

Cooperation in the South China Sea: from Dispute Management to Ocean Governance

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[T]he problems of ocean space are closely interrelated and need to be considered as a whole.¹

1. Introduction

The South China Sea (SCS) has long been of interest to scholars of international law and international relations.² But attention has been paid almost exclusively to the simmering territorial disputes in the SCS. While this is justified by the concern that such disputes pose a threat to regional peace and stability, that the management of the territorial disputes in the SCS dominates existing literature may belie the fact that problems associated with the use and management of oceans in general and the South China Sea in particular are interrelated and should be addressed in a holistic way. This paper canvasses for a more comprehensive approach to cooperation in the SCS through the prism of ocean governance.

The paper, besides the Introduction and Conclusions, contains four sections. Section 2 highlights the significance of the South China Sea. This is followed by a brief overview in Section 3 of the territorial disputes and their implications for the management of the SCS. Section 4 points out the shortcoming of the two existing approaches to the management of the SCS and Section 5 mentions some principles that inform an alternative approach to the SCS, that is ocean governance.

2. The significance of the SCS

The SCS – the second largest semi-enclosed sea in the world – is bordered by China (including Taiwan) and eight ASEAN countries, namely the Brunei, Cambodia, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam. As part of the most direct route between the Pacific and Indian Oceans, the SCS plays a crucial role in maritime trade of our globe,

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¹ The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 (LOS Convention), 1833 *UNTS* 396, Preambular paragraph 3.

² See, e.g. MS Samuels, *Contest for the South China Sea* (Methuen, New York, 1982) (historical account); MJ Valencia, JM Van Dyke and NA Ludwig, *Sharing the resources of the South China Sea* (Martinus Nijhoff, The Hague, 1997) (legal and natural science); S Bateman and R Emmers (eds), *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (Routledge, London, 2009) (interdisciplinary perspective); R Emmers, *Geopolitics and maritime territorial disputes in East Asia* (Routledge, London, 2009) (geo-political science). See also C Schofield and I Storey, 'The South China Sea Dispute: Increasing Stakes and Rising Tensions' [2009] *The Jamestown Foundation Occasional Paper* (The Jamestown Foundation, Washington, DC) (for a succinct summary of all pertinent issues relating to the SCS disputes).

serving as the crucial conduit for more than a quarter of the world's trade volume.³ Thus, the Sea Lines of Communication (SLOCs) through the SCS are of great importance to not only Southeast Asian coastal states but also states beyond the region. In fact, most of maritime traffic between East Asia and Europe, Africa, the Middle East and South Asia passes through the SCS.⁴ By the same token, the SCS is also significant in military terms, especially for naval powers who want to maintain or increase their global military posture and rely on the SCS transit corridors for rapid deployments between the Western Pacific and Indian Ocean.⁵

In addition to the geo-strategic importance, the SCS is vital to the developing economies of countries in the region as it holds a large number of assets, notably living and non-living resources. With regard to the latter, there is also widespread perception that the seabed of the SCS holds significant amounts of oil and gas. This is testified by significant commercial discoveries made at the margins of the SCS.⁶ Given their increasing energy demands and the surging oil prices, the oil factor arguably looms large in the geopolitical calculations of states in the region. Living resources in the SCS are abundant⁷ and most of the fisheries resources in the SCS are either highly migratory or transboundary stocks,⁸ such as scad, mackerel and especially tuna – the most valuable and sought-after species.⁹ The abundance of marine living resources in SCS is thanks to its high biodiversity¹⁰ with coral reefs being the important nursery and breeding grounds for regional fisheries.

The socio-economic importance of fisheries to the East Asian countries cannot be overestimated. In fact, fish has been and continues providing an important source of protein for

³ C Schofield, 'Dangerous Ground: A Geopolitical Overview of the South China Sea' in S Bateman and R Emmers (eds), *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (Routledge, London, 2009), ch 1, 7, 18.

⁴ G Kullenberg, 'Transportation across the Sea' in C Thia-Eng and others (eds), *Securing the Oceans: Essays on Ocean Governance* (GEF/UNDP/IMO Regional Programme on Building Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) and the Nippon Foundation, Quezon City, 2008), ch 4, 41, 49. See also Schofield, *supra*, 18, states that 70% of Japan's energy needs and 65% of China's pass through these SLOS.

⁵ Schofield and Storey, *supra*, 1.

⁶ See Table 3. The oil and gas potential of the central part of the SCS, however, remains speculative 'best guesstimate' due to the lack of sufficient exploration activities. See Schofield, *supra*, 15-6.

⁷ The SCS, flushed by several large rivers, is considered as one of the world's most productive fishing grounds. See D Rosenberg, 'Fisheries Management in the South China Sea' in S Bateman and R Emmers (eds), *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (London: Routledge, 2009) 61. T Kivimäki (ed), *War or peace in the South China Sea?* (Copenhagen: NIAS Press, 2002) at 44, ranks the SCS 4th in the 19 richest fishing zones in the world.

⁸ K-H Wang, 'Bridge over troubled waters: fisheries cooperation as a resolution to the South China Sea conflicts' (2001) 14(4) *The Pacific Review* 531, 535-36.

⁹ Rosenberg, *supra*, 62.

¹⁰ PEMSEA (Partnerships in Environmental Management for the Seas of East Asia), Sustainable Development Strategy for the Seas of East Asia: Regional Implementation of the World Summit on Sustainable Development Requirements for the Coasts and Oceans, 2003, 16, states that the SCS is "the global centre of marine shallow-water tropical biodiversity".

countries in the region.¹¹ The already high annual per capita fish consumption in China and Southeast Asia is estimated to increase from 33.6 million and 18 million tons in 2005 by 4.5-5.5 million and 3 million tones respectively after 10 years.¹² Fisheries have always been of great social importance to East Asian countries, creating jobs for a large portion of population living in the coastal sub-region. In fact, in 2010, the SCS countries accounted for more than 75% and approximately 49% of the total marine fish capture production of Asia and the world respectively.¹³ Economically speaking, fishery exports are an important source of foreign currency for coastal states.¹⁴

3. Territorial disputes and their implications for the management of the SCS

There are generally two types of territorial disputes in the South China Sea,¹⁵ the one relating to island sovereignty and the other to maritime boundaries (Figure 1). With regard to the former, the two most famous ones are the sovereignty disputes over two groups of islands, namely the Paracels and the Spratlys.¹⁶ The Paracels, a group of some thirty small islands, reefs and shoals situated to the central north of the SCS, forms the subject of a bilateral dispute between Vietnam and China (including Taiwan);¹⁷ the Spratlys, a group of over a hundred tiny islands, reefs and shoals scattering over a large area in the centre of the SCS, involves six claimants, i.e. Brunei, China, Malaysia, the Philippines, Vietnam and Taiwan. A more recent island sovereignty dispute, which has nevertheless increasingly drawn attention of the international community, is that between China and the Philippines over the ring-shaped Scarborough Reef which comprises several rocks to the north of the Spratlys and lies about 124 nm off the nearest coast of the Philippines.¹⁸

¹¹ Rosenberg, *supra*, 62. See FAO, *The State of World Fisheries and Aquaculture 2008* (Rome: Food and Agriculture Organization of the United Nations, 2009) at 154.

¹² See FAO, *ibid.* at 171, 172.

¹³ See Table 1 for greater details.

¹⁴ See Table 2.

¹⁵ Depending on how the Chinese Government articulates its claim (it has so far refrained from doing so), there might exist another dispute relating to the *infamous* nine-dashed-line map, which was officially introduced by China to the international community for the first time in May 2009 in its *Notes Verbales* sent to the UN Secretary-General to protest against the unilateral and joint submissions by Malaysia and Vietnam of their extended continental shelf claims in the SCS to the Commission on the Limits of the Continental Shelf.

¹⁶ For these two disputes, see generally, R Emmers, *Geopolitics and maritime territorial disputes in East Asia* (Routledge, London, 2009), ch 4.

¹⁷ In this paper, Taiwan is considered as a province of China, which is consistent with the 'one-China' policy of ASEAN countries. However, in the context of the Spratlys dispute, Taiwan is considered as a disputant on its own given its occupation of the largest feature of the Spratlys.

¹⁸ See K Zou, 'Scarborough Reef: a new flashpoint in Sino-Philippine relations?' (1999) 7 *Boundary & Security Bulletin* 71; Philippine Position on Bajo de Masinloc and the Waters Within its Vicinity' *Department of Foreign Affairs, Public Information Service Unit* (Republic of the Philippines, 18 April 2012) <<http://www.dfa.gov.ph/main/index.php/newsroom/dfa-releases/5216-philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity>> (accessed 30 April 2012).



Figure 1. Competing Claims in the South China Sea, from CIA Maps and Publications for the Public (available at <http://www.eia.gov/countries/regions-topics.cfm?fips=SCS>)

The geographic character of the SCS is such that myriad overlapping maritime zones have been created between the coastal states.¹⁹ Thanks to good will and ingenuity, some of these have been delimited by maritime boundary agreements²⁰ or managed through innovative provisional

¹⁹ See generally V Prescott and CH Schofield, *The Maritime Political Boundaries of the World* (2edn, Brill Academic Publishers, Leiden, 2005), ch 18.

²⁰ See *ibid.* Most of the delimitation agreements concluded by SCS countries have been reported and analysed in the *International Maritime Boundaries* series (now in six volumes) of the American Society of International Law (Region VI).

arrangements of practical nature, primarily joint petroleum development agreements.²¹ Yet, a large number of maritime boundary disputes remain.

It should be noted that while island sovereignty disputes and maritime boundary disputes are distinct and susceptible to different bodies of law, they are interrelated. Indeed, the sovereignty dispute over an island may become preliminary to the maritime delimitation process if that island itself gives rise to overlapping maritime entitlement. Because of this, there appears a legal dispute between some of the SCS states over the interpretation and application of Article 121 of the LOS Convention to the Spratlys. China considers the features of the Spratlys as 'islands' under Article 121, i.e. they are capable of having an exclusive economic zone (EEZ) and continental shelf,²² while other states consider them as 'rocks', which cannot sustain human habitation or economic life of its own and can only be entitled to a 12 nm territorial sea.²³ The reason for treating the features of the Spratlys as 'islands' under Article 121 is not difficult to understand. As Schofield makes a shrewd observation, the minuscule features of the Spratlys have little intrinsic value in themselves, what is significant is their potential to generate large maritime zones and hence entitle China, which otherwise lacks legal basis, to exploit marine natural resources therein²⁴ by virtue of its claim of title to the islands.

It should also be noted in passing that if the features in the Spratlys (and the Paracels) were considered as 'islands' under Article 121 of the LOS Convention, there would be no high seas in the

²¹ See, e.g. HT Nguyen, 'Vietnam and Joint Development in the Gulf of Thailand' (1998-1999) 8 *Asian YIL* 150.

²² See 'Note Verbale No. CML/8/2011 dated 14 April 2010 of the Permanent Mission of the People's Republic of China to the United Nations', <http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pdf>, (English translation) for Chinese position on the Spratlys. China appears to hold the same view with regard to the Paracels when it applies straight baselines to this group of islands. See 'Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996' (1996) 32 *Law of the Sea Bulletin* 37.

²³ Indonesia expressly states this position. See 'Note Verbale No. 480/POL-703/VII/10 dated 08 July 2010 of the Permanent Mission of the Republic of Indonesia to the United Nations', <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf>, (English translation). It has been interpreted that the joint submission by Malaysia and Vietnam to extend their continental shelf from coastlines indicates that Malaysia and Vietnam consider the features of the Spratly Islands as having 12 nm territorial seas only. See R Beckman, 'South China Sea: Worsening Dispute or Growing Clarity in Claims?' [2010] *RSIS Commentaries* 90/2010 16 August 2010; TL McDorman, 'The South China Sea after 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation?' (2010) 24 *Ocean Yearbook* 507, 516-17, 521. The position of the Philippines, while remaining somewhat equivocal, appears that most of the features in the Spratlys are not 'islands'. See 'Philippine Paper on ASEAN-China Zone of Peace, Freedom, Friendship and Cooperation (ZoPFF/C) in WPS (SCS)', presented at the 44th ASEAN Ministerial Meeting (AMM), Bali (Indonesia), 16-23 July 2011 (on file with author). Cf 'Philippines: Republic Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purpose' (2009) 70 *Law of the Sea Bulletin* 32 and 'Note Verbale No. 000228 dated 05 April 2011 of the Permanent Mission of the Republic of the Philippines to the United Nations', <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf>.

²⁴ Schofield, *supra*, 12-8.

South China Sea.²⁵ In other words, the centre of the SCS would fall under the regime of the exclusive economic zone of the Spratlys.

The tangle of island and maritime boundary disputes creates serious problems for the use and management of the SCS which predicate upon the delineation of the coastal state's maritime jurisdictional zones. The absence of well defined maritime boundaries might have repercussions for the management of fisheries in the SCS. In the same vein, the protection in the SCS marine environment is also fraught with difficulties. Conventional wisdom has it that to better manage the SCS, different schemes for the allocation of jurisdiction and enforcement responsibility between coastal states should be devised. These schemes have thus far been effected by either maritime delimitation agreement or provisional arrangement of practical nature. Neither of these is, unfortunately, in place for a large part of the SCS.

4. Existing cooperative approaches to the SCS

There are arguably two major approaches to cooperation in the South China Sea. The first one is pursued through the so-called Track I diplomacy, i.e. by official negotiations between ASEAN on the one hand and China on the other. The initial result of this process is the so-called Declaration on the Conduct of Parties in the South China Sea in 2002 (DOC) which serves as a confidence building measure with a view to preventing possible conflicts that might arise from the island disputes in the SCS.²⁶ The implementation of this political document is, however, a daunting process²⁷ and the DOC is far from being effective in reducing tensions over the disputed islands in the South China Sea.²⁸ ASEAN is now urging China to negotiate a Code of Conduct in the SCS which is expected to be binding and contain more stringent compliance mechanism.²⁹ Nevertheless, as seen from their context, both the DOC and the future COC manifest a reactive approach to cooperation between SCS countries—they are negotiated to respond to the rising tensions over the disputed islands in the SCS.³⁰ Consequently, they are limited in geographical scope.

²⁵ See L-AT Nguyen, *The South China Sea Dispute: A Reappraisal in the Light of International Law* (PhD thesis, University of Bristol, Bristol 2008), 55-61. See also AG Oude Elferink, 'The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?' (2001) 32 *ODIL* 169.

²⁶ See HT Nguyen, 'The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note' (2003) 34 *ODIL* 279.

²⁷ It took nine years for ASEAN and China to agree to the Guidelines for the implementation of the DOC.

²⁸ For a critical view of the effectiveness of the DOC, see HT Nguyen and T Nguyen Dang, 'The Code of Conduct in the South China Sea: The International Law Perspective' (2011) 24 *International Studies (Publication of the Diplomatic Academy of Vietnam)* 97, 105-10.

²⁹ ASEAN has reached agreement on the elements of a future COC. For a discussion of these elements, see CA Thayer, 'ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?', *The Asia-Pacific Journal: Japan Focus* No 34/4, 20 August 2012.

³⁰ For a background to the DOC, see HT Nguyen, 'Vietnam and the Code of Conduct for the South China Sea' (2001) 32 *ODIL* 105.

The second approach which is arguably more proactive than the DOC/COC approach has been canvassed extensively in academic writings. The solution most frequently suggested so far is joint development, particularly with regard to oil and gas. According to this solution, claimant states will put aside their territorial claims to engage in a cooperative undertaking in the exploration and exploitation of hydrocarbon resources.³¹ On the face of it, such a proposal is attractive, apparently given the increasing energy demand of countries in the region and the ostensible lure of oil and gas potential of the SCS. A practical implementation of this approach is the Joint Marine Seismic Undertaking (JMSU) between national oil companies of China, the Philippines and Vietnam in 2005 which was once hailed as a “historic event” or “a breakthrough” in the cooperation among parties to the Spratly Islands dispute.³² The JMSU is, however, a stillborn: no concrete result has been revealed and no follow-up actions undertaken upon the completion of the project.³³ It should also be noted that cooperation in ‘disputed areas’ is highly sensitive insofar as claimant states remain adamant that they have undisputed sovereignty over the area in question.³⁴ Furthermore, while the joint development agreement – a popular type of provisional arrangement in contested waters – is invariably equipped with a ‘without prejudice’ clause,³⁵ thus safeguarding the respective positions of the parties, the legal effect of such a provision is not easily explained to the uninitiated. Finally, joint development, functional as it is, is often resource-specific, either oil and gas or fisheries but rarely both.³⁶ In other words, such cooperation is limited as far as its subject matter is concerned.

The foregoing demonstrates the shortcoming of the existing approaches to cooperation in the SCS: they are limited either in their geographical scope or with regard to their subject matter. It is

³¹ The most detailed and thought-provoking analysis is perhaps MJ Valencia, JM Van Dyke and NA Ludwig, *Sharing the resources of the South China Sea* (Martinus Nijhoff, The Hague, 1997). See also K Zou, ‘A New Model of Joint Development for the South China Sea’ in K-c Fu and others (eds), *Recent Developments in the Law of the Sea and China* (Leiden: Martinus Nijhoff Publishers, 2006) 155 and by the same author ‘Cooperative Development of Oil and Gas Resources in the South China Sea’ in S Bateman and R Emmers (eds), *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (London: Routledge, 2009) 80. For a discussion on the merits of cooperation in the exploitation and management of living resources in the SCS, see T Nguyen Dang, ‘Fisheries Cooperation in the South China Sea and the (ir)relevance of the sovereignty question’ (2012) 2 *Asian JIL* 59.

³² HT Nguyen and R Amer, ‘A New Legal Arrangement for the South China Sea?’ (2009) 40 *ODIL* 333, 338.

³³ See C Schofield and I Townsend-Gault, ‘Brokering Cooperation Amidst Competing Maritime Claims: Preventative Diplomacy in the Gulf of Thailand and South China Sea’ in AE Chircop and others (eds), *The future of ocean regime-building: Essays in tribute to Douglas M Johnston* (Martinus Nijhoff Publishers, Leiden, 2009), 643, 665, stating that the result has been disappointed.

³⁴ See Schofield and Storey, *supra*, 24-5, for the controversy within the Philippines over the constitutionality of the JMSU.

³⁵ See LOS Convention, Arts 74(3) and 83(3).

³⁶ The reason is not difficult to understand: living and non-living resources are subject to different rules under international law. See R Lagoni, ‘Report on Joint Development of Non-living Resources in the Exclusive Economic Zone’ (1988) 63 *International Law Association Reports* 509, 511; H Fox and others, *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary* (Vol 1, British Institute of International and Comparative Law, London, 1989), 12-3. The management and exploitation of living resources is also different from that of the oil industry.

suggested that a holistic approach to cooperation in the SCS should be adopted and this can be achieved with the concept of ocean governance.

5. An ocean governance approach to the SCS

The ocean governance has become a current term for several decades.³⁷ It underscores the fact that ocean affairs are, as pointed out in the epigraph, closely interrelated and hence need to be addressed altogether. For instance, petroleum exploitation activities and navigation carry with them potential environmental hazards, threatening the marine environment. Marine environmental protection is, however, a *quid pro quo* for effective fisheries management and marine biological diversity. The regulation of fishing activities is, on the other hand, essential for the conservation of marine biological diversity. Indeed, the interrelatedness of these ocean use activities is evident in the context of the SCS.³⁸

The interplay between marine issues calls for a comprehensive treatment. It has been suggested that effective global ocean governance requires that nation-states relinquish significant sovereign power and authority to supranational organizations for the broader social good.³⁹ Ideal as it is, such a view is hardly plausible given the territorial obsession of the members of the international community modelled upon the Westphalian conception—territorial exclusivity remains the order of the day. This is especially true for Asian countries.

The legal framework for ocean governance remains that based on the so-called zonal approach according to which the ocean space is partitioned into various maritime zones subject to different legal regimes. Thus, the LOS Convention – the most important legal instrument governing almost if not all activities at sea – provides for a multitude of maritime areas within coastal state exclusive competence and the areas beyond national jurisdiction where states enjoy equally unfettered freedoms.

On the other hand, the LOS Convention, without mentioning ‘ocean governance’, arguably contains the principles that inform an integrated approach to the management of the oceans. As the Constitution for the Oceans, the LOS Convention also lays the groundwork for the further development of norms and principles of ocean governance. It is beyond the scope of this paper to

³⁷ The seminal work on this issue is J Van Dyke, D Zaelke and G Hewison, *Freedom of the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Island Press, Washington, D.C., 1993).

³⁸ See C Schofield and others, ‘From Disputed Waters to Seas of Opportunity: Overcoming Barriers to Maritime Cooperation in East and Southeast Asia’, *NBR Special Report No 30*, July 2011 (National Bureau of Asian Research, Seattle), 9-11.

³⁹ WJ Davis, ‘The Need for a New Global Ocean Governance System’ in J Van Dyke and others (eds), *Freedom of the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (Island Press, Washington, D.C., 1993), ch 12, 147, 166.

discuss in details these norms and principles. Some concepts particularly relevant to the SCS could be identified, however.

As far as the SCS is concerned, Article 123 of the LOS Convention on ‘Cooperation of States bordering enclosed or semi-enclosed seas’ must come to mind first. While Article 123 as such is far from imposing an obligation to cooperate,⁴⁰ it undoubtedly highlights the need for cooperation between the coastal states bordering an enclosed or semi-enclosed sea where activities of one state may impact on the rights and interests of others. On the other hand, the principle of cooperation is a long-standing one in general international law as well as in the international law of the sea, particularly in the fields of fisheries management⁴¹ and pollution prevention.⁴²

All SCS coastal states, except Cambodia, have become parties to the LOS Convention and hence are under a general obligation to properly conserve and manage the living resources in the exclusive economic zone.⁴³ Depending on how the insular features in the SCS are characterized under Article 121 of the LOS Convention, different legal duties to cooperate with regard to the conservation and development of transboundary fish stocks will enter the picture. If there are no high seas in the SCS (that is, most of the SCS become the exclusive economic zones of the coastal states), Article 63(1) provides for an obligation to cooperate with regard to fish stocks, which in this case migrate between the exclusive economic zones of two states or more. Article 63(2), on the other hand, requires a coastal state in the SCS to cooperate with the states fishing for the stocks which occur both within the exclusive economic zone of the former and in an area beyond and adjacent to the zone, i.e. the high seas. (Arguably, the first states that fish on these possible high seas in are the SCS coastal states.) Furthermore, should there be high seas in the SCS, Section 2 of Part VII of the LOS Convention contains five articles which require states, individually or jointly as appropriate, to conserve and manage the living resources in the areas of the high seas. These provisions of the LOS Convention have also been supplemented by, *inter alia*, the 1995 Fish Stocks

⁴⁰ Article 123 reads:

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

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

The word ‘should’ in the first sentence indicates an ‘hortatory’ language while the second sentence with the word ‘shall’ denotes a legal duty (though the verb ‘endeavour’ arguably leaves room for interpretation).

⁴¹ See *infra*.

⁴² See *MOX Plant (Ireland v United Kingdom) (Provisional Measure)* 41 *ILM* 405, para 82 (‘the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [LOS Convention] and general international law’).

⁴³ See LOS Convention, Article 61.

Agreement,⁴⁴ the 1995 FAO Code of Conduct for Responsible Fisheries⁴⁵ and the 2001 FAO Plan of Action for IUU Fishing.⁴⁶ It is submitted that these instruments are not as such binding upon all the SCS states either because they lack of the necessary ratification of the SCS state⁴⁷ or because they are only soft law documents. The instruments present a possible policy and legal framework that the SCS states should take into consideration in pursuing sustainable fisheries. It should be noted that implicit in the duty to conserve marine living resources is the adoption of precautionary principle⁴⁸ by using ‘the best scientific evidence available’ to prevent over-exploitation or to determine the total allowable catch.⁴⁹ Consequently, there is no longer a right to engage in unlimited fishing, be it within the exclusive economic zone or on the high seas.

In addition to the above obligations concerning fisheries, the LOS Convention also contains an essential principle of ocean governance, that is, environmental protection.⁵⁰ A number of principles and measures to operationalize this general principle of environmental protection are catalogued in Part XII of the LOS Convention,⁵¹ an important one being the principle of preventing transboundary harm.⁵² Furthermore, the LOS Convention has provided a legal framework for the implementation of contemporary principles of environmental protection, notable among which is, again, the precautionary principle. This principle is supplemented by a procedure for evaluating the likely environmental effects of any proposed activity at sea⁵³ – so-called ‘environmental impact assessment’ (EIA). The whole tenor of the precautionary principle and EIA is a requirement that any state who wants to undertake new developments engages in scientific studies to determine the environmental effect of its initiatives and also considers less intrusive alternative approaches.⁵⁴

An ocean governance approach to the SCS, on its face, has little to offer with regard to the simmering territorial disputes in the SCS. It is not about the management of dispute, much less its resolution. Rather all the principles embedded in the concept of ocean governance as briefly

⁴⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 United Nations Treaty Series 3.

⁴⁵ Available at <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM> .

⁴⁶ 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> .

⁴⁷ Among SCS states, only Indonesia has become party to the 1995 Fish Stocks Agreement.

⁴⁸ The precautionary principle defies definition. See generally, JM Van Dyke, ‘The Evolution and International Acceptance of the Precautionary Principle’ in DD Caron and HN Scheiber (eds), *Bringing New Law to Ocean Waters* (Martinus Nijhoff, Leiden, 2004), ch 15, 357. For the implication of the principle, see *infra*.

⁴⁹ See LOS Convention, Articles 61(2) and 119 (1).

⁵⁰ LOS Convention, Article 192.

⁵¹ Part XII seeks to address all sources of marine pollution, refers to the latest international rules and standards concerning environmental protection and provides for the enforcement capacity of three different types of states, namely port, flag and coastal states.

⁵² LOS Convention, Article 194(2). This principle is widely recognized as an obligation of customary law.

⁵³ See Van Dyke, *supra*, 359.

⁵⁴ *Ibid*, 359. See also N Craik, *The International Law of Environmental Impact Assessment* (Cambridge University Press, Cambridge, 2008), 4.

reviewed above aim at sustainable use of the SCS. But is sustainable use of the SCS a lofty goal to pursue? The answer must be in an emphatic YES. Indeed, when one, if not the, cause for the territorial disputes in the SCS is the desire to grasp the natural resources and exploit them, it is perfectly sensible that they can be exploited in a sustainable way.

That said, it is naïve to talk about ocean governance in the SCS without touching upon the territorial disputes in the SCS. Since the operative framework for ocean management remains, as indicated above, based on a zonal approach, partitioning the SCS is unavoidable. But from the perspective of ocean governance, the management of the territorial disputes in the SCS is bettered conceived of as a means, not an end. In other words, an ocean approach to the SCS gives further impetus for an early management of the disputes in the SCS. This is the merit of an ocean governance approach to the SCS as far as the territorial disputes are concerned.

6. Conclusion

This paper calls for a more holistic approach to the management and use of the SCS by adopting the concept of ocean governance. It emphasizes the need for cooperation between the coastal states, not least for the sake of sustainable use of the SCS. To this extent, there is a paradigm shift in the perception of the *raison d'être* for cooperation of the SCS. Cooperation is not so much about management of the territorial disputes as about sustainable use of the SCS.

Of course, in establishing a proper management regime for the SCS, the notorious territorial disputes in the SCS should be addressed. Yet it should be noted that this is but an element, essential though it may be, in the SCS governance regime. There are other principles that underlie the management of the SCS, the most significant among which is arguably the precautionary principle. Indeed, this principle preserves the sustainability of the marine natural resources. The application of this principle means that we abandon both the reactive and proactive approaches in favour of an anticipatory approach to the management of the SCS.

Table 1: Marine Fish Capture Production (in tonnes) in marine areas of SCS countries in comparison with Asia and the world between 2000-10⁵⁵

Land Area	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Brunei	2 558	1 639	2 112	1 854	2 510	3 137	2 734	3 160	2 826	2 192	2 758
Cambodia	39 176 <i>F</i>	47 094 <i>F</i>	49 946 <i>F</i>	63 931 <i>F</i>	73 357 <i>F</i>	78 890 <i>F</i>	68 670 <i>F</i>	64 790 <i>F</i>	67 560	76 940	87 214 <i>F</i>
China	27 809 739 <i>F</i>	28 170 439 <i>F</i>	29 191 266 <i>F</i>	30 186 431 <i>F</i>	31 630 464	32 146 392	32 655 437	33 226 750	33 853 192	35 042 989	36 592 485
Indonesia	4 014 352	4 205 838	4 309 338	4 589 699	4 717 048	5 340 843	5 703 372	6 486 715	6 889 552	7 804 186	9 067 298
Malaysia	1 390 896	1 341 635	1 389 913	1 403 145	1 451 283	1 333 909	1 416 985	1 538 271	1 605 912	1 647 247	1 771 162
Philippines	2 494 604	2 644 927	2 839 280	3 075 732	3 347 758	3 550 129	3 728 375	3 962 491	4 178 664	4 279 844	4 363 743
Singapore	9 823	7 083	7 180	6 507	7 030	7 235	11 249	7 681	4 858	5 407	4 821
Thailand	2 956 372	2 890 275	3 041 732	3 026 606	3 013 266	2 979 545	2 817 465	2 401 661	1 947 001	1 983 885	1 904 662
Viet Nam	1 468 312	1 551 175	1 675 640	1 777 233	1 918 669	1 964 900	2 007 000	2 084 900	2 158 050	2 297 333	2 434 930 <i>F</i>
Subtotal	40 185 832	40 860 105	42 506 407	44 131 138	46 161 385	47 404 980	48 411 287	49 776 419	50 707 615	53 140 023	56 229 073
Asia	57 178 763	57 855 209	59 382 395	61 363 161	63 003 061	64 292 991	66 152 776	68 153 065	69 237 886	71 380 650	74 655 385
World	107 201 085	105 723 153	107 580 458	105 921 454	112 287 332	112 605 932	111 190 136	112 809 150	113 189 227	114 922 176	115 334 507

Table 2: Export value (in thousand USD) of SCS countries in comparison with Asia and the world between 2000 - 09⁵⁶

Land Area	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Brunei	296 <i>F</i>	334	459	706	683 <i>F</i>	1 053 <i>F</i>	5 305	3 238 <i>F</i>	2 398 <i>F</i>	356 <i>F</i>
Cambodia	34 469	32 114	36 284	37 816	42 400	48 551	26 835	23 285	24 679	30 362
China	3 706 339	4 106 214	4 600 704	5 362 366	6 779 909	7 674 305	9 150 328	9 450 996	10 356 951	10 473 062
Indonesia	1 610 291	1 560 078	1 516 537	1 579 783	1 736 184	1 845 883	2 019 803	2 170 876	2 600 968	2 349 397
Malaysia	200 469	220 126	381 983	256 197	573 238	619 653	624 015	738 535	770 273	657 479
Philippines	455 984	420 184	453 030	464 463	454 384	380 094	418 361	498 301	671 364	583 291
Singapore	457 105	388 184	325 267	335 331	422 195	427 544	396 388	385 455	398 016	321 098
Thailand	4 384 437	4 075 341	3 713 299	3 943 194	4 079 407	4 502 821	5 275 349	5 721 525	6 547 742	6 248 891
Viet Nam	1 484 283	1 823 102	2 044 630	2 203 499	2 450 112	2 765 365	3 379 955	3 790 167	4 559 252	4 311 738
Subtotal	12 333 673	12 625 677	13 072 193	14 183 355	16 538 512	18 265 269	21 296 339	22 782 378	25 931 643	24 975 674
Asia	19 180 315	19 080 287	19 639 424	20 723 532	24 152 599	26 441 934	29 181 224	31 364 641	35 060 764	34 250 929
World	55 815 226	56 600 344	58 692 736	64 295 442	71 854 220	79 073 528	86 492 565	94 050 735	102 599 051	96 691 761

⁵⁵ Compiled from Global Capture Production 1950-2008, online: <<http://www.fao.org/fishery/statistics/global-production/query/en>>, query made on 15 October 2012. NB: “F” means FAO estimate from available source of international or calculation based on specific assumptions.

⁵⁶ Compiled from Commodities 1976-2006, online: <<http://www.fao.org/fishery/statistics/global-commodities-production/query/en>>, query made on 15 October 2012.

Table 3: Oil and Gas of the SCS countries⁵⁷

Country	Proven Oil Reserves (Billion Barrels)	Proven Gas Reserves (Trillion Cubic Feet)	Oil Production (Thousand Barrels/Day)	Gas Production (Billion Cubic Feet/Day)
Brunei	1.1	13.8	203.5	366
Cambodia	0	0	0	0
China	16	80	3,684.4	1,960
Indonesia	4.37	93.9	892.5	2,613
Malaysia	4.0	83.0	750.8	2,218
Philippines	0.14	3.5	15.2	88
Singapore	0	0	0	0
Taiwan	<0.01	.22	1.0	28
Thailand	0.5	11.7	186.9	858
Vietnam	0.6	6.8	344.6	162
Total	26.7	279.1	6,078.9	8,293

⁵⁷ Proved oil and natural gas reserves are as of 1/01/2008. Oil production is a 2006 average. Oil supply includes crude oil, natural gas plant liquids, and other liquids. Natural gas production is a 2006 projection. Information from US Energy Information Administration, available at <http://www.eia.gov/countries/regions-topics.cfm?fips=SCS> (accessed 10 October 2012).