projects and recommended that they be considered joint ASEAN-China initiatives.<sup>55</sup>

However, the main source of contention between ASEAN and China in implementing the DOC concerned the second point in the ASEAN-proposed guideline. As per ASEAN's practice in dealing with dialogue partners, ASEAN member states wanted to "consult among themselves" and then deal with China collectively; yet China preferred to have consultations with the "relevant parties" only, not with ASEAN as a bloc. Furthermore, China suggested that the guidelines be considered the principles for implementing only the "agreed joint cooperation activities stated in the DOC," not for implementing the declaration as a whole. China also refused to agree on organizing an ASEAN-China SOM on the DOC implementation, arguing that the SOM could not be held until the JWG had reached a consensus on the guidelines.<sup>56</sup> After another five meetings of the ASEAN-China JWG from 2005 to 2010, 20 times the draft Guidelines being rephrased by ASEAN, the parties were still not able to reach a consensus on this issue.

Trying to gain a diplomatic breakthrough before the ARF 18 meeting, ASEAN sped up the process of finalizing the Guideline for DOC implementation. On July 19, Indonesian President Susilo Bambang Yudhoyono urged the delegates to finalize the Guideline between ASEAN and China.<sup>57</sup>

Finally, after nine years of negotiations, ASEAN decided to delete point 2 from the proposed Guideline just before the AMM meeting in July 2011 in Indonesia. On July 20, the SOM meeting on DOC implementation between ASSEAN and China reached an agreement on the Guidelines, which were later endorsed by the following ASEAN-China Foreign Ministers' Meeting. The Guidelines,

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<sup>54</sup> "Report on the Second Meeting of the ASEAN-China Joint Working Group" (Hainan, China, February 8–9, 2006).

<sup>55</sup> "Report on the Second ASEAN-China Senior Officials Meeting on the Implementation of the DOC," (Siem Reap, Cambodia, May 2006).

<sup>56</sup> Author's interview with an ASEAN official

<sup>57</sup> "ASEAN Foreign Ministers Discuss South China Sea Dispute", <http://www.voanews.com/english/news/asia/ASEAN-Foreign-Ministers-Discuss-South-China-Sea-Dispute-125816578.html>

which aims to “guide the implementation of possible joint cooperative activities, measures and projects” in the South China Sea, consists of 8 points:

1. The implementation of the DOC should be carried out in a step-by-step approach in line with the provisions of the DOC.
2. The Parties to the DOC will continue to promote dialogue and consultations in accordance with the spirit of the DOC.
3. The implementation of activities or projects as provided for in the DOC should be clearly identified.
4. The participation in the activities or projects should be carried out on a voluntary basis.
5. Initial activities to be undertaken within the ambit of the DOC should be confidence-building measures.
6. The decision to implement concrete measures or activities of the DOC should be based on consensus among parties concerned, and lead to the eventual realization of a Code of Conduct.
7. In the implementation of the agreed projects under the DOC, the services of the Experts and Eminent Persons, if deemed necessary, will be sought to provide specific inputs on the projects concerned.
8. Progress of the implementation of the agreed activities and projects under the DOC shall be reported annually to the ASEAN-China Ministerial Meeting (PMC)./.<sup>58</sup>

From ASEAN’s viewpoint, insisting on point 2 of the draft Guidelines that “ASEAN members shall consult with each other before meeting with China” is no longer necessary as they are required to do so under ASEAN Charter, which came into force in December 2008. Article 41, paragraph 4 of Charter states that in conducting external relations, members shall, “on the basis of unity and solidarity, coordinate and endeavor to develop common positions and pursue joint actions”.<sup>59</sup> Furthermore, the adoption of the Guidelines would strengthen ASEAN political solidarity on the South China Sea issues and enhance the Association’s credibility as a “central” driver for the management of the South China Sea disputes, which has been partly undermined due to slow progress on the negotiation of the Guidelines.

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<sup>58</sup> “Guidelines for the Implementation of the DOC,” ASEAN website, <http://www.asean.org/documents/20185-DOC.pdf>.

<sup>59</sup> Charter of the Association of Southeast Asian Nations, Singapore, 20 November 2007. <http://www.asean.org/publications/ASEAN-Charter.pdf>

From China's perspective, after being isolated diplomatically, Beijing needs to reassure neighboring countries and to improve its partly damaged image in the region. Furthermore, in addition to the DOC, signing other document with ASEAN on the South China Sea issues, especially before the important meeting of the ARF 18 in July 24, China could demonstrate to the international community that ASEAN and China can work together to manage the disputes and that there is no need for external involvement in the South China Sea issues.

### **DOC Implementation and the COC**

After signing the Guidelines for DOC implementation, ASEAN and China are holding different views on the next steps to resolve the South China Sea issues. While ASEAN wanted to accelerate the process of establishing a more legally code of conduct,<sup>60</sup> China was reluctant to enter negotiations for a new set of rules that could constrain Chinese activities in the South China Sea. China's Foreign Minister Yang Jiechi said at the ARF 18 in July in Indonesia that China was open for discussing the formulation of a code of conduct "when conditions are ripe".<sup>61</sup> To slow the movement towards a code of conduct, China has emphasized a concentration on cooperative activities in the South China Sea. At the ASEAN-China SOM meeting on DOC implementation in July, the Chinese side proposed a series of initiatives for cooperative activities under the DOC framework. These initiatives include holding a seminar on navigation freedom in the South China Sea and establishing three technical committees on marine scientific research and environmental protection, navigation safety and search and rescue, combating on transnational crime at sea. To take initiative, ASEAN also decided that the first cooperative project on DOC implementation between ASEAN and China should be a Workshop on search and rescue cooperation initiated by Vietnam.

On other hand, ASEAN decided to begin drafting a code of conduct in the South China Sea and establishing a special ASEAN Working Group which met for the first time in November to discuss the elements of the COC.

An encouraging signal for moving toward COC from Chinese side happened at the East Asia Summit held in Indonesia in November. At the meeting, the South China Sea issue again loomed large as five Asean members—Singapore, Philippines, Vietnam, Malaysia and Thailand—as well as United States, Australia and India raised the South China Sea directly, while Russia, Indonesia and

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<sup>60</sup> "ASEAN wants faster process on COC", <http://www.thejakartapost.com/news/2011/05/09/asean-wants-faster-process-coc.html>

<sup>61</sup> Remarks by Foreign Minister Yang Jiechi at the ARF Foreign Ministers' Meeting. <http://www.fmprc.gov.cn/eng/zxxx/t842183.htm>

five others talked about maritime security. China's prime minister Wen Jiabao responded by advocating resolving the issue through dialogue with claimant countries but didn't mention the word "bilaterally" as Chinese officials normally do when discussing the matter. Mr. Wen also committed that China will move toward agreeing to a code of conduct in the South China Sea, without saying "at the appropriate time" or "when circumstances are propitious" as per usual.<sup>62</sup>

After signaling to work with ASEAN on a code of conduct, China wants to participate in the early stages of discussion with ASEAN members and does not want to see ASEAN agree internally first and then present to China a full text version of COC. On ASEAN's side, the association continues with its practice of coordinate and reach internal consensus before working with external partner. The ASEAN SOM Working Group on Regional Code of Conduct in the South China Sea met for second time on 9 January 2012 in Siem Reap, which discussed the duties, functions, and work program of the Working Group, as well as the possible elements to be incorporated in the COC.<sup>63</sup> The third WG ASEAN SOM on COC will be convened in Hanoi on 28 February 2012 and the fourth meeting will be organized in Malaysia.

## **Conclusions**

As the most powerful country in the region, China has set the tone for the disputes in the South China Sea. After 2007, when Beijing shifted its policy toward the South China Sea and adopted a more assertive approach, tensions increased. Opportunities were thus created for the United States to get involved and strengthen its position in the region. In late 2010, Beijing moderated its tone on the South China Sea to assure neighboring countries and to improve its partly damaged image in the region. However, China's softened tone did not reflect a major shift in its overall policy and was simply a tactic in dealing with the South China Sea issue. In the first half of 2011 China hardened its approach towards the South China Sea with more assertive or even aggressive behaviors, which provoked more involvement from other powers, especially the US and more concern from ASEAN side. In the second half of 2011, the concerned parties intensified diplomatic negotiations to calm down the disputes and manage the situation with the results of a more stable situation on the sea in recent months. In the future, the stable situation and peaceful environment in the South China Sea

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<sup>62</sup> Laura Meckler "China's Wen Discusses South China Sea Issue", The Wall Street Journal, November 21, 2011  
<http://online.wsj.com/article/SB10001424052970203710704577049890766208860.html>

<sup>63</sup> ASEAN Senior Officials' Meeting Siem Reap, Cambodia, 10 January 2012,  
<http://www.kemlu.go.id/Pages/PressRelease.aspx?IDP=1291&l=en>

will largely depend on whether China will continue with its moderated approach. A moderated policy of China towards the South China Sea depends largely on dynamics within China's internal politics, but in some extent it might be resulted from: i) a more coordinated and consensus ASEAN; ii) involvement of other powers, especially from the US; iii) a detailed, legally binding and workable regional COC, which could ensure all parties to play by the rules.