THE SOUTH CHINA SEA: AVENUES TOWARDS A RESOLUTION OF THE ISSUE

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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 a token presence and still be called "occupied." At present, Vietnam has occupied 27 islands and reefs; the Philippines has a presence on 8 islands in the eastern part; China has occupied 9, though some reports claim only 7; Malaysia has occupied 3 but has a presence on another 2 islands; Taiwan occupies 1 island. Both China and Vietnam claim the entire area, the Spratly Islands as well as the Paracels, which means that their claims 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 base their claims on historical contact or prior discovery. Vietnam has argued that contact was first made during the Nguyen dynasty [16th-19th 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 declared sovereignty over 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 divested Japan of possession of the islands but refused to return them to China. The Philippines lay claim to an area contiguous to Palawan based on prior discovery by Tomas Cloma of what was then regarded as terra nullius. That claim was supported by the Carlos Garcia declaration of February 1957 and incorporated into the Ferdinand Marcos presidential declaration of July 1971. Malaysia's claim to the resources was based on the continental shelf and was raised with the publication of a map of the area in 1979. 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 neighboring states. When Tomas Cloma claimed Kalayaan for the Philippines in 1956 it triggered a response from South Vietnam which began the occupation of islands in the area. Taiwan protested against Cloma's actions and was motivated to re-occupy Itu Aba or Tai Ping Island after withdrawing from it in 1950. After Vietnamese reunification in 1975 a reunited Vietnam began occupying islands in the Spratlys and aroused China's hostility. The Philippines was moved to occupy the islands in its claim zone beginning in March 1978 and Malaysia was spurred to announce its own claim in the following year. 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 occupy islands. In March 1988 Chinese naval vessels clashed with Vietnamese near Fiery Cross Reef [Đá Chữ *Thập or* Yung Shu Jiao] 3 Vietnamese vessels were sunk with the loss of 72 sailors. China then occupied 7 islands, and later another two.

One important factor in the scramble for occupation of the islands was the law of the sea, the negotiations began in 1973 and culminated in UNCLOS-III in December 1982.[1] UNCLOS-III allowed each littoral state to claim an Exclusive Economic Zone [EEZ] of 320 kms or a continental shelf and specified that islands could generate their own EEZs or continental shelves. UNCLOS-III 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

[1] UNCLOS 1 was conducted 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-III in 1984, Vietnam in 1994, while both Malaysia and China ratified the convention in 1996.

would generate. Other claimants such as Malaysia and the Philippines have been motivated to take preventive steps to ensure that islands in the own claim zone would not be occupied by others and have taken steps to demonstrate "effective occupation." 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 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.[2]

Another major hurdle for the claimants is that UNCLOS-III 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 economic 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.[3] 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. Then, 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 snorkeling or diving amongst the reefs is conducted on an organized basis this may satisfy the requirement. 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.

WHAT IS AT STAKE?

The scramble for islands, the assertion of conflicting claims and the absence of any movement towards a resolution ensures that conflict is always a possibility. China

[2] "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

[3] 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]

has been the only claimant to employ force so far which has reflected its latecomer status. While the other claimants have occupied islands in their respective zones China was excluded from asserting its claim in a similar way by the lack of a suitable naval capability and the presence of superpower navies. As a latecomer China has had the incentive to use force to stake a claim to the area and to be included in future negotiations relating to the South China Sea. In 1974 and 1988 China acted against Vietnam as the claimant with the largest number of occupied islands; it alarmed the ASEAN states and the international community and aroused suspicions of Chinese long term intentions. In May 1992 China announced that it had negotiated an oil exploration concession with the U.S. Crestone Company which raised the stakes. 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."[4] 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. Various epithets have been used to characterize the Chinese move including "creeping annexation" and "creeping invasion," which at least pointed to an effort to minimize risk by avoiding direct confrontation. The Philippines was targeted as the least able among the ASEAN countries to patrol its EEZ and enforce its claim. The risk for China, however, was ratcheted up when the Philippines negotiated a Visiting Forces Agreement [VFA] with the US navy in 1998 which was ratified by the Philippine Senate in May 1999. The US was interested in obtaining visiting rights for the navy which would enable it to respond much more quickly in the event of another Taiwan crisis. Because of Taiwan the US navy became involved more closely in the South China Sea. Stalemate has characterized the situation since then 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. 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 signaling a Chinese intention to resolve the issue DOC was a defensive move for China and an indication of prolonged stalemate.

[4] ASEAN Declaration On The South China Sea Manila, Philippines, 22 July 1992 http://www.aseansec.org/3634.htm

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 despite conflicting claims the status quo may be acceptable to all sides as an alternative to conflict. The status quo in the South China, however, is an uncertain one because the presence of oil and gas demands a resolution of the conflicting claims before large scale production can begin. 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 increasingly rapidly and imports are slated to reach 50% of consumption in 2010. China has attempted to diversify energy supplies to reduce the risk of supply disruption by seeking long term agreements with Venezuela, Nigeria, Sudan and at some point greater interest in the South China Sea's energy resources is likely to be stimulated. Chinese estimates of oil reserves in the South China Sea have been noticeably high 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." [5] Natural gas may be more important than oil in the South China Sea as U.S. 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.[6]

As energy needs increase the effort to exploit the energy potential of the South China may indeed trigger conflict. When in 1992 China involved the American company Crestone in oil exploration in the area Vietnam protested. Tensions between Vietnam and China over Crestone's activities continued through the 1990s. 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 prompting 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].

[5] See :"South China Sea' Oil and Natural Gas," *Energy Information Administration, Official energy Statistics from the US Government* http://www.eia.doe.gov/emeu/cabs/South_China_Sea/OilNaturalGas.html

[6] Ibid

As Vietnam attempts to exploit new fields there is the possibility of new clashes with China. In October 2004 a new offshore oilfield was discovered in northern Vietnam west of Hainan Island which involved a consortium including PetroVietnam, Malaysia's Petronas Carigali, Singapore Petroleum and American Technology Inc. Beijing's Foreign Ministry protested.[7] Malaysia and Brunei have disputed the development of a gas field involving 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.[8] More recently in March 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."[9] China protested nonetheless and its embassy in Manila declared it illegal. A resolution of the conflicting claims is required to avoid the uncertainly that would attend efforts to exploit the energy resources of the area.

APPROACHES TO A RESOLUTION

Multilateral negotiations

Proposals for multilateral negotiations over the South China have been opposed by China which has insisted that negotiations 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.[10] In March 1994 Ramos also called for the demilitarization of the Spratlys and a freeze on all destabilizing activities in the area. The intention behind Ramos' thinking was to kick start negotiations over the issue which

[7] Tran Dinh Thanh Lam, "Vietnam oil find fuels China's worries", *Energy Bulletin,* 26 October 2004. http://www.energybulletin.net/node/2838

[8] "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

[9] David Cagahastian, "Arroyo signs baselines bill into law" *Manila Bulletin,* 11 March 2009, http://www.mb.com.ph/node/198552

[10] *Reuters,* 16 July 1992

would bring the parties together to discuss the main issues at a later stage. In any case the demilitarization 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 chief rationale for the formation of the ASEAN Regional Forum [ARF] in 1993 was the need to engage China across the whole range of issues including the South China Sea. The Philippines discovered that that after China's occupation of Mischief Reef the issue could not be raised at the ARF as senior officials were opposed and kept the issue off the agenda. Neither ASEAN nor the ARF is able to deal with the issue which raises questions about their role and purpose.[11] ASEAN has not been united over this issue in any case as Malaysia supported China over bilateral negotiations. Malaysia's Prime Minister Mahathir sought to bandwagon with China over this issue which reflected his broader foreign policy agenda and his sparring with the US. A step by step approach to promote multilateral negotiations over the issue has been proposed. If the claimants start by 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.[12] The idea may be attractive but because Chinese and Vietnamese claims overlap with the others most bilateral issues would involve multilateral claimants. There are, indeed, few purely bilateral issues in the South China Sea. China did at least accept the November 2002 DOC which was prematurely regarded within ASEAN as evidence of Beijing's acceptance of multilaterism and a hope for the future. As explained above, however, DOC served Beijing's purpose in preventing ASEAN states from involving the US more closely in the dispute or from engaging in activities which would go against Beijing's interests. This agreement was preparatory to an actual code of conduct which was to be negotiated later but there has been no follow up and progress has been stalled.

Legal resolution

A legal resolution of the South China Sea dispute requires the adoption of UNCLOS principles to reconcile the different claims. One of the uncertainties of the dispute is that China has not defined its claim, it has published maps of its claim which include 80% of the South China Sea but these are vague and insufficient for legal purposes. In any case according to Articles 74 and 83 of UNCLOS-III in the case of

[11] Lee Lai To, "China, the USA and the South China Sea Conflicts," *Security Dialogue*, Vol. 34,No. 1 March 2003

[12] 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

overlapping EEZs and continental shelves delimitation will be effected by agreement on the basis of international law or the International Court of Justice to "reach an equitable solution." Both articles 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-III 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 utilize 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.[13] 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 at least four precedents for joint development 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. China subsequently opposed the agreement which made its practical implementation difficult. 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. The third is the Timor Gap Treaty concluded by Australia and Indonesia in December 1989. This treaty 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.

[13] *Business Times* [Singapore], 23 July 1992

Finally, there is the Malaysia-Vietnam agreement on joint development of the area of overlapping claims to the continental shelf which was signed in June 1992.

There are various problems in applying this principle to the South China Sea, however. The examples above are cases of successful bilateral agreements and transferring this idea to a complicated multilateral situation is fraught with difficulty. 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. This makes it more difficult for the claimants to share the resources of what they regard as their legitimate claim with others. Both Vietnam and Malaysia have little enthusiasm for this idea which is seen as favouring China above all. Critics see the Chinese proposal 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 cognizance 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 Ambassador Hasjim Djalal when he visited the ASEAN counties over May-June 1994 but with few results.[14] 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-III. China, in particular, would be stripped of its claim to the entire area with little compensation.[15] 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.

A maritime regime

A variant legal-political approach is the idea of a maritime regime which would govern the South China Sea. One specific proposal is for a Spratly Resource Development Authority [SRDA] which could pool the financial resources of claimants

[14] Nayan Chanda, "Divide and Rule," *The Far Eastern Economic Review*, 11 August 1994

[15] 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

into a common fund and would promote joint efforts to develop the area's resources.[16] A maritime regime is based on an understanding of common need as an incentive to resolve the sea boundary disputes between claimants. Article 123 of UNCLOS-III 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 championed this approach arguing that regional maritime cooperation could proceed progressively from policy consultation to policy harmonization, coordination and national policy adjustments. 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. [17] No doubt, an appropriate maritime regime for the South China 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 workshop approach

The workshop approach to dispute resolution, often called interactive problem solving, may be utilized when the formal diplomacy reaches a stalemate and when the parties are searching for a way out of their predicament. It may be used as a means to generate proposals for the resolution of the dispute and as an informal testing ground as to their feasibility without the encumbrances associated with the regular diplomatic process. This approach was pioneered by John Burton who in 1966 established the Centre for the Analysis of Conflict in the University of London, which later moved to the University of Kent at Canterbury. It was also employed by Herbert Kelman of Harvard University and Leonard Doob at Yale University in a series of workshops dealing with Cyprus, Indonesia and Malaysia. Kelman organized a series of workshops over the Arab-Israeli problem beginning in 1971 which continued until after the Oslo agreement of 1993. The idea was to involve participants in the workshop who were linked with the leaderships of the conflicting sides and to give them an opportunity to identify ways and means of resolving the conflict. The lessons of the workshop would then be transferred to the diplomatic negotiations either by the participants or by the organizers of the

[16] Christopher C. Joyner, "The Spratly Islands Dispute in the South China Sea: Problems, Policies, and Prospects for Diplomatic Accommodation" in Ranjeet Singh [editor] *Investigating Confidence Building Measures on the Asia Pacific Region*, Henry L. Stimson Centre, Report No. 28, Washington DC. 1999

[17] Mark J. Valencia, "Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia," *Ocean Development & International Law*, Volume 31, Issue 3, July 2000

workshop who would have their own channel of communication with governments of one or both sides. Ambassador Hasjim Djalal conceived the idea of similar workshops on the South China Sea which were sponsored by the Indonesian Foreign Ministry 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 11 countries, the ASEAN six, Taiwan, Cambodia, Laos, and Vietnam; China and Taiwan joined in 1991.[18] After CIDA ceased funding the workshops they have continued with funding on an ad hoc basis by participants.

There were several attempts to transform the second track workshops into first track diplomacy in a way which would be relevant for the South China Sea. Indonesian Foreign Minister Ali Alatas in 1992 claimed that after three workshops China had agreed to put its claim on hold and 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.[19] 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."[20] He told the 27th ASEAN Foreign Ministers meeting in July 1994 that the workshop could be upgraded to include "formal intergovernmental discussions and cooperation."[21] 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 the larger issues of the sovereign claims in a "spill over" effect. The workshop series continued with these studies and various committees were created for this purpose which reported to the workshop. 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

[18] 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/

[19] *Jakarta Post,* 20 July 1992

[20] *Straits Times,* 23 July 1994]

[21] *Sunday Times* [Singapore], 24 July 1994

discuss the larger issues. Ali Alatas also proposed to invite representatives from outside countries such as the US and Japan in the workshop which was strongly opposed by China.

What did the workshop 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. One major criticism of the South China Sea workshop approach is that the representatives involved had little influence on their respective governments for the most part. Had the workshop involved high ranking representatives with close ties to their senior leaders, as did Harvard University's workshop on the Arab-Israeli issue, perhaps it could have come up with better results. Claimant governments, particularly the Chinese, did not evince much interest in the workshop and the discussions continued without conclusion. In any case the involvement of senior representatives in a workshop does not necessarily result in a resolution as the Harvard series of workshops on the Arab-Israeli issue has demonstrated. In these workshops senior representatives could afford to display greater reasonability and understanding because they knew that the context was informal. Once they returned to their respective positions in government they reverted to their previous negotiating positions. From the beginning excessive hopes were placed upon the workshop approach which could not get very far while the claimant governments remained undecided.

Maritime energy cooperation

A resolution of the 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. The immediate result of the current stalemate would be that exploration for energy resources would be delayed and actual production would be prevented. International energy companies require a stable and conflict free environment of their activities and would hesitate to get involved if this could not be assured. 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 jeopardize 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 3 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. Criticisms of the agreement have been virulent both within and outside the Philippines for various reasons. The main objection was that it was unconstitutional as it infringed Article 12 [2] of the 1987 Philippine constitution or the national patrimony clause. This stipulates that coproduction agreements or joint ventures require a 60% stake for Filipino citizens and that the president is required to notify congress accordingly. JMSU was kept secret by the Manila administration and its terms were only revealed three years later. Philippine domestic critics accused Speaker Jose de Venecia Jr of negotiating the agreement in exchange for dubious loans from China which pointed to corruption. Critics claimed that by allowing China and Vietnam to operate within the Philippine EEZ the Philippine claim to the area was weakened and ASEAN solidarity over the South China Sea was broken.[22] Yet another criticism was that the Philippines could not benefit from the agreement since the seismic data was taken by China and Vietnam. The JSMU, indeed,

[22] Barry Wain,"Manila's Bungle in the South China Sea," *Far Eastern Economic Review* January/February 2008

was faulty yet it pointed to possibilities that could be explored in the future but with multilateral or ASEAN endorsement. An agreement for exploration and drilling involving the national oil companies of the claimants would be an attempt to 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. No doubt 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 and would be resisted. 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.

CONCLUSION

The proposal outlined in this paper is modest and practical and in view of the current deadlock in the South China Sea. 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 means building on existing efforts to exploit the resources of the area which have been undertaken by claimants separately and in their own claim zones. The extension of these efforts within a multilateral framework which could be coordinated by ASEAN is not impossible though 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 this proposal and by doing so it would strengthen its role in the Asia Pacific region.