

# Maritime Issues in the South China Sea

Troubled Waters or A Sea of Opportunity

Edited by

Nien-Tsu Alfred Hu and Ted L. McDorman



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South China Sea (SCS) issues are complex and dynamic, ranging from historic claims to present day military occupation, from military security to regional stability, from rhetorical appeasements to hard-line national interests, from intraregional competition to extraregional involvement. The submissions made in 2009 by several Southeast Asian states to the United Nations Commission on the Limits of the Continental Shelf (CLCS) respecting outer limits of extended continental shelves beyond 200 nautical miles in the South China Sea resulted in renewed attention to the maritime disputes over the insular features and the waters of the South China Sea among several claimant States. Questions have resurfaced about the future of cooperation in the region. Furthermore, the improvement of cross-Straits relations between Taiwan and China after 2008 has added a new element to the evolution of South China Sea issues. This book describes these recent developments in depth and provides an examination of possible future developments in the South China Sea.

All articles but one in this book were originally published as a Special Issue in *Ocean Development & International Law*.

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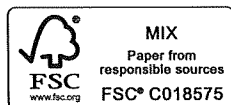
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Robert W. Smith

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Chris Rahman and Martin Tsamenyi

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*The ROC's Maritime Claims and Practices with Special Reference to the South China Sea*

Kuan-Hsiung Wang

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*The South China Sea Workshop Process and Taiwan's Participation*

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**Chapter 6**

*Regional Cooperation in Marine Environmental Protection in the South China Sea: A Reflection on New Directions for Marine Conservation*

Aldo Chircop

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**Chapter 7**

*Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan*

John W. McManus, Kwang-Tsao Shao, and Szu-Yin Lin

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**Chapter 8**

*Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea*

Nien-Tsu Alfred Hu

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pp. 281–314

## Co-editor's Preface

The South China Sea, while referred to differently by different groups, is the South Sea to the Chinese people and in the Chinese language. It is a semi-enclosed sea, as defined in Article 122 of the 1982 United Nations Convention on the Law of the Sea (LOS Convention), which because of its strategic location has become a testing ground for the utility of contemporary international regimes and the eventuality of regional cooperation.

The scattered insular features of islands, islets, reefs, rocks, banks, shoals and submerged reefs along with the long-standing Chinese "U-shaped dotted lines" map and the competing claims made by littoral States have created a difficult situation for maritime zones delimitation. This situation is further complicated by the known and/or potential of rich natural resources, living and non-living, within the area. So tempting are such resources and so intense the "sovereignty" issues that the littoral States of the South China Sea have invested significantly in military and law enforcement forces to support their claims over all or a part of the insular features and surrounding waters in the region.

There are also vital sea lines of communication through the waters of the South China Sea for the movement of goods and fossil fuels to Northeast Asian nations and strategic maneuvering and the deployment of armed forces by extra-regional powers to the region. Some littoral States are aligned with extra-regional powers in order to balance the emerging regional, if not global, reality of the People's Republic of China (PRC).

There is also a changing "cross-strait relationship" between the Republic of China (ROC or Taiwan) and the PRC. On South China Sea issues, the "two Chinas" essentially hold the same position in terms of their common claims over the South Sea. ROC/Taiwan has significant interests in the South China Sea and has occupied and continuously controlled the largest island in the Spratly Islands (Tai-Ping Island, 太平島 in Chinese or Itu Aba Island in English) for more than 60 years.

All the aforementioned issues are reflected in the book's subtitle "Troubled Waters or A Sea of Opportunity," a classic case of the glass half empty/half full perspective.

The genesis of this collection was the International Conference on Issues in the South China Sea (南海問題國際研討會), held in Taipei, Taiwan, 19–20 August 2009, organized by The Center for Marine Policy Studies (CMPS, 海洋政策研究中心) of the National Sun Yat-sen University (國立中山大學) and chaired by one of the co-editors. Selected papers presented at the Conference were published in *Ocean Development & International Law (ODIL)* in 2010 as a Special Issue entitled "Issues in the South China Sea" (Vol. 41, Numbers 3 and 4, pp. 203–356), under the guest editorship of one of the co-editors. The publisher of *ODIL*, Routledge, identified the Special Issue as fitting within their "Journal Special Issues as Books" (SPIBS) program to be published in book form to extend the readership for the material.



## CO-EDITOR'S PREFACE

A feature of the "Journal Special Issues as Books" program is that the articles from the *ODIL* Special Issue are republished unaltered. To this the co-editors have added this brief preface as well as an epilogue chapter which provides updates of recent legal and political developments and analyses of such developments respecting the South China Sea region.

Each of the co-editors has come to this work following different paths. Both have been involved in academic work respecting South China Sea matters for decades. Both have government experience, albeit for one of the co-editors that experience did not involve Asia in any direct way. And, of most importance, both have worked together on conferences, editing and brainstorming, which for each, has been a career highlight.

We thank the authors of the various chapters for sharing their expertise and insights at the 2009 Conference in Taipei and for their further work in preparing and finalizing their papers for publication in *ODIL*. We also thank the staff of The Center for Marine Policy Studies, especially the Executive Secretary of the CMPS, Ms. Yu-Ling Emma Lin, for their dedication in ensuring a well-organized and enjoyable Conference and for their assistance in the preparation of this book. Rosemary Garton, the editorial assistant for *ODIL*, deserves a special note of thanks for her work on the papers published in *ODIL*.

We hope that this book will contribute to a fuller understanding of the issues at play in the South China Sea region. It is our view that the South China Sea area is one of opportunity and hope that globalization, regionalization and bilateralism, each in different ways, will lead to the situation where the label "dangerous waters" often found on nautical charts comes to refer only to navigational risks.

Prof. Nien-Tsu Alfred Hu, Kaohsiung  
Prof. Ted L. McDorman, Ottawa  
October 2012

# Post-2009: An Overview of Recent Developments Concerning the South China Sea

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## Introduction

There is no question that the conflicting claims to islands and ocean areas within the South China Sea has dominated almost all discussions and undermined most attempts at regional cooperation on marine matters in the South China Sea. The bases of the legal/political arguments for the claims of Brunei, China (People's Republic of China and the Republic of China), Malaysia, the Philippines and Vietnam over the islands and ocean areas within the South China Sea, whether it be historic usage, discovery, occupation, proximity or a combination of these and other arguments, are well-known.<sup>1</sup> The activities of the various actors respecting the islands and ocean areas have been extensively documented and analyzed.<sup>2</sup> It is widely acknowledged that the 2002 Declaration on the Conduct of the Parties in the South China Sea involving the Association of South East Asian Nations (ASEAN) and the People's Republic of China<sup>3</sup> has had a stabilizing effect on State actions within the South China Sea<sup>4</sup> without, however, yielding much beyond a maintenance of the *status quo* respecting the conflicting ocean and insular claims. Subsequent to the Declaration there have been activities and statements that have provoked protests over interference with sovereignty and that the activity/statement is straying from the principles in the Declaration.<sup>5</sup> The South China Sea situation is further complicated by the interactions between the "two Chinas" – the People's Republic of China (PRC) and the Republic of China (ROC or Taiwan). While there has been a congruence of position across the Taiwan Strait on South China Sea matters,<sup>6</sup> Taiwan is an actor in the South China Sea, if for no other reason, that it occupies the largest of the

Spratly Islands – Itu Aba or the Tai-Ping Island.<sup>7</sup> Since the commencement in 2008 of Ma Ying-Jeou's Presidency, there has been a generally amicable political atmosphere across the Taiwan Strait. This has led to the PRC and Taiwan engaging in unprecedented levels of cooperation on the South China Sea issues, such as, a jointly proposed program of activity in a regional, multilateral, second-track forum (namely, the Workshops on Managing Potential Conflicts in the South China Sea), a jointly published regional situation assessment report<sup>8</sup> through a bilateral mechanism, and confidence building measures informally proposed by various scholars from both sides.

Apart from the intra- and extra-regional State actors that have shaped the situation in the South China Sea region, a non-State body, the Commission on the Limits of the Continental Shelf (CLCS) has also influenced recent developments in the region. While States understand that the CLCS is not a forum to settle disputes involving maritime claims and/or delimitation between or among States, it is inevitable that in their submissions to the CLCS that States have asserted and accentuated claims that may overlap with claims of other States. This has happened in the South China Sea.

This chapter provides information on new developments as well as a legal and policy overview analysis regarding South China Sea issues that have arisen subsequent to the writing and publication of the other chapters in this collection which was published in the Special Issue of *Ocean Development and International Law* entitled "Issues in the South China Sea" in mid-2010.

## 2009

### *Submissions, Legislation and Official Communications*

In 2009 the focus of attention on the South China Sea moved from the water to the United Nations and specifically to the CLCS, a body of geoscience experts established pursuant to the U.N. Convention on the Law of the Sea (the LOS Convention)<sup>9</sup> to provide assistance to States regarding the application of the complex criteria set out in Article 76 of the Convention for the establishment by States of their outer limits of the continental shelf beyond 200-n. miles. The LOS Convention indicates that a coastal State is to submit information supporting its proposed outer limits of its "legal" continental shelf to the Commission.<sup>10</sup> Annex II to the Convention provides that a coastal State intending to establish outer limits of the continental shelf "shall" submit information to the Commission "within 10 years of entry into force" of the Convention for the State.<sup>11</sup> The 10 year mark for States that were parties to the LOS Convention when it came into effect in 1994 was adjusted at the Eleventh Meeting of the State Parties to the LOS Convention to commence as of 13 May 1999.<sup>12</sup> Thus, 13 May 2009 became the newly adjusted ten-year time limit or the new date of submission deadline as understood by most States.<sup>13</sup> In June 2008, the Eighteenth Meeting of the State Parties decided that the ten year time frame could be met by States submitting "preliminary information indicative of the outer limits ... and a description of the status of preparation and intended date for making a submission."<sup>14</sup> The preliminary information would not be acted upon by the Commission and would be without prejudice to a subsequent full submission. As all the littoral States of the South China Sea became parties to the LOS Convention prior to 1999 (except the Republic of China due to obvious political and diplomatic difficulties), the above explains

both why 2009 was an active year for communications to the Commission and the differences in the types of communications sent to the Commission.

It is important to note that the Commission's mandate is one of technical examination of the submitted material. The mandate of the Commission is not to involve an examination or resolution of legal or political matters. Both the LOS Convention and the Rules of Procedure of the Commission make it clear that actions of the Commission are without prejudice to the delimitation between States of maritime boundaries.<sup>15</sup> For greater clarity and pursuant to Article 9 of Annex II to the LOS Convention, the Commission's Rules of Procedure provide that as regards a submission, "where a land or maritime dispute exists," the Commission will not proceed with the submission.<sup>16</sup> The Rules of Procedure further indicate that "the competence with respect to matters regarding disputes ... rests with States."<sup>17</sup> This means that it is up to States to decide (rather than the Commission), amongst other things, whether or not a land or maritime dispute exists. Thus, where a State indicates that a land or maritime dispute exists and the State invokes directly or indirectly the relevant provision of the Rules of Procedure (Annex I, paragraph 5(a)), the Commission is without jurisdiction to proceed with a submission since the Commission is not competent to evaluate whether and to what extent a dispute exists as this is a political matter for the States involved.<sup>18</sup>

The following is a list of documents presented to the Commission in 2009, official comments made concerning the documents, and other related legislative changes.

- Malaysia and Vietnam made a Joint Submission to the Commission respecting the outer limit of the continental margin beyond 200-n. miles in the southern part of the South China Sea.<sup>19</sup> In the Joint Submission, Malaysia and Vietnam identified 200-n. mile limits and an area of continental shelf (referred to as the "defined area") adjacent to these limits that might, in the future, be subject to Malaysian-Vietnam negotiation and a bilateral maritime boundary agreement.
- Vietnam made a submission to the Commission respecting its proposed outer limit of the shelf in the northern part of the South China Sea.<sup>20</sup>
- The People's Republic of China responded to each of the above submissions with nearly identical *notes verbales* claiming that Malaysia and Vietnam had "seriously infringed" on its "sovereignty, sovereign rights and jurisdiction" in the South China Sea.<sup>21</sup> Attached to both of People's Republic of China's *notes* was a map (the U-shaped dotted line map).
  - The People's Republic of China notified the Commission of its intention to submit information respecting an outer limit of the continental shelf adjacent to its 200-n. mile limit in the East China Sea and reserved its right to also make a submission respecting "other sea areas."<sup>22</sup>
- The Republic of China responded to the submissions by Vietnam and Malaysia in very similar terms to that of the People's Republic of China asserting that the island groups and their surrounding waters including the seabed are part of the its territory.<sup>23</sup> One variation is that no reference was made to the dotted lines map or to any identification of the area that the Republic of China claims in the South China Sea.<sup>24</sup> In May 2009, the Republic of China issued the "Declaration of the Republic of China on the Outer Limits of Its Continental Shelf" in lieu of the presenting of a

submission or a preliminary information to the CLCS to which it does not have legal access.<sup>25</sup>

- The Philippines also responded to the Joint Submission of Malaysia/Vietnam and the Submission of Vietnam with nearly identical *notes verbales* noting that the areas covered in the submissions “overlap” with areas claimed by the Philippines.<sup>26</sup>
  - In March 2009, the Philippines adopted a new law on baselines for the archipelago.<sup>27</sup> Although the Philippine archipelagic baselines prescribed in the law seem not to extend to the insular features claimed by the Philippines in the South China Sea, the Philippines indicated that they continue to claim sovereignty over “their” insular features in the South China Sea, including the Kalayaan Island Group and the Bajo de Masinloc, also known as Scarborough Shoal. The Republic of China, the People’s Republic of China and Vietnam objected to the new Philippine law on the grounds that the law interfered with their claims over islands in the South China Sea.<sup>28</sup>
  - The Philippines submitted information to the Commission in 2009, but the continental shelf area in question was adjacent to the east coast of the Philippines and not within the South China Sea.<sup>29</sup> In the submission the Philippines made it clear that it reserved its rights as regards the outer limits of the continental shelf in other areas adjacent to the Philippines.<sup>30</sup>
- Brunei notified the Commission of its intention to submit information respecting an outer limit of the continental shelf adjacent to its 200-n. mile limit,<sup>31</sup> but made no comment respecting the Joint Submission of Malaysia – Vietnam.
  - Brunei and Malaysia, through a March 2009 Exchange of Letters, have agreed on a maritime boundary for the territorial sea, continental shelf and exclusive economic zone.<sup>32</sup> The precise details of the delimitation have not yet been made public.

### *A Brief Analysis*

It is to be noted that the May 2009 *notes verbales* from the People’s Republic of China regarding the Malaysia/Vietnam Joint Submission and Vietnam’s Submission regarding the northern South China Sea makes specific reference to Annex I, paragraph 5(a) of the Rules of Procedure of the Commission and states: “the Chinese Government seriously requests the Commission not to consider” the Joint Submission or the Submission of Vietnam.<sup>33</sup> The August 2009 *notes verbales* from the Philippines similarly requests the Commission “to refrain from considering” the two submissions.<sup>34</sup> It can be safely predicted that the Commission will not proceed with a consideration of either submission unless new communications are received.

One of the enduring legal questions about the South China Sea is that of islands versus rocks. Not all insular formations are equally capable of generating a full set of maritime zones. The 1982 LOS Convention draws a distinction between islands that can legally generate a 12-n. mile territorial sea, 200-n. mile EEZ and, where possible, a continental shelf area beyond 200-n. miles, and islands that are rocks that can legally generate only a 12-n. mile territorial sea and a 12-n. mile contiguous zone.<sup>35</sup> While some direction is provided in the LOS Convention regarding how to differentiate between an island and a rock, this is an area of uncertainty and debate.<sup>36</sup>

Malaysia and Vietnam did not use any of the insular features in the Spratly Islands in the construction of their 200-n. mile zones shown in the Joint Submission. The identified 200-n. mile limits are based on baselines along the coasts of each State. A peculiarity is that there are a number of Vietnam occupied islets that are within the depicted Malaysian 200-n. mile limit. Presumably, Vietnam's position would be that these claimed islands vis-à-vis Malaysia would be enclaved with territorial seas within Malaysian waters. As regards the northern South China Sea, in Vietnam's Submission the depicted 200-n. miles line is delineated based on the mainland coast and not relying on any insular formations. The northern end point of the Vietnam 200-n. mile limit is described as being "the equidistance line between the territorial sea baselines of Vietnam and the territorial sea baselines of the People's Republic of China."<sup>37</sup> While the Submission indicates that Vietnam has sovereignty over the Paracel's archipelago,<sup>38</sup> no effect is given to the islets of the archipelago in the determination of Vietnam's 200-n. mile limit. Also worth noting is that the Vietnamese Submission does not indicate any significant ocean area adjacent to the Scarborough Shoal/Reef or Lincoln Island and Bombay Reef, the latter two located between the Paracel archipelago and Scarborough Shoal/Reef.

The Philippine situation in terms of its determination of the baselines for the Kalayaan Island Group and the Scarborough Shoal is less certain, as the 2009 Archipelagic Baselines Law indicates in Section 2 that:

The baselines in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS): (a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596; and (b) Bajo de Masinloc, also known as Scarborough Shoal.<sup>39</sup>

The implication is that while the Philippines claims to exercise its sovereignty and jurisdiction over the Kalayaan Island Group and the Scarborough Shoal, the baselines or baseline systems of the Kalayaan Island Group and the Scarborough Shoal may be different from the archipelagic baselines prescribed for the Philippine archipelagos and that the legal status of the insular features of the Kalayaan Island Group and the Scarborough Shoal may be determined in accordance with the "Regime of Islands" article of the LOS Convention. The latter further implies that some of the insular features may be rocks, rather than islands, that will not generate a 200-n. mile EEZ and/or continental shelf. However, it was the sovereignty and jurisdiction claims in the Philippine Archipelagic Baselines Law over the Kalayaan Island Group and the Scarborough Shoal that invited protests from both Chinas and Vietnam.

Malaysia, the Philippines and Vietnam appear to have accepted that the LOS Convention and the definition of rock/islands applies to the insular features of the South China Sea, with Malaysia and Vietnam clearly of the view that many of the insular features are rocks and thus, at most, entitled to a 12-n. mile territorial sea.

This leaves the two Chinas (both the Republic of China and the People's Republic of China) and the U-shaped dotted line. While the U-shaped dotted line map has been known about for years, as it goes back to at least the late 1940s when the government of the Republic of China for the first time publicized a "South Sea Islands Location Map" with 11 discontinuous U-shaped lines to depict the localities of the four island groups within the lines,<sup>40</sup> the attachment by the People's Republic of China of the map to its 2009 *notes*

*verbales* to the United Nations is the first time in an official and diplomatic matter publicly that the People's Republic of China has asserted the line contained on the map.

## Post 2009

### *The South China Sea as a "Core Interest" for the PRC*

Much has been made of the report that in March 2010 unnamed senior officials of the People's Republic of China told U.S. officials that Beijing considered South China Sea to be a "core interest" of its sovereignty and territorial integrity, wording usually reserved for the non-negotiability of Taiwan, Tibet and Xinjiang.<sup>41</sup> Exactly what was said, by whom<sup>42</sup> and what was meant has attracted much attention mainly due to the perceived escalation of the South China Sea disputes by Beijing with much being made of a "new" position or policy. In official communications, Beijing has apparently avoided explicitly commenting on the matter or repeating the language, nor has it denied it. Hence, a year later a *New York Times* headline stated "China Hedges Over Whether South China Sea is a 'Core Interest' Worth War."<sup>43</sup>

While detailed analysis by foreign commentators reveals confusion about the meaning and use of "core interest",<sup>44</sup> Chinese government officials, military professionals, scholars, and columnists seem to agree that downplaying or obfuscating the linkage of "core interests" with the South China Sea issues is in the national interest, at least for the time being. For example, Chinese State Councillor Dai Bingguo (戴秉國) in 2009 broadened the usage of the term by saying that China had three core interests: maintaining its political system, defending its sovereignty claims and promoting its economic development.<sup>45</sup> An international relations professor at Peking University thought that "It's not Chinese policy to declare the South China Sea as a core interest, [b]ut the problem is that a public denial will be some sort of chicken action on the part of Chinese leaders. So the government also doesn't want to inflame the Chinese people."<sup>46</sup> A Chinese columnist doubted whether it was wise to elevate "South China Sea" to a core interest since it would upset and enrage the United States which had enjoyed preeminence and hegemony over the region, could strike a nerve with China's neighboring countries, and would be superfluous when China had always claimed indisputable sovereignty over the islands in the South China Sea.<sup>47</sup> Thus, a plausible interpretation for the term "core interest" and its application to the South China Sea is that the Chinese government considers that sovereignty and territorial integrity of all the insular features within the U-shaped lines are important as a core national interest, however, it would be premature for it to publicly declare as such when, as Han Xudong (韓旭東), a PRC army colonel and a professor at PLA's National Defense University put it, "China's comprehensive national strength, especially in military capabilities, is not yet enough to safeguard all of the core national interests. In this case, it's not a good idea to reveal the core national interests."<sup>48</sup>

The rhetorical claim of "core interest" for the South China Sea needs to be understood from the Chinese perspective. The Kuala Lumpur Security Review (KLS Review)<sup>49</sup> once reported that a "Southeast Asian Spratly Group" was "shaping up," meaning that the ASEAN countries were forming a coalition against China to increase their bargaining power.<sup>50</sup> Although a senior PRC diplomatic official dismissed the existence of such coalition,<sup>51</sup> a signed article released by a Hong Kong-based news media group argued that

the greatest problem for Beijing was not the existence of a “Spratly Group;” rather it was the activities of certain countries: “double speed-up” (雙加快) (speed-up of actual occupation 加快事實佔領 and speed-up of unilateral exploitation 加快獨自開發) along with three “becomings” (化) – “military stationing becoming normal practice, military fortification becoming perpetuated, and military position becoming deepening” (駐軍常態化、工事永久化、陣地縱深化).<sup>52</sup> Besides the strengthening of military control over the islets and rocks in the South China Sea, especially in the Spratly Islands, by intra-regional States, the maneuvering of American forces in the region along with the “return of the U.S. to Asia,” all contribute to the rhetorical and practical reaction of the PRC.

### *The United States*

Over the last few decades, the United States had been seen as maintaining a “hands-off” policy respecting the South China based on the May 1995 U.S. Statement on the South China Sea.<sup>53</sup> The 1995 Statement expressed concern about increasing tensions in the region, noted that the United States had no position on the merits of the sovereignty disputes, indicated that the United States was willing to assist in seeking a resolution and that the “United States would, however, view with serious concern any maritime claim or restriction on maritime activity in the South China Sea that was not consistent with international law...”<sup>54</sup>

This has changed in July 2010 as a result of Secretary of State Hilary Clinton’s comments at the ASEAN Regional Forum. Clinton indicated in her remarks that

we have a national interest in *freedom of navigation, open access to Asia’s maritime domain*, the maintenance of peace and stability, and respect for international law in the South China Sea. . . . The United States supports a *collaborative diplomatic process by all claimants* for resolving the various disputes in the South China Sea. . . . (emphasis added)

She stressed that “we do not take a position on the competing territorial claims over land features in the South China Sea. We believe all parties should pursue their territorial claims and accompanying rights to maritime space in accordance with international law, including as reflected in the 1982 Law of the Sea Convention.”<sup>55</sup>

The U.S. posture at the meeting has been reported in the press as being a “sharp rebuke” to Beijing and that the United States “would step into the tangled dispute” in the South China Sea.<sup>56</sup>

Clinton reportedly suggested that a formal legal process be established to resolve the outstanding issues.<sup>57</sup> At a 23 July 2010 press briefing, Clinton reiterated the long-standing U.S. position that it “does not take sides on the competing territorial disputes over the land features in the South China Sea,” noting however, that the United States “is prepared to facilitate initiatives and confidence building measures” in order to “help create the conditions for resolution of the disputes and a lowering of regional tensions.”<sup>58</sup> While a close reading of the comments of Secretary Clinton indicates a significant congruence with the 1995 Statement, nevertheless, Clinton’s comments are said to reflect a renewed focus by the United States on the South China Sea situation arising, according to one writer, as a result of “... China’s turn in 2009 toward an assertive, even aggressive approach – especially in its efforts to control U.S. naval activities in the South China Sea ...”<sup>59</sup> Clinton’s comments have also been tied to the above noted reported comments of senior Chinese officials that the South China Sea was a “core interest” for Beijing.<sup>60</sup>



While Beijing responded negatively to Clinton's remarks,<sup>61</sup> reportedly the South China Sea has not been a significant issue in subsequent U.S.-People's Republic of China dialogue.<sup>62</sup>

A January 2012 headline in the *Washington Post*, "U.S. seeks to expand presence in Philippines: Nations discussing a bigger footprint to help counter China,"<sup>63</sup> describes the delicate interaction between the Philippines and the United States in bolstering their military partnership with a common goal of encountering the rising power of the People's Republic of China in the South China Sea. The article says:

The number of port visits by U.S. Navy ships has soared in recent years. The Philippines recently acquired a cutter from the U.S. Coast Guard and is seeking two more of the ships to boost its naval forces. It also wants to buy F-16 fighter jets from Washington. In interviews, neither Philippine nor Obama administration officials would rule out a return by U.S. ships or forces to Subic Bay. . . . But even a small, visiting U.S. force in the Philippines would send a strong signal to Beijing. Although Washington has said it is not trying to contain China's rise as an economic and military superpower, Obama announced a new military strategy this month under which the Pentagon will 'rebalance' the armed forces toward the Asia-Pacific region in the aftermath of the wars in Iraq and Afghanistan.

The same article also reports that U.S. Senator James Webb, chair of the Senate Foreign Relations Subcommittee on East Asia and Pacific Affairs considers that: "The presence of the United States has become the essential ingredient for stability." This perceived "essential ingredient for stability" is accented by a U.S. Navy vessel's visit in August 2011 to the Vietnamese naval base at Cam Ranh Bay, the first such visit in 38 years.<sup>64</sup>

What is stated by the United States to be a "rebalance" of its armed forces in the Asia-Pacific region together with a perceived developing partnership of the United States with some ASEAN States on South China Sea issues can be viewed by the People's Republic of China as a move towards joint containment.

### *Implementing the 2002 Declaration on Conduct*

Two of the key contents of the 2002 Declaration on Conduct are:

- the parties undertake to resolve their territorial and jurisdiction disputes using peaceful means;<sup>65</sup> and
- self restraint is to be exercised by the parties in conducting activities that might complicate or escalate the existing disputes including refraining from occupying uninhabited features.<sup>66</sup>

Overall, the thrust of the 2002 Declaration is one of enhancing cooperation and building trust and confidence as regards the South China Sea. While it might have been hoped by some ASEAN States that a treaty-like document with internationally legally binding status might have been adopted,<sup>67</sup> the 2002 Declaration is a political rather than a legal document. It has been assessed that the Declaration is a "formal ... framework for understanding and cooperation" and as "safety valve to prevent ... further unilateral actions ... in the disputed waters and area."<sup>68</sup> The most common narrative of the 2002

Declaration is that it was a beginning of a step-by-step process with the end goal being, not a direct resolution of the disputes, but a legally binding code of conduct.<sup>69</sup>

As a follow-up to the 2002 Declaration, the ASEAN – People's Republic of China Joint Working Group on the Implementation of the Declaration was established.<sup>70</sup> In 2006 the Working Group identified six projects dealing with, among other things, search and rescue and regional oceanographic exchanges,<sup>71</sup> which could be seen as attempts to encourage regional ocean cooperation. While the working group continued to meet, there was little progress on the establishment of these or similar type projects.<sup>72</sup> A positive cooperative endeavor that might be attributable to the 2002 Declaration was a bilateral joint marine seismic undertaking agreement and a tripartite joint marine scientific research agreement in the region. The bilateral Agreement for Joint Marine Seismic Undertaking in Certain Areas in the South China Sea by and between China National Offshore Oil Corporation and Philippine National Oil Company was signed in Beijing on 1 September 2004 and was for a term of three years.<sup>73</sup> In its preamble, the Agreement stated that: "the Parties' respective governments have expressed the commitment to pursue efforts to transform the South China Sea into an area of cooperation," noting, however, that "the signing of this Agreement by herein Parties shall not undermine the basic position held by the Government of each Party on the South China Sea issue."<sup>74</sup> The Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea by and among China National Offshore Oil Corporation, Vietnam Oil and Gas Corporation and Philippine National Oil Company was signed on 14 March 2005 in Manila for a term of three years.<sup>75</sup> Again, in its preamble, this tripartite Agreement states that "the Parties' respective governments have expressed their commitment to pursue peaceful efforts to transform the South China Sea into an area of peace, stability, cooperation and development; . . . the Parties shall abide by their respective government's commitment to fully implement the United Nations Convention on the Law of the Sea (UNCLOS) and the ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC); . . . for a joint marine seismic undertaking within the Agreement Area; . . ." while "the Parties recognize that the signing of this Agreement shall not undermine the basic position held by the Government of each Party on the South China Sea issue."<sup>76</sup> Along with the Tripartite Agreement, the three State-owned oil companies issued a Joint Statement, which it states that:

The three parties affirm that the signing of the Tripartite Agreement will not undermine the basic positions held by their respective Governments on the South China Sea issue and will contribute to the transformation of the South China Sea into an area of peace, stability, cooperation, and development in accordance with the 1982 United Nations Convention on the Law of the Sea and the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea.<sup>77</sup>

From the perspective of a Vietnamese Foreign Ministry spokesman, this Agreement "highlights the principles of equality and consensus among relevant Parties during the joint research process."<sup>78</sup>

While Philippine President Gloria Arroyo spoke of the historic significance of the tripartite Agreement,<sup>79</sup> the Agreement and the previous one were smeared by domestic allegations in the Philippines that the signing of the agreements were made in exchange for official development assistance from the PRC to fund government projects. Critics

also raised the issue of treason against the Arroyo government for the alleged “sellout” of Philippine territory since the agreements covered 24,000 square kilometers of undisputed Philippine territory and encroached on some 80 percent of the Kalayaan group of islands claimed by the Philippines.<sup>80</sup> These ill-fated agreements fell well short of achieving the goals hoped for by the parties to them.

New life may have been given to the 2002 Declaration when the Foreign Ministers of ASEAN and the People’s Republic of China reached agreement in July 2011 on Guidelines for the Implementation of the Declaration of Conduct.<sup>81</sup> The Guidelines, which are little more than a statement of good intentions, endorse the promotion of dialogue and consultations and a step-by-step approach to confidence building measures. In the face of a number of incidents involving the People’s Republic of China and both Vietnam and the Philippines and a perceived rising of tensions in the South China Sea, the timing of a recommitment to the Declaration on Conduct is important. As the People’s Republic of China noted:

In the current circumstances, the parties recognized that completing the consultations on the guidelines as quickly as possible, actively implementing the “Declaration” and promoting pragmatic cooperation is a necessary requirement to maintain peace and stability in the South China Sea ...<sup>82</sup>

Moreover, the People’s Republic of China proposed a series of cooperative initiatives including holding a workshop on freedom of navigation in the South China Sea, and committed to continuing with the cooperative projects already being led by Beijing.<sup>83</sup>

In a statement delivered by Premier Wen Jiabao at the 14th China-ASEAN Summit as a Commemorative Summit to Celebrate the 20th Anniversary of China-ASEAN Relations on 18 November 2011 in Bali, Indonesia, expansion of practical maritime cooperation was highlighted as one of the six fields of cooperation between Beijing and ASEAN.<sup>84</sup> The Premier also stated:

The disputes over the South China Sea between the relevant countries in the region have existed for many years. They should be settled through friendly consultation and negotiation between the sovereign states directly concerned. *Outside forces should not get involved under any excuse.* In 2002, China and ASEAN countries signed the Declaration on the Conduct of Parties in the South China Sea and agreed to advance practical cooperation and work for the final conclusion of a code of conduct. This is the common desire of ASEAN countries and China. We stand ready to work actively with ASEAN countries to fully implement the Declaration on the Conduct of Parties in the South China Sea, enhance practical cooperation and begin discussions on a code of conduct in the South China Sea. (emphasis added)<sup>85</sup>

It is apparent that the PRC’s approach to the South China Sea disputes has not changed: it favors bilateral solutions, or intra-regional solutions at most, and opposes extra-regional involvement, especially the involvement of the United States under the guise of “freedom of navigation” in order to pursue its foreign policy “shift in emphasis to Asia” based on its view that US presence in the region is an “essential ingredient for stability.”

*Communications to the Commission*

Further to the 2009 Joint Submission made by Malaysia and Vietnam and the Submission by Vietnam respecting the Northern Area to the Commission and the diplomatic missives that ensued in 2009, Indonesia (on 8 July 2010),<sup>86</sup> the Philippines (on 5 April 2011),<sup>87</sup> the People's Republic of China (on 14 April 2011),<sup>88</sup> and Vietnam (on 3 May 2011)<sup>89</sup> have provided *notes verbales* to the Commission.

The Indonesian communication zeroes in on the map appended to the People's Republic of China's 2009 *notes* and comments: "Thus far, there is no clear explanation as to the legal basis, the method of drawing, and the status of those separated dotted-lines."<sup>90</sup> Indonesia states that if the lines on the map are based upon maritime zones from the various small features in the South China Sea then "the so-called 'nine-dotted-lines map' ... clearly lacks international legal basis."<sup>91</sup> The Indonesian communication refers to several statements made by Chinese delegates in 2009 that small island features, i.e., rocks, are not entitled to zones beyond 12-n. miles and that Indonesia is in agreement with these observations.<sup>92</sup>

The Philippines April 2011 *note* asserts sovereignty over the Kalayaan Island Group and the jurisdiction permitted under the LOS Convention adjacent to the islands mindful of Article 121 (respecting islands and rocks) of the Convention.<sup>93</sup> The Philippine *note* also indicates that there is "no basis under international law, specifically UNCLOS" for the People's Republic of China's claim to "relevant waters as well as the seabed and subsoil thereof" captured by the U-shaped line.<sup>94</sup>

The April 2011 response of the People's Republic of China to the Philippines asserts "indisputable sovereignty over the islands ... and adjacent waters as well as the seabed and subsoil thereof" and that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."<sup>95</sup> The 2011 *note* indicates that since the 1930s that "the Chinese Government has given publicity several times to the geographical scope of China's Nansha Islands and the names of its components."<sup>96</sup> The *note* continues: "In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea" as well as national law, "China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."<sup>97</sup> As has been observed: "This sentence ... states publicly for the first time the Chinese official position on the status of the Nansha Islands" that they "meet the requirements of Article 121 to have their own EEZ and continental shelf" and is "an indirect response" to Indonesia's *note*.<sup>98</sup> While there is no explicit reference in the April *note* to the U-shaped line, it is not necessarily the case that Beijing has abandoned it. The tying of historical and legal evidence to "China's sovereignty and related rights" can be said to keep the ambiguity of the U-shaped line alive.

**Conclusion**

While the disputes and maneuvers among the South China Sea littoral governments has long been the focus of regional and multilateral attention, there is no question that 2009, with its flurry of official communications, has increased local sensitivities and global awareness of the issues. There has been a degree of clarity of what is being claimed and the basis for the claims that is hopefully helpful, particularly, if there is coalescence

around shared principles or approaches such as those in the LOS Convention. While the lens of this contribution (and this collection) has been primarily one of international law and marine policy, there is no doubting that the fluctuating temperature of the South China Sea disputes is a matter of the political choices of the governments of the region with the most important actor being the government in Beijing. The fizzle of the “core interest” hubbub and the adoption of the Guidelines for the Implementation of the Declaration on the Conduct of the Parties in the South China Sea in 2011 can be viewed as calming events. Even the April 2011 communication from the People’s Republic China clarifying its view of the legal status of the insular features of the South China Sea can be seen as a positive. There is no denying, however, that to the consternation of its neighbors and even the United States, the People’s Republic of China has actively, and in the eyes of some aggressively, pursued its position respecting the waters of the South China Sea, which has included increased patrols and surveillance activities in large parts of the South China Sea largely coincident with the ambiguous U-shaped line.<sup>99</sup> Who knows whether the 2011 calming events are just “the calm before the storm”?

## ANNEX

### *Guidelines for the Implementation of the DOC*

[Adopted on 20 July 2011 by Senior Officials of the People’s Republic of China and the ASEAN States in Bali, Indonesia.]

*Reaffirming that the DOC is a milestone document signed between the ASEAN Member States and China, embodying their collective commitment to promoting peace, stability and mutual trust and to ensuring the peaceful resolution of disputes in the South China Sea;*

*Recognizing also that the full and effective implementation of the DOC will contribute to the deepening of the ASEAN-China Strategic Partnership for Peace and Prosperity;*

*These Guidelines are to guide the implementation of possible joint cooperative activities, measures and projects as provided for in the DOC.*

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 under 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).

## Notes

1. For a good overview, see: Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea* (The Hague: Martinus Nijhoff, 1997), at pp. 17–38.

2. See, amongst many others: *ibid.*; Nguyen Hong Thao and Ramses Amer, “A New Legal Arrangement for the South China Sea?” (2009), 40 *Ocean Development and International Law* 333–349; and Sam Bateman and Ralf Emmers, eds., *Security and International Politics in the South China Sea* (London: Routledge, 2009). For a rich analysis of events in 2010, see: Carlyle A. Thayer, “Recent Developments in the South China Sea: Grounds for Cautious Optimism,” 14 December 2010, RSIS Working Paper No. 220 (S. Rajaratnam School of International Studies, Singapore) and regarding the actions by the People’s Republic of China, see: Zou Keyuan, “China’s U-Shaped Line in the South China Sea Revisited” (2012), 43 *Ocean Development and International Law* 18–34.

3. Declaration on the Conduct of Parties in the South China Sea, 4 November 2002, available on the website of ASEAN at <[www.aseansec.org/13163.htm](http://www.aseansec.org/13163.htm)> (accessed 19 July 2009) and as an appendix to Nguyen Hong Thao, “The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note” (2003), 34 *Ocean Development and International Law* 279, at pp. 282–285.

4. For a detail review of the 2002 Declaration, see: Thao, “The 2002 Declaration: A Note,” *supra* note 3, at pp. 279–282; Nguyen Hong Thao, “The Declaration on the Conduct of Parties in the South China Sea: A Vietnamese Perspective, 2002–2007” in Bateman and Emmers, *supra* note 2, at pp. 210–211; Ralf Emmers, *Geopolitics and Maritime Territorial Disputes in East Asia* (London: Routledge, 2010), at pp. 118–120; Aileen S.P. Baviera, “The South China Sea Disputes after the 2002 Declaration: Beyond Confidence Building” in Saw Swee-Hock (蘇瑞福), Sheng Lijun (盛立軍) and Chin Kin Wah (陳建華), eds., *ASEAN – China Relations: Realities and Prospects* (Singapore: Institute of Southeast Asian Studies, 2005), pp. 348–350; and Tran Truong Thuy, “Recent Development in the South China Sea: From Declaration to Code of Conduct,” 15 July 2011, on the website of the Program for East Asia (South China Sea) Studies, Diplomatic Academy of Vietnam, at [www.nghiencuubiendong.vn/en](http://www.nghiencuubiendong.vn/en) (accessed 12 September 2011).

5. See: Thao, “The 2002 Declaration: A Vietnamese Perspective,” *supra* note 4, at pp. 211–215; Emmers, *supra* note 4, at pp. 74–76; and note: Gao Zhigou, “South China Sea: Turning Suspicion into Mutual Understanding and Cooperation” in Saw, Sheng and Chin, *supra* note 4, at p. 340.

6. See: Nien-Tsu Alfred Hu, “South China Sea: Troubled Waters of a Sea of Opportunity?” (2010), 41 *Ocean Development and International Law* 203–213, at 206–207 (in this collection) and Valencia, et al., *supra* note 1, at pp. 29–30.

7. See: Nien-Tsu Alfred Hu, “Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea” (2010), 41 *Ocean Development and International Law* 281–314, at 301; Yann-huei Song, “The South China Sea Workshop Process and Taiwan’s Participation” (2010), 41 *Ocean Development and International*

Law 253–269; and Kuan-Hsiung Wang, “The ROC’s Maritime Claims and Practices with Special Reference to the South China Sea” (2010), 41 *Ocean Development and International Law* 237–252 (all of which are in this collection).

8. Lui Fu-Kuo (劉復國) and Wu Shicun (吳士存), eds., *2010 South Sea Region Situation Assessment Report* (2010 年南海地區形勢評估報告, in Chinese) was jointly published in July 2011 by the Institute of International Relations of the National Chengchi University (國立政治大學國際關係研究中心) in Taipei, Taiwan and the National Institute for South China Sea Studies (中國南海研究院) in Haikou City, Hai-Nan Province, mainland China. There are seven chapters in the Report along with an annex of major events. It is worth noting that each chapter was co-written by one scholar from Taiwan and another from mainland China and the final presentation was made after group discussions. The report reflects the academic view of both sides of Taiwan Strait on the current situation in South China Sea.

9. See: U.N. Convention on the Law of the Sea, done at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994, 1833 *U.N.T.S.* 397, Article 76(8) and Annex II. See the website of the Commission of the Limits of the Continental Shelf, available at [www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm).

10. *Ibid.*, Article 76(8).

11. *Ibid.*, Annex II, Article 4

12. Eleventh Meeting of the State Parties, “Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea,” Doc. SPLOS/72, 29 May 2001, available on website of the U.N. Division on Oceans and the Law of the Sea (DOALOS), at [www.un.org/Depts/los](http://www.un.org/Depts/los).

13. It is worth noting that a recent International Tribunal for the Law of the Sea (ITLOS) judgment delivered on 14 March 2012 on the “Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal”, or the Case No. 16: Bangladesh/Myanmar, the first case of the ITLOS relating to the delimitation of maritime boundaries, states that the continental shelf rights are inherent and unaffected by the procedural aspects of the CLCS which deals only with the outer limits (in particular, paragraphs 407 to 409) and the same Judgment considers that the activities of ITLOS and the CLCS are complementary to each other so as to ensure coherent and efficient implementation of the Convention (paragraphs 373, 376, 377, and 379). See: the ITLOS press release at [www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/pr\\_175\\_engf\\_02.pdf](http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/pr_175_engf_02.pdf), and the full text of the ITLOS judgment at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/1C16\\_Judgment\\_14\\_02\\_2012.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1C16_Judgment_14_02_2012.pdf) (accessed 10 April 2012).

14. Eighteenth Meeting of the States Parties, “Decision regarding the Workload of the Commission and the Ability of States to fulfil the Requirements of Article 4 of Annex II,” Doc. SPLOS/183, 20 June 2008, paragraph 1, available on the DOALOS website, *supra* note 12.

15. LOS Convention, *supra* note 9, Article 76(10) and Annex II, Article 9 and Rules of Procedure of the Commission, Doc. CLCS/40/Rev.1, 17 April 2008, Rule 46(2) and Annex I, paragraphs 3 and 5(b), on the website of the Commission, *supra* note 9.

16. Rules of Procedure of the Commission, *supra* note 15, Annex I, paragraph 5(a).

17. *Ibid.*, Annex I, paragraph 1.

18. See generally: T.L. McDorman, “The Commission on the Limits of the Continental Shelf (CLCS): The Nature of its Existence and Role in the Establishment of the Outer Limits of the Continental Shelf” (paper presented at the “Colloquium on the Outer Limits of the Continental Shelf and Consideration of Submissions,” Kuala Lumpur, Malaysia, May 2010). See also: Alex G. Oude Elferink, “The options to deal with a deadlock in the consideration of a submission by the Commission on the Limits of the Continental Shelf,” presented at the same Colloquium.

19. Malaysia – Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in respect of the Southern Part of the South China Sea, Executive Summary, May 2009, on the website of the Commission, *supra* note 9.

20. Vietnam Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982, Partial Submission in respect of Vietnam's Extended Continental Shelf: North Area (VNM-N), Executive Summary, April 2009, on the website of the Commission, *supra* note 9.

21. People's Republic of China, *Note Verbale* to Secretary-General of the United Nations, doc. CML/17/2009, New York, 7 May 2009 and *Note Verbale* to Secretary-General of the United Nations, doc. CML/18/2009, New York, 7 May 2009, both on the website of the Commission, *supra* note 9.

22. People's Republic of China, Preliminary Information Indicative of the Outer Limits of the Continental Shelf beyond 200 nautical miles, May 2009, paragraph 10, on the website of the Commission, *supra* note 9.

23. See: Republic of China, Ministry of Foreign Affairs, "Statement concerning a Joint Submission presented by Malaysia and Vietnam to the UN Commission on the Limits of the Continental Shelf," 11 May 2009, available on the website of the Ministry at [www.mofa.gov.tw/webapp/fp.asp?xItem=38047&ctnode=1901](http://www.mofa.gov.tw/webapp/fp.asp?xItem=38047&ctnode=1901) (accessed 19 July 2009) and "The Ministry of Foreign Affairs of the Republic of China solemnly declares statement on the governments of Malaysia and Vietnam filed a Joint Submission to the Commission on the Limits of the Continental Shelf of the United Nations, extending the outer limits of their respective continental shelf 200 nautical miles beyond their shorelines," 11 May 2009, available on the website of the Ministry at [www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/890fb320-603c-49b2-a2cc-7842923e66c8?arfid=0b12blae-64ff-4e4b-b6bd-e20fbf2c7a13&opno=49be2475-017b-4647-8ac1-9a0ec20d892c#print](http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/890fb320-603c-49b2-a2cc-7842923e66c8?arfid=0b12blae-64ff-4e4b-b6bd-e20fbf2c7a13&opno=49be2475-017b-4647-8ac1-9a0ec20d892c#print) (accessed 7 February 2012).

24. See, however, Republic of China, "Policy Guidelines for the South China Sea," March 1993, attached as Appendix I to Kuan-Ming Sun, "Policy of the Republic of China towards the South China Sea" (1995), 19 *Marine Policy* 401, at p. 408.

25. Republic of China, Ministry of Foreign Affairs, "Declaration of the Republic of China on the Outer Limits of Its Continental Shelf," 12 May 2009, English text is available on the website of the Taipei Economic and Cultural Representative Office in the United States, available at [www.taiwanembassy.org/us/ct.asp?xItem=91327&ctNode=2300&mp=12](http://www.taiwanembassy.org/us/ct.asp?xItem=91327&ctNode=2300&mp=12) (accessed 7 February 2012).

26. The Philippines, *Note Verbale* to Secretary-General of the United Nations, doc. No. 000818, New York, 4 August 2009 and *Note Verbale* to Secretary-General of the United Nations, doc. 000819, New York, 4 August 2009, on the website of the Commission, *supra* note 9.

27. The Philippines, Republic Act No. 9522, An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5466, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, approved 10 March 2009, available on the website of the Philippine Law and Jurisprudence Database at [www.lawphil.net/statutes/repacts/ra2009/ra\\_9522\\_2009.html](http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html). See generally: Rodolfo C. Severino, *Where in the World is the Philippines?* (Singapore: Institute of Southeast Asian Studies, 2011), at pp. 35–37 and 73–74.

28. Republic of China, Ministry of Foreign Affairs, "MOFA reiterates this Country's sovereignty over Nan-Sha islands and surrounding waters," 13 March 2009, available on the website of the Ministry at [www.mofa.gov.tw/official/Home/Detail/649168df-4a62-495e-9267-fdd7a92e04b9?arfid=7f013c3f-f130-44a9-905f-84cbaba2eca6&opno=907477b5-1d95-4205-a89d-320ed4806d4b#print](http://www.mofa.gov.tw/official/Home/Detail/649168df-4a62-495e-9267-fdd7a92e04b9?arfid=7f013c3f-f130-44a9-905f-84cbaba2eca6&opno=907477b5-1d95-4205-a89d-320ed4806d4b#print), in Chinese, (accessed 7 February 2012); People's Republic of China, *Note Verbale* to Secretary-General of the United Nations, doc. CML/12/2009, New York, 13 April 2009, available on the DOALOS website, *supra* note 12 and Vietnam, Permanent Mission to the United Nations, "Vietnam's Response to Philippine President's signing of Baseline Act," 13 March 2009, available at [www.vietnam-un.org/en/news.php?id=77&act=print](http://www.vietnam-un.org/en/news.php?id=77&act=print).

29. The Philippines, A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea, Executive Summary, May 2009, on the website of the Commission, *supra* note 9.

30. *Ibid.*, at pp. 1 and 12. The Philippines noted, at p. 12, that they opted only to submit information respecting its eastern coast "in order to avoid creating or provoking maritime boundary



disputes where there are none, or exacerbating them where they may exist ... This is to build confidence and promote international cooperation in the peaceful and amicable resolution of maritime boundary disputes.”

31. Brunei Darussalam, Preliminary Submission concerning the Outer Limits of its Continental Shelf, May 2009, on the website of the Commission, *supra* note 9.

32. Malaysia, Ministry of Foreign Affairs, “Press Release,” 3 May 2010, available on the website of Ministry of Foreign Affairs. More generally, see: Severino, *supra* note 27, at pp. 80–82 and Johan Saravanamuttu, “Malaysia’s Approach to Cooperation in the South China Sea,” paper presented at the May 2010 International Conference, Cooperation on Dealing with Non-Traditional Security Issues in the South China Sea: Seeking More Effective Means, held in Haikou.

33. PRC *Note Verbale*, CML/17/2009 and *Note Verbale*, CML/18/2009, *supra* note 21, paragraph 3.

34. The Philippines *Note Verbale*, No. 000818 and *Note Verbale*, No. 000819, *supra* note 26, paragraph 4.

35. LOS Convention, *supra* note 9, Article 121.

36. See generally: Jon M. Van Dyke and Robert A. Brooks, “Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources” (1983), 12 *Ocean Development and International Law* 265–284; Marius Gjetnes, “The Spratlys: Are They Rocks or Islands?” (2001), 32 *Ocean Development and International Law* 191–204; and Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2<sup>nd</sup> ed.) (Leiden: Martinus Nijhoff, 2005), at pp. 57–91.

In the *Case Concerning Maritime Boundary Delimitation in the Black Sea (Romania v. Ukraine)*, 3 February 2009, available on the website of the International Court of Justice, [www.icj-cij.org](http://www.icj-cij.org), the issue was raised whether Serpents Island constituted a rock. The International Court, at paragraph 187, decided that it did not need to answer the question.

37. Vietnam Submission, *supra* note 20, paragraph 6.

38. *Ibid.*, paragraph 1.

39. The Philippines, 2009 Archipelagic Baselines Law, *supra* note 27.

40. See: Wang, *supra* note 7; Zou, *supra* note 2; Hu, “South China Sea,” *supra* note 6, at pp. 206–207; and Li Jinming and Li Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note” (2003), 34 *Ocean Development and International Law* 287–296.

41. Edward Wong, “Chinese Military Seeks to Extend Its Naval Power,” *New York Times*, 23 April 2010, available at [www.nytimes.com/2010/04/24/world/asia/24navy.html?pagewanted=all](http://www.nytimes.com/2010/04/24/world/asia/24navy.html?pagewanted=all) and see further Thayer, *supra* note 2, at pp. 2–3.

42. For the names of Chinese and American governmental officials involved in the alleged dialogue from which the “core interest” came, Zeenews, an Indian news agency, reported that, according to a Japanese source, Kyodo News Agency, “China has officially conveyed its new state policy to the US that it considers the South China Sea part of its ‘core interests’”. It further reported that “China conveyed the new policy to visiting US Deputy Secretary of State James Steinberg and Jeffrey Bader, senior director for Asian Affairs on the National Security Council, in early March, Kyodo quoted the sources as saying. The two US officials met Chinese State Councillor Dai Bingguo (戴秉國), Foreign Minister Yang Jiechi (楊潔篪) and Vice Foreign Minister Cui Tiankai (崔天凱) in Beijing, and Dai is believed to have relayed the policy to the US side given that he provides overall management in foreign affairs, the Japanese news agency reported.” See Zeenews.com, “China adds South China Sea to ‘core interest’ in new policy,” 4 July 2010, available at [zeenews.india.com/news/world/china-adds-south-china-sea-to-core-interest-in-new-policy\\_638592.html](http://zeenews.india.com/news/world/china-adds-south-china-sea-to-core-interest-in-new-policy_638592.html) (accessed 11 February 2012).

43. Edward Wong, “China Hedges Over Whether South China Sea Is a ‘Core Interest’ Worth War,” *New York Times*, 30 March 2011, available at [www.nytimes.com/2011/03/31/world/asia/31beijing.html](http://www.nytimes.com/2011/03/31/world/asia/31beijing.html) (accessed 11 February 2012).

44. Thayer, *supra* note 2, at pp. 2–6 and see: Michael D. Swaine, “China’s Assertive Behavior: Part One – On ‘Core Interests,’” February 2011, *China Leadership Monitor*, No. 34 (Hoover Institution, Stanford University).

45. Wong, "China Hedges Over Whether South China Sea Is a 'Core Interest' Worth War," *supra* note 43.
46. *Ibid.*
47. Li Hongmei, "Unwise to elevate 'South China Sea' to be core interest?" *People's Daily Online*, 27 August 2010, available at [english.peopledaily.com.cn/90002/96417/7119874.html](http://english.peopledaily.com.cn/90002/96417/7119874.html) (accessed 11 February 2012).
48. Wong, "China Hedges Over Whether South China Sea Is a 'Core Interest' Worth War," *supra* note 43.
49. Kuala Lumpur Security Review is an online military news portal cum media center registered in Malaysia. See its website at [www.klsreview.com](http://www.klsreview.com) (accessed 3 May 2010).
50. See: Kuala Lumpur Security Review, "Southeast Asian Spratly Group is Probably Taking Shape Now", 28 July 2009, at [www.klsreview.com/HTML/2009Jul\\_Dec/20090728\\_01.html](http://www.klsreview.com/HTML/2009Jul_Dec/20090728_01.html) (accessed 3 May 2010).
51. See: *ibid.*, "Special Representative of PRC Foreign Minister Dismissed the Existence of 'Southeast Asian Spratly Group'", in Chinese, at [www.klsreview.com/HTML/2009Jul\\_Dec/20090728\\_02.html](http://www.klsreview.com/HTML/2009Jul_Dec/20090728_02.html) (accessed 3 May 2010).
52. See: "China Must Curb the Relevant Activities of Occupation on Islets by Nan-Hai Countries: Hong Kong Media Says" (港媒稱中國須遏制南海諸國侵佔島礁相關活動), in Chinese, at [mil.news.sina.com.cn/2009-07-14/1218558823.html](http://mil.news.sina.com.cn/2009-07-14/1218558823.html) (accessed 12 December 2009).
53. United States, Department of State, "Daily Press Briefing," 10 May 1995, available at [dosfan.lib.uic.edu/ERC/briefing/daily\\_briefings/1995/9505/950510db.html](http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1995/9505/950510db.html) (accessed 9 October 2011).
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60. See: Landler, *supra* note 56.
61. See: People's Republic of China, Ministry of Foreign Affairs, "Foreign Minister Yang Jiechi Refutes Fallacies on the South China Sea Issue," 26 July 2010, available at [www.mfa.gov.cn/eng/zxxx/t719460.htm](http://www.mfa.gov.cn/eng/zxxx/t719460.htm) (accessed 9 October 2010) and Andrew Jacobs, "China Warns U.S. to Stay Out of Islands Dispute," *New York Times*, 26 July 2010, available at [www.nytimes.com/2010/07/27/world/asia/27china.html](http://www.nytimes.com/2010/07/27/world/asia/27china.html) (accessed 21 December 2011). See also: Thayer, *supra* note 2, at pp. 13–16.
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64. *Ibid.*

65. Declaration on the Conduct of Parties in the South China Sea, *supra* note 3, paragraph 4.

66. *Ibid.*, paragraph 5.

67. Emmers, *supra* note 4, at p. 133.

68. Gao Zhigou, *supra* note 5, at p. 340.

69. Thao, "The 2002 Declaration: A Vietnamese Perspective," *supra* note 4, at pp. 218–219 and Thao and Amer, *supra* note 2, at p. 337. Gao Zhigou, *supra* note 5, at p. 341 sees the Declaration as part of a positive trend and takes the view that: "The long-standing jurisdictional claims and territorial disputes in the SCS [South China Sea] have yielded to the concept of comprehensive security in the region."

70. Terms of Reference of the ASEAN – China Joint Working Group on the Implementation of the Declaration on the Conduct of the Parties in the South China Sea, text available on the ASEAN website at [www.aseansec.org/16886.htm](http://www.aseansec.org/16886.htm) (accessed 19 July 2009).

71. See: Thao, "The 2002 Declaration: A Vietnamese Perspective," *supra* note 4, at p. 215 and Thao and Amer, *supra* note 2, at p. 338.

72. Thao and Amer, *supra* note 2, at p. 339. The Joint Oceanographic Marine Scientific Expedition in the South China Sea (JOMSRE-SCS), which predates the 2002 Declaration, has seen a renewal of cooperation post the 2002 Declaration. See: Thao, "The 2002 Declaration: A Vietnamese Perspective," *supra* note 4, at pp. 216–217 and Thao and Amer, *supra* note 2, at p. 338.

73. The English text of the bilateral Agreement can be found at [pcij.org/blog/wp-docs/RP\\_China\\_Agreement\\_on\\_Joint\\_Marine\\_Seismic\\_Undertaking.pdf](http://pcij.org/blog/wp-docs/RP_China_Agreement_on_Joint_Marine_Seismic_Undertaking.pdf) (accessed 27 February 2012).

74. *Ibid.*

75. The English text of the tripartite Agreement can be found at [nghiencuubiendong.vn/trung-tam-du-lieu-bien-dong/doc\\_details/138-a-tripartite-agreement-for-joint-marine-scientific-research-in-certain-areas-in-the-south-china-sea](http://nghiencuubiendong.vn/trung-tam-du-lieu-bien-dong/doc_details/138-a-tripartite-agreement-for-joint-marine-scientific-research-in-certain-areas-in-the-south-china-sea) (accessed 28 February 2012).

76. *Ibid.*

77. See: People's Republic of China, Foreign Ministry, "Oil companies of China, the Philippines and Vietnam signed Agreement on South China Sea Cooperation", 15 March 2005, , on the Ministry's website at [www.fmprc.gov.cn/eng/wjb/zwjg/zwbdt/t187333.htm](http://www.fmprc.gov.cn/eng/wjb/zwjg/zwbdt/t187333.htm) (accessed 28 February 2012).

78. See: Answer to correspondent by Mr. Le Dzung, the Spokesman of the Vietnamese Ministry of Foreign Affairs on 14th March 2005, at [www.mofa.gov.vn/en/tt\\_baochi\\_pbnfn/ns050314164241](http://www.mofa.gov.vn/en/tt_baochi_pbnfn/ns050314164241) (accessed 27 February 2012).

79. See: Oil companies of China, the Philippines and Vietnam signed Agreement on South China Sea Cooperation, *supra* note 77.

80. See: "Stirrings over Spratlys," dated 10 March 2008, at [pcij.org/blog/2008/03/10/stirrings-over-spratlys](http://pcij.org/blog/2008/03/10/stirrings-over-spratlys) (accessed 27 February 2012). The PCIJ, or the Philippine Center for Investigative Journalism, is an independent, nonprofit media agency that specializes in investigative reporting. It was founded in 1989 by nine Filipino journalists. PCIJ also publishes [www.pcij.org/blog](http://www.pcij.org/blog), a daily institutional news blog. See PCIJ official website, at [pcij.org/about/](http://pcij.org/about/) (access 29 February 2012). As a side note, Mr. Eduardo V. Manalac, then President and CEO of the Philippine National Oil Company, who was the representative of the Philippines signing the two Agreements, was later charged with "grave misconduct and conduct grossly disadvantageous to the interest of government service" for violation of the Anti-Graft and Corrupt Practices Act or Republic Act No. 3019 by a Philippine Order issued on 3 February 2006. See: "PNOC Corruption – Anti Graft – Eduardo Manalac" at [sukhin-energy.net/PNOC\\_CORRUPTION.html](http://sukhin-energy.net/PNOC_CORRUPTION.html) (accessed 28 February 2012).

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83. *Ibid.*

84. Premier Wen, Statement at the 14th China-ASEAN Summit, available on People's Republic of China's Official web portal at [english.gov.cn/2011-11/18/content\\_1997716.htm](http://english.gov.cn/2011-11/18/content_1997716.htm) (accessed 28 February 2012).

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87. The Philippines, *Note Verbale* to the Secretary-General of the United Nations, doc. No. 000228, 5 April 2011, on the website of the Commission, *supra* note 9.

88. People's Republic of China, *Note Verbale* to the Secretary-General of the United Nations, doc. No. CML/8/2011, 14 April 2011, on the website of the Commission, *supra* note 9.

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90. Indonesian *Note Verbale*, *supra* note 86, paragraph 2.

91. *Ibid.*, paragraphs 2 and 4.

92. *Ibid.*, paragraph 3.

93. The Philippines 2011 *Note Verbale*, *supra* note 87, paragraphs 3 and 5.

94. *Ibid.*, paragraph 6. For a detailed analysis of the Philippine communication, see: Nguyen-Dang Thang and Nguyen Hong Thao, “China's Nine-Dotted Lines in the South China Sea: The 2011 Exchange of Diplomatic Notes of the Philippines and China” (2012), 43 *Ocean Development and International Law* 35–56.

95. PRC 2011 *Note Verbale*, *supra* note 88, paragraph 2.

96. *Ibid.*, paragraph 4. The “Nansha Islands” (南沙群島) in Chinese is the Spratly Islands in English.

97. *Ibid.*

98. Thang and Thao, *supra* note 94, at p. 45.

99. See generally: Zou Keyuan, *supra* note 2, at pp. 20–21.