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# Rising Tensions in the South China Sea: Prospects for a Resolution of the Issue

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The article examines the overlapping and conflicting claims to the South China Sea which have resulted in a stalemate. China claims the Spratly and the Paracel islands as well as the surrounding waters and has attempted to prevent the other claimants, whether Vietnam, the Philippines or Malaysia, from developing the oil and gas potential of their own claim zones. The stalemate is an uncertain one and moves to develop the energy resources of the area could result in conflict. The article then examines various approaches towards a resolution of the problem including, multilateral negotiations, as well as legal and maritime regimes. It concludes by identifying a maritime energy regime as one approach that could lead to a resolution by involving China and ASEAN giving them both a stake in the stability of the area.

## Description of the Issue

The South China Sea area comprises the Spratly Islands, known in Vietnam as the Trường Sa and in Chinese as the Nansha, the Paracel Islands, known as the Hoàng Sa and the Zhongsha, the Pratas Islands, also known as the Dongsha, and the Macclesfield Bank, also known as Quần đảo Trung Sa or Zhongsha Qundao. Estimates of the number of features in the area vary considerably because of the difficulty of distinguishing between islands, atolls and reefs, many of which are only visible in low tide. Some estimate the number at 190 islets, still others opt for the general figure of 400 rocks, reefs, and islands, other estimates range as high as 650. Figures on the number of occupied islands for this reason vary and range from 48-50. The term occupation is ambiguous as some islands may have a permanent garrison while small atolls may be garrisoned for part of the year; others may have only a token presence and still be called "occupied". At present, Vietnam has occupied or has a presence on twenty-seven features; the Philippines claims a presence on nine features; China has a presence on nine features, though some reports claim only seven; Malaysia has occupied three but has a presence on another two islands; Taiwan occupies one island. Chinese and Vietnamese claims loop around the Spratly as well as the Paracel Islands and overlap with the specific claims raised by the Philippines, Malaysia and Brunei. These countries have specific claims to areas contiguous to their own territory which also overlap. The Philippine claim to *Kalayaan* (Freedomland) as an extension of the island of Palawan overlaps with the Malaysian claim which extends from Sarawak/Sabah;

Brunei's claim which extends from its own territory overlaps with that of both Malaysia and the Philippines.

Both Vietnam and China have based their claims on historical contact and prior discovery. Vietnam has argued that contact was first made during the Nguyen dynasty (16<sup>th</sup>-19<sup>th</sup> centuries), though evidence exists for such contact with the Paracel Islands but not for the Spratlys. Vietnam also bases its claim on rights of succession as the heir to the French colonial regime which first occupied islands in the Spratlys in 1933. China has claimed the area on the basis of prior discovery and it protested vociferously when the San Francisco Conference of September 1951 formally divested Japan of ownership of the islands but refused to return them to China. Without an occupant the way was open for Philippine adventurer Tomas Cloma to claim *Kalayaan* or "Freedomland" for the Philippines in May 1956. Cloma's declaration embraced an area that extended from Palawan and included 53 features. It was supported by Philippine Foreign Secretary Carlos Garcia who in December 1956 issued the Garcia Declaration which treated the area in the Cloma claim as *terra nullius*. This act triggered a response from South Vietnam, which began occupying islands in the area, and Taiwan which was motivated to re-occupy Itu Aba or Tai Ping Island after withdrawing from it in 1950. In 1975 a reunited Vietnam began occupying islands in the Spratlys. President Marcos was then prompted to incorporate the Philippine claim into two presidential decrees on 11 June 1978; Presidential Decree number 1596 defined the coordinates of the *Kalayaan* and declared that it was "subject to the sovereignty of the Philippines", it was also made a separate municipality of Palawan province.<sup>1</sup> Presidential Decree number 1599 declared a Philippine Exclusive Economic Zone (EEZ) of 200 nautical miles which fell short of including all of *Kalayaan*. Manila has argued that *Kalayaan* forms part of the continental shelf of the Philippines and extends further West than its EEZ. Malaysia's claim was stimulated by the Philippine presidential declarations and was expressed with the publication of a map in 1979 authorised by the Home Ministry. Malaysia and the Philippines have similarly occupied islands in their own claim zones in what has been an action-reaction response to the moves of neighbouring states.<sup>2</sup>

One important factor in the scramble for occupation of the islands was the United Nations Convention on the Law of the Sea (UNCLOS) which was negotiated in December 1982. It allowed each littoral state to claim an EEZ extending 200 nautical miles from territorial sea baselines or a continental shelf and specified that islands could generate their own EEZs or continental

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<sup>1</sup> 'Presidential Decree No. 1596', *Chan Robles Virtual Law Library*, <<http://www.chanrobles.com/presidentialdecrees/presidentialdecreeno1596.html>> [Accessed 20 June 2010].

<sup>2</sup> For a background to the dispute and the various claims, see Choon-Ho Park, "The South China Sea Disputes: Who Owns the Islands and the Natural Resources?", *Ocean Development and International Law Journal*, vol. 5, no. 1 (1978); Robert Rau, 'Present and Future Maritime Security Issues in the Southeast Asian and South China Seas', *Contemporary Southeast Asia*, vol. 8, no. 1 (June 1986).

shelves.<sup>3</sup> UNCLOS did not offer much support for Vietnamese and Chinese claims which go beyond their respective EEZs or continental shelves as historical rights of first discovery do not carry much weight. This has stimulated both claimants to occupy islands for the EEZs and the continental shelves they would generate. Indeed, international law has stressed the importance of the “effective occupation” of islands to prove title rather than historical rights or first discovery. This precedent was laid down by the Permanent Court of Arbitration in the Island of Palmas case in April 1928. More recently, The International Court of Justice decided in December 2002 in favour of Malaysia and against Indonesia in relation to ownership over Pulau Ligitan and Pulau Sipadan for similar reasons. The court applied the test of evidence of “activities evidencing an actual, continued exercise of authority over the islands, i.e., the intention and will to act as sovereign”. It found that Malaysia had engaged in a regular pattern of state-sponsored activities “revealing an intention to exercise state functions” in relation to the islands and which were not opposed by Indonesia.<sup>4</sup> Another major hurdle for the claimants is that UNCLOS distinguishes between islands and rocks or reefs which cannot generate EEZs or continental shelves. Article 121 (3) refers to rocks and reefs which “cannot sustain human habitation or an economic life of their own shall have no exclusive economic zone or continental shelf.” Many of the “occupied” features in the South China Sea at first sight would not meet this standard.<sup>5</sup> Nonetheless, claimants have acted to pre-empt others from occupying features in their own claim zones without as yet defining clearly their legal position which has been postponed to some later time. Later, they may press for more liberal interpretations of economic viability to support their claims. If the waters around a reef or an atoll are regularly used for tourism or fishing, if snorkelling or diving amongst the reefs is conducted on an organised basis the requirement may be satisfied. In the Ligitan/Sipadan case above the international court noted the importance of turtle egg collecting in supporting the Malaysian claim of “effective occupation” and similar arguments may be used in the future to support claims of economic viability.

The absence of any movement towards a resolution of the issue raises the prospect of future conflict. As a latecomer China has had the incentive to use force to stake a claim in an area that was already occupied by others,

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<sup>3</sup> UNCLOS 1 was negotiated over 1956-58 and resulted in the 1958 convention, UNCLOS-II met in 1960 without result; the negotiations for UNCLOS-III began in 1973 and were concluded in December 1982 with the signing of the convention; it came into force in 1994 when the required number of 60 state signatories was met. The Philippines ratified UNCLOS in 1984, Vietnam in 1994, while both Malaysia and China ratified the convention in 1996.

<sup>4</sup> ‘International Court Finds that Sovereignty over Islands of Ligitan and Sipadan Belongs to Malaysia’, *Press Release, International Court of Justice/605*, 17 December 2002, <<http://www.un.org/News/Press/docs/2002/ICJ605.doc.htm>> [Accessed 20 June 2010].

<sup>5</sup> Itu Aba (Ba Dinh, or Tai Ping Dao) which is approximately 960 by 400 metres has its own water supply may qualify, other possible candidates include London Reef, Namyit Island (Bai Nam Yet or Hung Ma Dao).

and to be included in future negotiations relating to the South China Sea. China resorted to naval power to eject South Vietnam from the Paracel islands in January 1974 but its limited off shore naval capability could not reach down into the Spratlys. Moreover the American naval presence in the Philippines and later the Soviet navy in Cam Ranh Bay acted as a deterrent to Chinese action. Only when Soviet leader Gorbachev began improving the relationship with Beijing did China have the confidence to move against Vietnam in the Spratlys and to occupy islands. In March 1988 Chinese naval vessels clashed with Vietnamese near Fiery Cross Reef (Đá Chũr Thập or Yung Shu Jiao) three Vietnamese vessels were sunk with the loss of seventy-two sailors. China then occupied seven islands, and later another two. This action alarmed the ASEAN states and the international community and aroused suspicions of Chinese long term intentions. Nonetheless, China was induced to join ASEAN to sign the Declaration of the South China Sea in July 1992. In this declaration China and ASEAN were obliged to resolve questions of sovereignty in the South China Sea "by peaceful means, without resort to force."<sup>6</sup> Subsequently, however, China reverted to stealth when in February 1995 it was revealed that it had occupied Mischief Reef (Meijijiao or Panganiban) which is within the Philippine EEZ. China then built structures on this reef which were extended and strengthened in 1999, supposedly for fishing purposes. Stalemate has characterised the situation since as the competing claims remain unresolved. In November 2002 ASEAN and China signed a 'Declaration on the Conduct of Parties in the South China Sea' (DOC) which was lauded as a positive development within ASEAN and an indication that China's intentions had changed for the better.<sup>7</sup> The DOC, however, was a measure to maintain the status quo and worked to Chinese advantage in a situation where Beijing feared US involvement. Rather than signalling a Chinese intention to resolve the issue DOC was a defensive move for China and an indication of prolonged stalemate.

## Rising Tensions

Stalemated situations can exist for some time in international politics without erupting into violence in the absence of a pressing need for a resolution. If normal business can be conducted the status quo may be acceptable to all sides as an alternative to conflict. The status quo in the South China Sea, however, is an uncertain one and there are forces which are likely to challenge it in the future. Claimants have an incentive to modernise and expand their maritime capabilities to strengthen their positions in which case the possibility of local naval clashes cannot be dismissed. China regards the area as its "South Gate" through which 80 percent of its crude oil imports are

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<sup>6</sup> 'ASEAN Declaration On The South China Sea Manila, Philippines', Association of Southeast Asian Nations web site, 22 July 1992, <<http://www.aseansec.org/3634.htm>> [Accessed 20 June 2010].

<sup>7</sup> 'Declaration on the Conduct of Parties on the South China Sea', Association of Southeast Asian Nations web site, <<http://www.aseansec.org/13163.htm>> [Accessed 20 June 2010].

shipped from the Middle East and Africa and it has strengthened its own naval capability accordingly.<sup>8</sup> China's actions, however, prompt similar moves from the other claimant states whose ties with external powers such as the United States and Japan place the security of China's southern gate at risk. Moreover, efforts to exploit the oil and gas reserves of the South China Sea could also trigger conflict while the claims remain unresolved. Global demand for energy will increase in the future as China, India, and other producers seek new sources to fuel their expanding economies. China's energy needs are increasing rapidly and imports are slated to reach 50 percent of consumption in 2010.<sup>9</sup> China has attempted to diversify energy supplies to reduce the risk of supply disruption by seeking long term agreements with Venezuela, Nigeria, Sudan and greater interest in the South China Sea's energy resources would also be stimulated. Chinese estimates of oil reserves in the South China Sea have been noticeably optimistic prompting the US Department of Energy to declare that "there is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources".<sup>10</sup> Natural gas may be more important than oil in the South China Sea as US Geological Survey estimates claim that about "60 to 70% of the region's hydrocarbon resources are natural gas". Again, Chinese estimates of the area's natural gas reserves are considerably higher than others. In April 2006 the American company Husky Energy which was conducting exploration with the Chinese National Offshore Oil Corporation (CNOOC) claimed that proven natural gas reserves of nearly 4 to 6 trillion cubic feet existed near the Spratly Islands.<sup>11</sup>

Vietnam is the major oil producer in the area producing some 350,000 barrels a day in 2007. The joint venture called Vietsovpetro which was negotiated with the Soviet Union in 1981 and continues to function today operates three oil fields in the South China Sea; they are the White Tiger field (Bach Hổ) which first began production in 1986, the Blue Dragon field (Rồng Xanh) and the Big Bear field (Đại Hùng). Production at the White Tiger field, which is Vietnam's main off shore oil field, has been declining which has prompted a search for alternative fields. Vietnam has been exploring production feasibility in other fields such as the Black Lion (Sư tử Đen), the Gold Lion (Sư tử Vàng) and the White Lion (Sư tử Trắng). As Vietnam attempts to exploit new fields there is the possibility of new clashes with China. Since China has claimed most of the South China Sea it would oppose efforts on the part of other claimants to exploit its resources. In October 2004 a new offshore oilfield was discovered in northern Vietnam west of Hainan Island which involved a consortium including PetroVietnam,

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<sup>8</sup> 'Changing Tack with Sea Strategy', *Chinadaily.com*, 13 May 2009.

<sup>9</sup> 'China', *EIA, US Energy Information Administration* <<http://www.eia.doe.gov/cabs/China/Oil.html>> [Accessed 20 June 2010].

<sup>10</sup> See 'South China Sea Oil and Natural Gas', *EIA, US Energy Information Administration, Official energy Statistics from the US Government* <[http://www.eia.doe.gov/emeu/cabs/South\\_China\\_Sea/OilNaturalGas.html](http://www.eia.doe.gov/emeu/cabs/South_China_Sea/OilNaturalGas.html)> [Accessed 20 June 2010].

<sup>11</sup> *Ibid.*

Malaysia's Petronas Carigali, Singapore Petroleum as well as the company called American Technology. Beijing's Foreign Ministry protested that China's sovereign rights were violated.<sup>12</sup> When Forum Energy Philippines Corporation prepared for oil extraction from Reed bank which is inside the Philippines EEZ Chinese Ambassador Liu Jianchao objected.<sup>13</sup> Malaysia and Brunei in 2003 disputed the development of a gas field in an area where their claims overlap. Identical blocs were awarded to different companies; Malaysia awarded exploration rights to Murphy Oil while Brunei awarded similar rights to Royal Dutch Shell and France's Total. The dispute prevented work from continuing and it was not until March 2009 that the two claimants agreed to settle their territorial dispute to allow work to proceed.<sup>14</sup> China warned the American oil company ExxonMobil when it signed a preliminary cooperation agreement with PetroVietnam relating to an exploration project in the South China Sea. It claimed that this activity would "infringe on China's sovereignty and territorial integrity in the South China Sea". China's Foreign Ministry threatened the American company saying that if it went ahead with the project it would jeopardise its future business on the mainland. In 2008 China also warned BP in regard to a similar exploration agreement with PetroVietnam, the British oil company halted operations and declared that PetroVietnam had continued alone with surveying activity.<sup>15</sup>

More recently, in February 2009 Philippine Congress passed the baselines law which was intended to identify country's archipelagic baselines. The act excluded *Kalayaan* and Scarborough shoal from being part of Philippine territory but placed them in an ambiguous category as a "regime of islands under the Republic of the Philippines."<sup>16</sup> China protested nonetheless and its embassy in Manila declared it illegal. China also opposed Philippine plans to extract oil from the Reed Bank which is 100 kilometres west of Palawan, and well within the Philippine EEZ. Chinese Ambassador Liu Jianchao told the Filipinos that China opposed unilateral economic activity in disputed areas. China also protested when Malaysia and Vietnam on 7 May 2009 issued a joint submission on the outer limits of their extended continental shelves to the UN Commission on the Limits to the Continental Shelf. China urged the UN Commission to follow its own rules and not to

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<sup>12</sup> Tran Dinh Thanh Lam, 'Vietnam Oil Find Fuels China's Worries', *Energy Bulletin*, 26 October 2004, <<http://www.energybulletin.net/node/2838>> [Accessed 20 June 2010].

<sup>13</sup> 'China Objects to RP Oil Project', *Philstar.com*, 15 August 2009, <<http://www.philstar.com/Article.aspx?articleid=496221>> [Accessed 20 June 2010].

<sup>14</sup> 'Brunei, Malaysia settle 6-year oil territory', *Sun. Star network online*, <<http://67.225.139.201/network/brunei-malaysia-settle-6-year-oil-territory-spat-146-pm>> [Accessed 20 June 2010].

<sup>15</sup> 'China Angered over Exxon Mobil Oil Agreement', *Chinadaily.com*, 23 July 2008; Michael Richardson, 'Rising Demand for Oil to Churn up South China Sea', *The Straits Times*, 30 July 2008.

<sup>16</sup> David Cagahastian, 'Arroyo Signs Baselines Bill into Law' *Manila Bulletin*, 11 March 2009, <<http://www.mb.com.ph/node/198552>> [Accessed 20 June 2010].

review a submission in case of a dispute.<sup>17</sup> Other problems were created by the arrest and confiscation of fishing vessels in claimant zones. China imposed a fishing ban in an area which overlapped with the Vietnamese claim between 16 May and 1 August 2009. Fishing patrols were increased and Vietnamese fishermen were arrested and their vessels were confiscated. According to Vietnam's Quang Ngai province from 2005 to the end of March 2009 a total of seventy-four Vietnamese fishing boats and 714 fishermen were arrested by various claimants; China arrested thirty-three vessels and 373 fishermen and then demanded a ransom for the release of these vessels.<sup>18</sup> Chinese fishermen have been arrested by Indonesia and in June 2009 China protested Indonesia's arrest of seventy-five Chinese fishermen who were fishing, according to the Indonesian Foreign Ministry, in Indonesia's EEZ near the Natuna Islands.<sup>19</sup> Thirty-eight Vietnamese fishermen were arrested by the Malaysian Maritime Enforcement agency in May 2009 for illegal fishing in the Malaysian EEZ; four fishing vessels and their catch were confiscated.<sup>20</sup> As fish stocks dwindle in the area the problem of fishery disputes will escalate.

In the past China's weakness was its inability to extend naval power into the area to enforce its claim and also to protect its own fishermen. China has been strengthening its naval power and has been constructing a major underground nuclear submarine base near Sanya on Hainan Island. Sanya may become a major power projection point for the Chinese navy through the Malacca Straits and the Indian Ocean. It would allow China to monitor the Southeast Asian sea lanes and would give cause for concern to countries such as Japan and South Korea whose economies are also dependent upon imported oil from the Middle East.<sup>21</sup> From Sanya on 26 December 2008 China dispatched a naval squadron, two destroyers and a supply vessel, for anti piracy duties in the Gulf of Aden. This was the first time that Chinese naval vessels have ventured so far in modern times revealing a newly developed capability to protect Chinese shipping in distant oceans.<sup>22</sup> China increased its patrols in the South China Sea in 2009 to protect its EEZ, to curb illegal fishing activities and to "protect its rights and

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<sup>17</sup> 'China Urges UN Commission not to Review Malaysia-Vietnam Submission', *People's Daily online*, 8 May 2009, <<http://english.peopledaily.com.cn/90001/90776/90883/6653317.html>> [Accessed 20 June 2010].

<sup>18</sup> 'Fishing Ground Off Limits, Fishing Boats Stay in Port', *Vietnam Net*, 8 June 2009, <<http://english.vietnamnet.vn/social/2009/06/851942/>> [Accessed 20 June 2010]. Also 'China Arrests Vietnamese Fishermen, Demands Astronomical Fines', *Vietnam Net*, 30 June 2009, <<http://english.vietnamnet.vn/reports/2009/06/855491/>> [Accessed 20 June 2010].

<sup>19</sup> 'Indonesia Told to Release 75 Chinese Fishermen', *Chinadaily.com*, 26 June 2009.

<sup>20</sup> '38 Vietnamese Fishermen Caught', *New Straits Times*, 14 May 2009.

<sup>21</sup> 'Secret Sanya—China's New Nuclear Naval Base Revealed', *Jane's Intelligence Review*, 21 April 2008, <[http://www.janes.com/news/security/jir/jir080421\\_1\\_n.shtml](http://www.janes.com/news/security/jir/jir080421_1_n.shtml)> [Accessed 20 June 2010].

<sup>22</sup> Frank Ching, 'China Comes to the Fore to Safeguard its Shipping', *New Straits Times*, 8 January 2009.

interests in the South China Sea.”<sup>23</sup> On 10 March China’s largest fishery patrol vessel the Yuzheng 311 was sent from Sanya base to the Paracels and then the Spratly Islands on the same day that the Philippine base line bill was signed by the President. On 26 March the Yuzheng 45001 followed while in May China sent the Yuzheng 44183 on a similar voyage.<sup>24</sup> Other vessels soon followed in what was intended to be a regular patrol routine over the next three to five years. Director of the Administration of Fishery and Fishing Harbor Supervision of the South China Sea, Wu Zhuang, stressed China’s need to protect its fishermen saying that “China should also build a few fishery administration bases on the reefs and islands in the South China Sea, so that the response to incidents can be quicker”.<sup>25</sup> If China is planning to increase its presence in the South China in this way more incidents, and possible naval clashes involving the other claimants, would be expected.

Most disturbing for the security of the area was China’s confrontation of the American survey vessel the USNS *Impeccable* on 9 March 2009. The American survey vessel was located some 113 kilometres off Hainan island when it was surrounded and harassed by five Chinese ships, a naval intelligence vessel, two smaller trawlers, a fisheries patrol boat and an official oceanographic ship.<sup>26</sup> The Chinese insisted that the *Impeccable* had conducted “spying activities” in China’s EEZ and that they were within their rights to confront the vessel which, they said, should observe China’s laws and regulations.<sup>27</sup> The Americans claimed rights of passage in what they regarded as international waters and insisted that the *Impeccable* was conducting routine operations in the South China Sea in accordance with international law. They declared that UNCLOS allowed military activity inside exclusive economic zones and there was nothing in the convention which specially prohibited that.<sup>28</sup> No doubt, the *Impeccable* had been collecting surveillance data on shipping movements around Sanya base and as China deploys its nuclear submarines and long range patrol vessels there the Pentagon’s interest in surveillance would increase. The US Navy dispatched a guided-missile destroyer the USS *Chung-Hoon* to the South China Sea to protect the *Impeccable* to show that it would not be

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<sup>23</sup> ‘Reinforced Patrol Sails from Hainan’, *Chinadaily.com*, 19 May 2009.

<sup>24</sup> Zhan Lisheng, ‘One More Ship to Patrol the South China Sea’, *China Daily*, 15 May 2009, <[http://www.chinadaily.com.cn/china/2009-05/15/content\\_7779730.htm](http://www.chinadaily.com.cn/china/2009-05/15/content_7779730.htm)> [Accessed 20 June 2010].

<sup>25</sup> ‘Nation charts course toward secure South China Sea’, *Chinadaily.com*, 1 July 2009.

<sup>26</sup> Thom Shanker and Mark Mazzetti; ‘Tussle at Sea Has U.S. and China Quarreling’, *The New York Times*, 11 March 2009.

<sup>27</sup> ‘Navies Try to Resolve Maritime Discords’, *China Daily*, 15 May 2009, <[http://www.chinadaily.com.cn/cndy/2009-05/15/content\\_7779111.htm](http://www.chinadaily.com.cn/cndy/2009-05/15/content_7779111.htm)> [Accessed 20 June 2010]; Ariana Eunjung Cha, ‘China Derides Account by U.S. of Ship Dispute’, *Washington Post*, 10 March 2009.

<sup>28</sup> For a report on the clash see ‘United States Protests Chinese Interference with U.S. Naval Vessel, Vows Continued Operations’, *The American Journal of International Law*, vol. 103, no. 2 (April 2009), pp. 349-51.

intimidated.<sup>29</sup> Subsequently, similar incidents involving Chinese harassment of American surveillance vessels were reported including fly-bys by Chinese aircraft. On 12 June 2009 a Chinese submarine collided with an underwater sonar array towed by the Arleigh-Burke destroyer the USS *John S. McCain* in the South China Sea. This time the Chinese called the incident an accident and the Americans regarded it as an "inadvertent encounter".<sup>30</sup> Nonetheless, China's aggressive patrolling in the South China Sea has raised the concern that another inadvertent encounter may provoke an unintended conflict as China tests its newly developed naval strength.<sup>31</sup>

The development of Chinese naval power in the South China Sea could have several consequences which would have an unsettling effect upon the security of the area. The first is that claimants who rely upon American support may find that the United States would be deterred from acting in the area in which case China would be emboldened to act more aggressively. The United States has repeatedly stressed that it has no position over the claims and has expressed its interest in maintaining stability in the area, and in supporting freedom of navigation, and the right to lawful commercial activity in East Asia's waterways.<sup>32</sup> The Chinese have interpreted America's position as commendable and appropriate neutrality in which case they may regard it as a green light for further activities in the area intended to press the claimants to accept China's claims.<sup>33</sup> In earlier decades the Truman Administration failed to include the Korean Peninsula as a major interest in Northeast Asia which emboldened Kim Il-Sung to take the risk of launching an attack on the South Korea. Ambiguity, indeed, may have unexpected consequences for the United States. Secondly, some claimants would similarly develop their own naval and air capability to deter the Chinese and to protect their own claims and fishermen in the area. Their intention would be to signal a willingness to stand up to China calculating that Beijing would hesitate to use force against a smaller power when it has so much at stake in peaceful relations with the region. Vietnam which has already clashed with China twice in the South China Sea may do so yet again calculating that China would be restrained by its economic and investment needs, and its desire to project a peaceful image within East Asia. In December 2009 Vietnam announced the purchase of six "Project 636" type Kilo Class submarines and twelve SU-30MKK fighter jets from Russia; the submarine

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<sup>29</sup> Ann Scott Tyson, 'Destroyer to Protect Ship Near China', *Washington Post*, 13 March 2009.

<sup>30</sup> 'Sub Collides with Sonar Array Towed by U.S. Navy Ship', *CNN.com*, 12 June 2009, <<http://www.cnn.com/2009/US/06/12/china.submarine/index.html>> [Accessed 20 June 2010].

<sup>31</sup> Mohd Nizam Basiron, 'Keeping Stability in South China Sea', *New Straits Times*, 20 April 2009.

<sup>32</sup> Testimony of Deputy Assistant Secretary Scot Marciel, Bureau of East Asian and Pacific Affairs, US Department of State before the Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, United States Senate, 15 July 2009, <<http://foreign.senate.gov/testimony/2009/MarcielTestimony090715p.pdf>> [Accessed 20 June 2010].

<sup>33</sup> 'Washington Stance on Nansha Applauded', *Chinadaily.com*, 5 June 2009.

deal was estimated at \$2 billion and would give Vietnam a new capability that it never had before. The Sukhoi fighters came with a \$600 million price tag and would increase Vietnamese air strength from eight SU-27s and SU-30MKKs to a total of twenty.<sup>34</sup>

## Approaches to a Resolution

### MULTILATERAL NEGOTIATIONS

Proposals for multilateral negotiations over the South China have been opposed by China which has insisted that negotiations with the claimants be conducted bilaterally. Philippine President Fidel Ramos in 1992 proposed an international conference on the Spratlys under UN auspices which many regarded as a logical step. The proposal was repeated by his Foreign Minister Raul Manglapus at the ASEAN Foreign Ministers meeting in July 1992. The Chinese Foreign Ministry, however, quickly voiced its opposition and the proposal has not been raised since.<sup>35</sup> In March 1994 Ramos also called for the demilitarisation of the Spratlys and a freeze on all destabilising activities in the area. The intention behind Ramos' thinking was to kick start negotiations over the issue which would bring the parties together to discuss the main issues at a later stage. In any case, the demilitarisation of the islands was a non-starter because it would give the advantage to China, which had extensive claims but comparatively fewer islands under occupation. The ASEAN Regional Forum (ARF) was the obvious place to raise the issue and it was created in 1994 with the purpose of engaging China across a whole range of troubling issues including the South China Sea. The Philippines discovered, however, that after China's occupation of Mischief Reef ARF senior officials kept the issue off the agenda. Neither ASEAN nor the ARF is able to deal with this issue which raises questions about their role and purpose.<sup>36</sup> When the ARF met in met in Phuket on 23 July 2009 China's Ambassador to ASEAN Xue Hanqin again ensured that discussion of the issue was kept off the agenda. She declared that this was not an issue for ASEAN, that it involved only the coastal states, and that China intended to resolve the dispute through bilateral and not multilateral negotiations.<sup>37</sup> ASEAN has not always been united over this issue in any case as Malaysia has supported China over bilateral negotiations. One way of circumventing this opposition to multilateralism would be to adopt a step by step approach. If the claimants start by

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<sup>34</sup> 'Vietnam Buys Russian Kilo Class Subs, SU-30 Fighters, Nuke Plant', *Defense Industry Daily*, 17 December 2009, <<http://www.defenseindustrydaily.com/Vietnam-Reportedly-Set-to-Buy-Russian-Kilo-Class-Subs-05396/>> [Accessed 20 June 2010].

<sup>35</sup> *Reuters*, 16 July 1992.

<sup>36</sup> Lee Lai To, 'China, the USA and the South China Sea Conflicts', *Security Dialogue*, vol. 34, no. 1 (March 2003).

<sup>37</sup> 'Beijing: South China Sea Territorial Disputes not on ASEAN Agenda' *VOA News.com*, 1 October 2009, <<http://www1.voanews.com/english/news/a-13-2009-10-21-voa20.html>> [Accessed 20 June 2010]; Greg Torode, 'A Diplomatic Victory for China', *South China Morning Post.com*, 31 October 2009.

agreeing over bilateral issues this could reduce the disputed area to manageable proportions and leave the difficult part, which would require multilateral negotiations for later.<sup>38</sup> China and Vietnam have conducted bilateral negotiations at deputy foreign minister level in Beijing to explore a “transitional and provisional solution for the sea issue”. They agreed that a solution should be based upon international law and UNCLOS but could not agree on anything else.<sup>39</sup> The problem is that there are few purely bilateral issues in the South China Sea as Chinese and Vietnamese claims overlap with those of the other claimants. China did at least accept the DOC in 2002 which was prematurely regarded within ASEAN as evidence of Beijing’s acceptance of multilateralism and a hope for the future. Vietnam has been discussing with other ASEAN members the possibility of extending the DOC into a proper code of conduct, one that would be legally binding for all parties.<sup>40</sup> The Vietnamese have been concerned about China’s military build up in the area and intend to use their position as rotating Chair of ASEAN for 2010 as a platform to bring about progress on this much delayed proposal. When the ARF met in Phuket in 23 July 2009 it reaffirmed the continuing importance of the DOC and called for “the eventual conclusion of a Regional Code of Conduct in the South China Sea”.<sup>41</sup> One major stumbling block has been Vietnam’s demand that the Paracel Islands be included which China steadfastly opposes. ASEAN may hope to engage China in a way that would bring about constraints upon its behaviour and provide reassurance to members but it is still unable to come to grips with this issue.

## **LEGAL RESOLUTION**

A legal resolution of the South China Sea dispute would require the application of UNCLOS principles to reconcile the different claims. It may also entail an agreement to submit the issue to external adjudication but this would in both cases require a political decision from the claimants. One of the uncertainties of the dispute is that China has not defined its claim although it has published maps of its nine dash claim line in the South China Sea they are vague and insufficient for legal purposes. In any case should the claimants reach a political decision to seek a resolution by legal means they would refer to Articles 74 and 83 of UNCLOS; these articles stipulate that in the case of overlapping EEZs and continental shelves delimitation will be effected by agreement on the basis of international law or by the International Court of Justice to “reach an equitable solution”. Both articles

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<sup>38</sup> Scott Snyder, ‘The South China Sea Dispute: Prospects for Preventive Diplomacy, United States Institute of Peace’, August 1996, <<http://www.usip.org/resources/south-china-sea-dispute-prospects-preventive-diplomacy>> [Accessed 20 June 2010].

<sup>39</sup> ‘China, Vietnam Hold Talks on South China Sea Issue’, *Xinhua*, 13 August 2009, <[http://news.xinhuanet.com/english/2009-08/13/content\\_11877364.htm](http://news.xinhuanet.com/english/2009-08/13/content_11877364.htm)> [Accessed 20 June 2010].

<sup>40</sup> Greg Torode, ‘Vietnam Seeks legal Settlement to South China Sea Claims’, *South China Morning Post.com*, 1 June 2009.

<sup>41</sup> ‘Joint Communiqué of the 42nd ASEAN Foreign Ministers Meeting’, Phuket, Thailand, 20 July 2009, <<http://www.aseansec.org/PR-42AMM-JC.pdf>> [Accessed 20 June 2010].

mention that if no agreement is reached within a “reasonable period of time” then the parties “shall resort” to the dispute resolution procedures in Part XV. In Part XV it is said that the parties have an “obligation to settle disputes by peaceful means” (Article 279), they may take the matter to the International Tribunal for the Law of the Sea, or the International Court of Justice, or a special “arbitral tribunal” (Article 287). The resort to compulsory mediation with binding authority is voluntary and UNCLOS stipulates that “a state shall be free to choose” one of these methods of dispute resolution. UNCLOS has no immediate way of dealing with a situation where the claimants have no intention to resort to binding mediation.

One way of prompting interest in a legal solution would be to utilise the Chinese proposal for joint development as a basis for resolving the claims. The idea was first broached by Chinese Premier Li Peng in Singapore on 13 August 1990 when he called upon claimants to set aside sovereignty to enable joint development to proceed. The proposal was repeated when the then Malaysian Defence Minister and current Prime Minister Najib Tun Razak visited Beijing in June 1992, and when Li Peng visited Hanoi in the following December 1992. Chinese Foreign Minister Qian Qichen told the ASEAN Foreign Ministers meeting in July 1992 that when conditions are ripe then negotiations over the South China Sea could begin, and that China was willing in principle to set aside its territorial claims.<sup>42</sup> The idea of joint development has often been raised by the Chinese side on other occasions but without further clarification. Including the incentive of joint development in a proposal for legal resolution of the conflicting claims may motivate the Chinese to clarify their position. It could unveil an avenue for the resolution of the issue that would meet their interest. There are four precedents for joint development from surrounding areas that may have a bearing on the South China Sea. The first is the Japan- South Korea agreement of January 1974 for joint development of the area of overlapping sea claims in the Tsushima Strait.<sup>43</sup> The second is the Malaysia-Thailand agreement over the sea boundary of February 1979 which created a joint development authority to administer the area where the claims overlapped.<sup>44</sup> The third is the Timor Gap Treaty concluded by Australia and Indonesia in December 1989. This treaty also created a joint development zone in the area where the sea claims overlapped. After East Timor gained its independence from Indonesia negotiations for a new treaty with Australia were initiated which resulted in the Timor Sea Treaty of May 2002.<sup>45</sup> There is also the Malaysia-Vietnam agreement on joint development of the area of overlapping claims

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<sup>42</sup> *Business Times* (Singapore), 23 July 1992.

<sup>43</sup> See Choon-Ho park, ‘Joint Development of Mineral Resources in Disputed Waters: the Case of Japan and South Korea in the East China Sea’, *Energy*, vol. 6, no. 11 (November 1981).

<sup>44</sup> See Malaysia-Thailand Joint Authority website at <<http://www.mtja.org/>> [Accessed 20 June 2010].

<sup>45</sup> See ‘Timor Sea Treaty between the Government of East Timor and the Government of Australia’, Dili, 20 May 2002, <<http://www.austlii.edu.au/au/other/dfat/treaties/2003/13.html>> [Accessed 20 June 2010].

to the continental shelf which was signed in June 1992.<sup>46</sup> These examples are cases of successful bilateral agreements but transferring this idea to a complicated multilateral situation is another matter. It may be possible for two claimants to agree to a formula to apportion the revenue from a joint development area but agreement becomes exceedingly complicated when other parties are involved, and in the case of the South China there are seven parties with an interest in the dispute. Vietnam and Malaysia have little enthusiasm for the Chinese idea of joint development which is regarded as a way of levering China into the area at the expense of the ASEAN claimants. One way of meeting these concerns would be to devise a proposal for joint development which would take cognisance of sovereignty. This was attempted the Ali Alatas “doughnut” proposal of 1994. This proposal allowed each state to claim a 320 km EEZ the boundaries of which would leave an inner hole. This inner area would then be subject to joint development and the revenue would be apportioned according to an agreed formula. This proposal was promoted by Indonesia’s Ambassador at large Hasjim Djalal when he visited the ASEAN countries over May-June 1994.<sup>47</sup> The major difficulty with the “doughnut” proposal was that it directly opposed Vietnamese and Chinese claims and would reduce them to the 320 km limit as stipulated by UNCLOS. China, in particular, would be stripped of its claim to the entire area with little compensation.<sup>48</sup> Moreover, the proposal did not identify how the overlapping claims between the ASEAN countries would be settled. In any case once the littoral states claimed the resources in their EEZs there would be little left in the doughnut hole to share with others as the major energy reserves were not found there. These were other reasons as to why this proposal made little headway.

Moreover, it is not clear what China means by joint development. The Chinese have pointed to the East China Sea agreement with Japan as an example of joint development which they claim would hold out a promise for the future. When Japan protested that Chinese drilling in the Chunxiao gas field in the East China Sea drew gas from the Japanese EEZ a dispute was triggered; eleven rounds of negotiations were conducted over 2004 to 2007 and on 18 June 2008 they reached an agreement which Chinese commentators lauded an example of joint development.<sup>49</sup> The difficulty was, however, that the Chinese Foreign Ministry presented the agreement as a case of Japanese investment in a Chinese field and went to some length to deny the idea of joint development. Vice Foreign Minister Wu Dawei declared that Chinese retained sovereignty over the gas field, that its development must be in accordance with Chinese law, and that Japan had

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<sup>46</sup> Nguyen Hong Thao, ‘Joint Development in the Gulf of Thailand’, *IBRU Boundary and Security Bulletin*, Autumn 1999, <[http://www.dur.ac.uk/resources/ibru/publications/full/bsb7-3\\_thao.pdf](http://www.dur.ac.uk/resources/ibru/publications/full/bsb7-3_thao.pdf)> [Accessed 20 June 2010].

<sup>47</sup> Nayan Chanda, ‘Divide and Rule’, *The Far Eastern Economic Review*, 11 August 1994.

<sup>48</sup> Ji Guoxing, *Maritime Jurisdiction in the Three China Seas: Options for Equitable Settlement* (Institute on Global Conflict and Cooperation, University of California, October 1995), p. 26.

<sup>49</sup> ‘East China Sea Deal No Dilution of Sovereignty’, *Chinadaily.com*, 30 June 2008.

acknowledged China's sovereignty over the field.<sup>50</sup> Japan has since expressed concern over Chinese intentions to develop the field which it says violate the joint development agreement. Japanese Foreign Minister Katsuya Okada has threatened countermeasures if China goes ahead with drilling, he mentioned an appeal to the International Tribunal for the Law of the Sea.<sup>51</sup> If this is China's idea of joint development it does not bode well for the resolution of the South China Sea dispute.

### **A COOPERATIVE REGIME**

Various proposals for cooperative regimes have been made which could prepare the ground for a resolution of the issue. One approach was to utilise track two workshops involving participants who are linked with the governments of the conflicting sides in an effort to move beyond the gridlock created by sovereignty. If the workshop could identify ways and means of functional cooperation the lessons could then be transferred to the track one diplomatic negotiations, either by the participants or by the organisers of the workshop, who would have their own channel of communication with the governments. Functional cooperation could then prepare the ground for an eventual resolution of the issue, or at least would provide incentives to avoid conflict and provocative activity which would raise tensions. Hasjim Djalal developed this approach in a series of workshops which were sponsored by the Indonesian Foreign Ministry and funded until 2001 by the Canadian International Development Agency (CIDA). They were entitled "Managing Potential Conflicts in the South China Sea" and were held annually beginning in Bali in January 1990. They involved government officials and technical experts on maritime cooperation resource development from eleven countries, the ASEAN six, Taiwan, Cambodia, Laos, and Vietnam; China and Taiwan joined in 1991.<sup>52</sup> After CIDA ceased supporting the workshops they continued on an ad hoc basis with funding by participants. There were several attempts to transform the second track workshops into first track diplomacy in a way relevant for the South China Sea. Indonesian Foreign Minister Ali Alatas in 1992 claimed that China had agreed to put its claim on hold and was willing to seek "mutually beneficial cooperation with ASEAN". He declared that "conditions were conducive" for ASEAN countries to forge some kind of cooperation over the Spratlys but he encountered resistance from the delegations.<sup>53</sup> In 1994 Ali Alatas again thought that the workshops could be upgraded to track one level and claimed that they had reached a "decisive stage".<sup>54</sup> He told the 27<sup>th</sup> ASEAN Foreign Ministers

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<sup>50</sup> 'Vice FM' Chunxiao Oil Field's Sovereign Rights Belong to China', *People's Daily online*, 19 June 2008, <<http://english.people.com.cn/90001/90776/90883/6433585.html>> [Accessed 20 June 2010].

<sup>51</sup> 'Disputed Gas Field is China's, Yang Tells Okada', *Japan Times*, 21 January 2010; 'China Gas Row May Go Before Global Tribunal', *Japan Times*, 24 February 2010.

<sup>52</sup> For details on the workshop series see The South China Sea Informal Working Group at the University of British Columbia, <<http://faculty.law.ubc.ca/scs/>>

<sup>53</sup> *Jakarta Post*, 20 July 1992.

<sup>54</sup> *Straits Times*, 23 July 1994.

meeting in July 1994 that the workshop could be upgraded to include “formal intergovernmental discussions and cooperation”.<sup>55</sup> At first Ali Alatas had hoped to invite ambassadors from the claimant countries to participate which would have converted the workshop directly into track one format. When this direct approach encountered opposition from the Chinese side he proposed an indirect approach which relied on functionalist assumptions. If government officials and their agencies were invited to participate in studies over functional issues such as marine pollution, biodiversity, navigation safety etc, habits of cooperation could be created which could be extended to negotiations over the sovereign claims in a “spill over” effect. Functionalist assumptions about the “spill over” effect, however, proved to be unsubstantiated as cooperation over these functional issues could continue without any appreciable impact upon the willingness of the delegations to discuss sovereignty. Ali Alatas also proposed to invite representatives from outside countries such as the United States and Japan to the workshop which was strongly opposed by China. What did the workshops achieve? Its proponents have justified the time and expense by claiming that the delegations got to know each other and their positions better, that the Chinese side was made more aware of the views of the other claimant countries. It was claimed that the 1992 “Declaration on the South China Sea” was earlier discussed in the 1991 workshop, and that the idea of a code of conduct was often discussed at workshop meetings before the DOC was signed. Nonetheless, whatever its merits, the workshop failed to achieve its primary goal which raises questions about the efficacy of the approach.

Another proposal called for a Spratly Resource Development Authority (SRDA) which could pool the financial resources of claimants into a common fund and would promote joint efforts to develop the area's resources.<sup>56</sup> Article 123 of UNCLOS stipulates that States “bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention”. The article adds that they should do so “directly or through an appropriate regional organization”. Mark Valencia has supported this approach arguing that regional maritime cooperation could proceed progressively from policy consultation to policy harmonisation, coordination and national policy adjustments. Nonetheless, while Article 123 may enjoin cooperation Article 56 gives the littoral states sovereign rights to natural resources in which case there is little reason to cooperate with others in the formation of a maritime regime.<sup>57</sup> No doubt, an appropriate maritime regime for the South China

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<sup>55</sup> *Sunday Times* (Singapore), 24 July 1994.

<sup>56</sup> Christopher C. Joyner, ‘The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation’, in Ranjeet Singh (ed.), *Investigating Confidence Building Measures on the Asia Pacific Region*, Report No. 28 (Washington DC: Henry L. Stimson Centre, 1999).

<sup>57</sup> Mark J. Valencia, ‘Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia’, *Ocean Development & International Law*, vol. 31, no. 3 (July 2000).

would be the desideratum but it would demand multilateral negotiations between the claimant states which have been opposed by China. Its formation would be a political decision for which the claimant states are not yet prepared.

The Chinese, in any case, have proposals of their own to involve ASEAN claimants in functional cooperation which would avoid multilateral negotiations with ASEAN or the ARF. They intend to separate the ASEAN claimants from ASEAN as an organisation, and from the external powers involved in the ARF, which would leave them in a position of advantage. One proposal called for a South China Sea Economic Cooperation Organization (SCSEC) which was raised during a conference of Chinese and Southeast Asian researchers in Haikou (Hainan province) in March 2008. This conference was a local provincial initiative and involved representatives from Brunei, Malaysia, the Philippines, Vietnam, and Singapore on the ASEAN side and from Hainan, Guangdong and Guangxi provinces from the Chinese side. It proposed a mechanism to promote trade and investment and to strengthen cooperation in infrastructure, tourism and agriculture.<sup>58</sup> China has also pointed to the Pan Beibu Gulf (Gulf of Tonkin) Economic Cooperation Forum as a basis for cooperation with ASEAN over maritime issues such as the South China Sea. The first forum was held in July 2006 and included the above ASEAN countries as well as Korea. It was intended to develop closer ties between China and ASEAN and to forge China-ASEAN regional cooperation.<sup>59</sup> The fourth Pan Beibu Gulf Economic Cooperation Forum was held in August 2009 in Nanning which proposed that ASEAN-China maritime economic cooperation be strengthened. This was to entail cooperation over port facilities, tourism, logistics, and infrastructure construction which was to complement bilateral economic cooperation in the Mekong River valley. From the Chinese perspective these moves would demonstrate sufficient cooperation to “ease tensions in the South China Sea”.<sup>60</sup> China has made much of its willingness to negotiate the demarcation of the Beibu/Tonkin gulf with Vietnam; in July 2004 an agreement was signed with Vietnam on the demarcation of territorial waters, EEZs and continental shelves in the gulf, A fishery cooperation agreement was also signed with much fanfare. Despite this, however, problems with the claims continued to bedevil the relationship with Vietnam. In 2008 China and Vietnam were still negotiating the maritime claims in the gulf and discussed a joint survey of the area and joint

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<sup>58</sup> ‘Experts Propose to Build South China Sea Cooperation Zone’, *People’s Daily Online*, 6 March 2008, <<http://english.peopledaily.com.cn/90001/90776/90884/6368021.html>> [Accessed 20 June 2010].

<sup>59</sup> ‘Background of the Pan-Beibu Gulf Economic Cooperation’, 6 July 2009, <[http://www.bbw.gov.cn/zt/fanbeibbs/article\\_en.php?id=6457](http://www.bbw.gov.cn/zt/fanbeibbs/article_en.php?id=6457)> [Accessed 20 June 2010].

<sup>60</sup> Zhai Kun, ‘On the Road to Development with ASEAN’, *China Daily.com*, 21 August 2009.

development of the fishing resources there.<sup>61</sup> The 2004 agreement initiated a process of negotiation which continues and that it was not a final determination of the maritime claims. Moreover, if China has been unable to settle its disputes with Vietnam the prospects for the Pan Beibu Gulf Economic Cooperation Forum are rather dim. China cannot promote maritime cooperation and hope to ease the concerns of the ASEAN countries while these territorial and fishery disputes with Vietnam continue.

### **MARITIME ENERGY COOPERATION**

A resolution of the South China Sea issue cannot be expected by resort to any of the approaches outlined above. While legality may dictate that the ASEAN countries sit on their claims and hope for the best this offers little prospect of a resolution. The longer a resolution is delayed the more likely it is that conflict would break out or that tensions would be stimulated as claimants attempt to exploit the energy resources of their respective zones. One possible way out would be to use cooperation over energy as a means to initiate a process of wider collaboration as the first steps towards a maritime regime. If ASEAN could promote energy cooperation in the South China Sea on a strictly commercial basis it could get the parties used to working each other. Vietnam, Malaysia and the Philippines have involved international oil companies in exploration, drilling and also production in the area. It would be a step forward if the national oil companies of the main claimants were involved in joint activity on a commercial basis and without infringing upon sovereign claims. Allowing Chinese energy companies access to the resources of the area on a commercial basis would give China a stake in the stability of the South China Sea and could create opportunities for the exploitation of the energy resources there. If Chinese oil companies, China National Petroleum Corp, China Petrochemical Corp. and China National Offshore Oil Corp (CNOOC) were involved in exploration and drilling with PetroVietnam, Petronas of Malaysia and the Philippine National Oil Corporation (PNOC) there would be an incentive for the Chinese side to avoid disruptive activities which would jeopardise their interest. No doubt, difficulties would arise in apportioning shares of resources once the joint activity moves to production as claimants would press for particular benefits in recognition of their sovereign claims, but they need not be insurmountable.

There is the precedent of a Joint Marine Seismic Undertaking (JMSU), a three-year tripartite agreement for joint exploration mainly in the Philippines claim zone which was signed in September 2004. At first it involved PNOC and CNOOC and, after the Vietnamese protested, PetroVietnam was included in March 2005. As an idea JMSU had potential but it was a deeply flawed agreement which stimulated much criticism. Philippine Congressional

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<sup>61</sup> 'China, Vietnam Agree on Joint Maritime Survey in Parts of Beibu Bay', *Gov.cn*, the Chinese Government's Official Web Portal, 2 June 2008, <[http://www.gov.cn/misc/2008-06/02/content\\_1002162.htm](http://www.gov.cn/misc/2008-06/02/content_1002162.htm)> [Accessed 20 June 2010].

critics were appalled that 80 percent of the survey area was within the Philippine claim zone and the remaining 20 percent was in contested waters; six islands occupied by the Philippines were included in the area of the seismic undertaking.<sup>62</sup> The major objection raised by legal experts was that the Philippines had weakened its claim to the area by involving China and Vietnam, which had overlapping claims to much the same territory.<sup>63</sup> Philippine domestic critics accused Speaker Jose de Venecia Jr of negotiating the agreement in exchange for dubious loans from China which pointed to corruption. Moreover, the agreement stipulated that there was to be a division of labour as China was to gather seismic data through a Chinese seismic vessel which was contracted to conduct the survey while a representative from each oil company was to be on board.<sup>64</sup> Vietnam was to process the information while the Philippines was to interpret the data. This explanation was unconvincing to many as interpretation would naturally come with data collection with the result that the Philippines would be sidelined and would not benefit from the survey. The JMSU, indeed, was faulty yet it pointed to possibilities that could be explored in the future but with multilateral or ASEAN endorsement. Malaysia's Prime Minister Najib Razak proposed joint exploration with Brunei in the South China Sea which shows that the idea may attract wider support.<sup>65</sup> Exploration and drilling activity involving the national oil companies of the claimants would implement the idea of joint development in the context of a wider maritime regime. It would have to avoid the pitfalls of the Philippine-sponsored JMSU and should embrace all claim zones and should not be located in any one. There would be a host of issues to be resolved relating to rights to seismic data in the case of exploration agreements, and the apportionment of revenue in the case of production. Normally, the legal system of the claimant state would decide the rules for such commercial ventures and the surrender of this right to a cooperative enterprise would imply a violation of sovereignty. If the venture was promoted by ASEAN and received collective ASEAN endorsement an effective multilateral framework could be devised which could deal with these issues. ASEAN, however, has been too divided and fragmented over the issue and hesitant to negotiate with Beijing from a position of strength.

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<sup>62</sup> Those islands were Patag (Flat), Lawak (Nanshan), Parola (Northeast Cay), Panata (Lankiam Cay), Kota (Loaita) and Likas (West York) Islands.

<sup>63</sup> Barry Wain, 'Manila's Bungle in the South China Sea', *Far Eastern Economic Review* (January/February 2008); Islands claimed by Vietnam included in the survey area were Sonca (Sand Cay), Nam Yit Islands, Collins, Da Nu Thui (Petley) Reefs; islands claimed by China were Landsowne (Da Len Dao), Nan Xun Jiao (Gaven), Kennan, Subi. Sinh Cow, as well as Yong Shu Jian (Fiery Cross), which was the site of the March 1988 clashes between Chinese and Vietnamese naval forces. Yvonne T. Chua and Ellen Tordesillas, '6 Philippine-occupied Islands Covered in Spratly Agreements', *GMA News.TV*, 9 May 2009, <<http://www.gmanews.tv/story/84023/6-Philippine-occupied-islands-covered-in-Spratly-agreements>> [Accessed 20 June 2010].

<sup>64</sup> 'Joint Marine Seismic Undertaking [JMSU] South China Sea', *PNOC Exploration Cop. web site*, <[www.pnoc-ec.com.ph/jmsu.html](http://www.pnoc-ec.com.ph/jmsu.html)> [Accessed 20 June 2010].

<sup>65</sup> Joniston Bangkuai, 'Petronas to Tap South China Sea Oil, Gas Fields?', *New Straits Times*, 7 August 2009.

## **Conclusion**

A resolution of the issue cannot be expected in the near future. China is a rising power and has no incentive to lock itself prematurely into positions when in time it may gain much more. By playing upon fears of its growing might and the inevitability of its rise China's intention is to invoke voluntary compliance with its aims and interests and to undermine opposition to its claims. China has involved the ASEAN claimants in maritime cooperation in an effort to deprive them of the negotiation leverage gained through ASEAN and the ARF, and to create those conditions where its interests would be recognised as dominant. China's position over the Gulf of Beibu/Tonkin Gulf is instructive. After proclaiming a maritime settlement with Vietnam in 2004 China continues to engage in disputes with Vietnam about maritime claims and fisheries which for all intents and purposes have worsened over the past few years. While China's actions and its proclaimed purposes diverge, its efforts to dislodge the ASEAN countries from their claims cannot be expected to succeed. Claimants will continue to hedge against China in various ways, some like the Philippines will maintain security cooperation with the United States; others like Indonesia will encourage a balancing presence from the United States; while others such as Vietnam will develop their own capabilities to increase the risks for China. ASEAN claimants do not need to match China's naval capability to deter it as that would be beyond their means in any case. By creating a "quick riposte" capability which could defend their already occupied islands in the South China Sea claimants would create unacceptable risks for China in the resort to force. Any naval clash in the area would have immediate repercussions for China's relationship with ASEAN and Taiwan and would affect investor confidence in the region from which China would suffer. The awareness of these repercussions would act a constraint upon China and would direct its strategy over the issue away from overt confrontation and the use of naval power towards the development of cooperative strategies. These efforts would deter China from resorting to force but they would not bring a resolution of the issue any closer. The likely result would be a continuing standoff and increased tensions as naval forces are developed and expanded.

The proposal for maritime energy cooperation is one that would offer positive incentives to the Chinese to negotiate in view of their increased demand for energy. Ambitious proposals that call for wide sweeping agreements on a legal or political basis cannot make any headway in this dispute while the claimants insist on their sovereign claims. The stalemate may suit governments which are interested in demonstrating effective occupation of islands to support their legal claims, but it will not allow them to exploit energy resources without stimulating tensions and conflict. The positive incentive of maritime energy cooperation and all its benefits is required to move beyond the stalemate. This would entail a multilateral effort to exploit the resources of the area and to go beyond what has been undertaken by

claimants separately and in their own claim zones. The extension of these efforts within a multilateral framework should be coordinated by ASEAN but it would demand a major change in ASEAN's attitude towards the issue. ASEAN's passivity towards the range of problems and issues it now faces is a barrier to its future development and it should take the initiative over an issue of vital importance to its future. ASEAN has the status to promote this proposal and by doing so it would strengthen its role in the Asia Pacific region.

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