



DISPUTES IN THE SOUTH CHINA SEA AND THE NEED TO STRENGTHEN INTERNATIONAL COOPERATION



**INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS
INTERNATIONAL FUND THE WAY FOR PEACE**

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IADL, International Association of Democratic Lawyers, is a Non- Governmental Organization (NGO) with consultative status to ECOSOC and represented at UNESCO and UNICEF. The IADL was founded in 1946 by a gathering of lawyers who had survived the war against fascism and participated in the Nuremberg Trials.

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INTRODUCTION

Along with recent fluctuations in international relations, the South China Sea (East Sea) plays an increasingly important role in bridging the Indian and Pacific oceans, promoting the recovery of economic and social development after the Covid-19 pandemic, continuing to contribute to marine and ocean biodiversity, securing seafood sources and incomes to feed millions of people in various communities adjacent to the South China Sea, and promoting other economic sectors related to seas and oceans. On the other hand, the South China Sea also continues to face many difficulties and challenges such as the increasingly complicated climate change situation, the increasing rate of smuggling and piracy in some areas during the pandemic, difficulties in the maritime transportation and rising costs which make the supply chain through the South China Sea somewhat broken...

Regarding the disputes over sovereignty in the South China Sea, the situation continues to be complicated with relevant parties continuing to put pressure and reclaim the features in the South China Sea, calling for support for their positions..., the Covid-19 complicated developments and restrictions on travel and meetings between the parties, countries outside the region also continue to express high interests in the development of the Asia-Pacific in general and the situation in the South China Sea in particular... Basically, countries continue to push the parties to refrain from conflicts, have peaceful settlement of disputes in compliance with the provisions of the international law of the sea, including the 1982 United Nation Convention on the Law of the Sea (UNCLOS). The countries also expressed their interest in many forms such as issuing joint statements, sending notes, expressing concern about the Code of Conduct (COC) negotiation situation...

International Association of Democratic Lawyers (IADL) has actively contributed to the peaceful settlement of the disputes in the South China Sea and has organized three international conferences from 2017 to 2019 in order to shed more light on the South China Sea situation and its implications on the international law. After 3 years of hiatus due to the Covid-19 epidemic, the 2022 conference in Moscow is an important opportunity for scholars to re-evaluate the development situation in the South China Sea over the years, the risks to the region and the world from militarization activities in the South China Sea and affecting freedom of navigation and overflight as well as the lack of effective measures by countries to improve the situation here. Among the quite

comprehensive solutions mentioned, compliance with 1982 UNCLOS and respect for the 2016 Arbitral Tribunal's Award continues to be highly appreciated.

The fourth IADL international conference on the South China Sea in 2022 continued to aim at obtaining a clear picture of the situation in the South China Sea during and after the Covid-19 from the perspectives of parties in and out of the region; in the meantime gathering ideas/suggestions to contribute to calming down the situation and slowly settling the dispute in a peaceful way in accordance with international law. The actual situation in the South China Sea in general, as well as the assurance of maritime security in particular, requires countries to continue their efforts for the goal of building a peaceful and secure South China Sea region; further strengthen international cooperation to promote compliance with the law and maintain a rules-based order and peaceful negotiation.

In this issue of the Review, the Editorial Board presents selected articles, speeches and reports from the 2022 conference "Disputes in the South China Sea and the need to strengthen international cooperation" in Moscow.

EAST SEA (SOUTH CHINA SEA)

THE CONFLICT THAT LASTS WITHOUT END

*Prof. Dr. Dmitri Valentinovic Mosiakov**

When assessing the situation in the Asia-Pacific region, it is impossible to ignore an armed conflict dangerous for regional and global security, where the US and Chinese navies are in direct confrontation. This is a conflict around islands and waters of the South China Sea. As in the Taiwan Strait, the militaries of these two countries are contesting the right of each great power to make their own codes of conduct and, accordingly, dominate this part of the world. American warships regularly move around the restricted area of China's major islands under the range of Chinese guns, and at any time, due to some incident, military conflict between the two powerful superpowers could explode. The situation is aggravated by the fact that Washington, regarding military conflict with China in the South China Sea, is still confident that in any serious situation, China will not risk war, and as has happened more than once, Beijing will try to find a compromise and concession.

It should be noted that the US-China conflict in the East Sea has a rather short history and there was a period when it was the US that helped China establish its order in the Paracel Islands. In 1971 they took no action against China's construction of a naval base on Woody Island in the part of the Paracel Islands controlled by China, and in January 1974 they also looked on indifferently as the Chinese army landed on the part of the Paracels controlled by one of America's closest allies, the South Vietnamese military regime led by Nguyen Van Thieu. All calls for help from the South Vietnamese army went unanswered, although the American ships were very close to the islands. But then, after the signing of the 1972 Shanghai Communiqué¹ and the prospect of China becoming America's ally in the confrontation with the Soviet Union, enlisting China's support was much more important for Washington than defending some of the islands under South Vietnamese control. In 1974, China, with real support from the United States, captured the entire Paracel Islands and opened the way further south to the Spratlys.

And why have the Chinese have made such efforts, since the total area of all the Spratly Islands claimed by six countries today does not exceed five square kilometers. t

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¹ The Shanghai Communiqué represented the United States first diplomatic negotiations with People's Republic of China since its 1949 founding. It acknowledged the One China policy

all revolves around the so-called “exclusive economic zone” (EEZ). According to the 1982 United Nations Convention on the Law of the Sea, it is “a sea area over which a sovereign state has special rights in relation to exploration and use of marine resources, including the production of energy from water and wind. It extends from the baseline to 200 nautical miles from the coast”² The islet also has a multitude of resources within a radius of 200 nautical miles. The South China Sea is one of the richest seas in the world in terms of fish stocks, and there are well-founded assumptions that the richest oil and gas fields are also located there. Running through this sea is one of the busiest maritime trade routes connecting the South China Sea with the Pacific Coast of the United States, Japan, South Korea, China, Russia, Singapore and the Strait of Malacca. It is clear that a country that can establish control of this sea will not only receive huge wealth, but also have the opportunity to exert political and economic influence. After the Japanese gave up their rights to these islands after World War II, they became the object of active negotiation, in which the main participants were Viet Nam and Malay Taiwan and the Philippines, and of course China, which claims sovereignty over 80% of the islands in the South China Sea.

The Americans firmly oppose China's claims in the South China Sea and have turned the area into a place where they are showing ASEAN countries that they are willing to take most decisive action to prevent Chinese domination in the region. In this regard, a situation arose in the South China Sea in which the U.S.’ command to “stay” conflicts with China's order to “return” because, from the Chinese leadership's point of view, the South China Sea is China's historic water. In fact, Beijing considers the South China Sea to be China's territory, having belonged to China since ancient times but was lost in the so-called “historical weakness” era, when China was subjected to the brutal pressure of the European colonial powers. The Communist Party of China and accordingly, the State Council of the People's Republic of China have never recognized that the space and the islands of this sea are outside China's jurisdiction. For example, in July 1977, at a meeting with representatives of the Philippine government, Chinese Foreign Minister Huang Hua pointed out that “Chinese territory extends south to James Shoal near Sarawak (Malaysia). He stated that,” you can exploit the minerals there as you want, however, when the time comes, we will take these islands. Then there will be no need to negotiate, because these islands have long belonged to China...”

This position was formalized in February 1992 when the Chinese government promulgated the “Law of the People's Republic of China on the Territorial Sea and the

² https://www.un.org/depts/lo/convention_agreements/texts/unclos/part5.htm

Contiguous Zone", establishing the basic legal regime for the territorial sea and the contiguous zone of China. This document states that "the mainland territory of the People's Republic of China (PRC) includes the mainland of the PRC and its coastal islands, Taiwan and adjacent islands, including Diaoyu Island, Penghu Archipelago, and East Islands the Paracel Islands (China calls these the Xisha Islands), the Zhongsha Islands, the Spratlys Islands (the Chinese calls these the Nansha Islands) and all other islands of the People's Republic of China". The new law was supposed to give legitimacy to the actions of the Chinese fleet, whose ships at the time landed on reefs and uninhabited islands in the South China Sea, aiming to constitute an actual area of Chinese control in these waters. Thereafter, all the islands captured by China (by various estimates, 8-9 islands, reefs and atolls - author), as well as China's claims to other islands part of the archipelago, which were indicated on a map of China's maritime boundary. It was distributed in 2009 to the United Nations as an attachment to an official letter to Secretary-General Ban Ki-moon. On this map, not only the islands and reefs that China has captured, but in fact the entire South China Sea is shown as Chinese territory. The potential Chinese possessions were outlined by a dotted line, which later became known as the nine-dash line. For a longtime no one could understand how this line could be determined to be within the Chinese border. Many believe that holding these is simply an opportunity for China to negotiate with other interested parties, such as Viet Nam, the Philippines, and Malaysia, which also have claims to the islands and territorial sea in this area.

Viet Nam alone controls more than 20 islands in the Spratly archipelago, the largest island is controlled by Taiwan - Itu Aba and the Philippines and Malaysia are also active in "their" archipelago, islands and reefs, as well as Viet Nam and Taiwan which are within the nine-dash line drawn by China.

Therefore, whenever Vietnamese and Philippine ships go to "their" islands, and most of these are small and waterless pieces of land, they violate the maritime boundary established by China, there is always the potential for a serious collision. There are many examples of such clashes, when the Chinese border forces opened fire on wooden boats of Vietnamese fishermen, especially in the waters of the Paracel Islands where the number of clashes was very high. Just visit the Vietnamese island of Ly Son, located off the coast of Quang Ngai province, where fishermen, who have historically always fished in the waters of the Paracels, watch their fragile ships cut. by the muzzles of the Chinese maritime border guards. In this way, China seeks to undermine Vietnamese fisheries in both the Paracels and the Spratlys. This is done under the pretext of protecting fish stocks, and as a result, Chinese border guards ban fishing in traditional

Vietnamese fishing places which Chinese patrol boats, more and more yearly, often arresting them or simply shooting them, forcing them to leave the Spratlys and Paracels.

However, this situation with Vietnamese fishermen, as well as with Filipino fishermen in the area opposite Palawan Island, is only one of the problems, and not the most important, in the conflict over islands and territorial waters in the South China Sea. The situation there has been extremely tense for many years, and at times threatens regional and global peace and stability. The problem is that in the waters of the Spratly archipelago, the most likely to occur is a direct collision between Chinese and American warships, it is there where there is a change in the balance of forces in the Asia-Pacific region.

Since the mid-2010s, China has begun to establish its military presence by building artificial islands on the small atolls and reefs in the South China Sea. Dozens of ships brought soil and construction materials to seven selected atolls, and within a short time, new islands appeared in the South China Sea, home to Chinese military bases. The most active work took place in 1994. Mischief Reef - over several years, China reclaimed more than 550 hectares from the sea, built military bases and airstrips on the reef, and deployed systems, anti-aircraft defenses, turning this once tiny rocky outcrop into one of the most important military bases in the region.

At the same time, the activity of the Chinese fleet in the waters adjacent to the Philippine archipelago became so intense that the Philippines was forced to hold an emergency meeting with the US leadership. In it, Philippine Foreign Secretary Albert del Rosario said that "Chinese forces have violated Philippine territorial waters nine times since February 25, and such actions are clearly becoming more aggressive and frequent." Having received assurances of US support for the Philippines' position on the issue of territorial sovereignty over the Spratly Islands, the Government immediately announced the allocation of \$252 million to modernize its naval forces.

On the islands and reefs occupied by China, one can observe the artificial islands complete with airfields, tracking stations and ports armed with Chinese warships that have sprouted from the old rocks and atolls. Relying on these new military bases, the Chinese navy is increasingly confident in the places where US warships once dwelt. US warships make regular demonstration cruises into areas containing many large islands that China has declared a no-go zone, and the Americans have stated that they do not recognize the legitimacy of this decision. As a result, skirmishes and other military incidents between ships of the two countries occur with frightening frequency. At the

same time, the actions of the American destroyers, which immediately left the course when threatened with a collision with a Chinese warship, showed that the Americans were not actually ready to engage in a military conflict over the islands with China as a demonstration of their strength and determination.

Furthermore, US military expeditions, which are supposed to demonstrate the US commitment to the defense of freedom of navigation in the South China Sea, in fact only reinforce and justify such activities of China's military preparation. After each time an American ship passed under the guns of China, the military composition on the big islands improved even more. According to some reports, a YJ-12B cruise missile, capable of striking within a radius of 295 nautical miles (about 546 km), as well as striking targets in the air at a distance of 160 nautical miles (about 296 km) has been deployed on the islands occupied by China. In total, Beijing has 27 outposts, almost all of which are equipped with airstrips, allowing the Peoples Liberation Army (PLA), Navy and Air Force to truly threaten the vital trade routes leading from the Indian Ocean to United States' Pacific Ocean.

The Americans ignored China's warnings and announced that from 2011 they would conduct the so-called FONOPs (Freedom of Navigation Operations) with a certain degree of frequency. This decision was initiated by Barack Obama himself, who ordered US warships to blatantly violate the 12-nautical-mile area that China has declared as a no-go zone around the artificial islands. With this decision, the US President wanted to show that the US does not recognize these waters as China's and that in its' view, these waters continue to maintain its international position.

However, the show of strength of the American fleet did not bring tangible results for the Americans. China has not changed its approach to the situation in the Paracels and Spratlys by even one millimeter. Moreover, the ASEAN countries themselves are quite critical of the operations of the American destroyers, whose mission, in their view, only aggravated the situation, turning the entire region into a possible battlefield for a US-China war. It is also seen that the show of military might, the until recently undefeated US weapon, has begun to falter, as the People's Liberation Army Navy (PLAN) shows its determination to resist naval American expeditions by military force. This is evidenced by one of the latest incidents, when on September 30, 2018, the Chinese destroyer Luyang intercepted the American destroyer Decatur, which was operating in waters where China banned ships around the tiny Gaven rock that China has occupied since 1988. During this time they had turned it into an island with

a total area of 34 hectares. The two ships almost collided, and only the retreat of the American destroyer avoided a serious military incident.

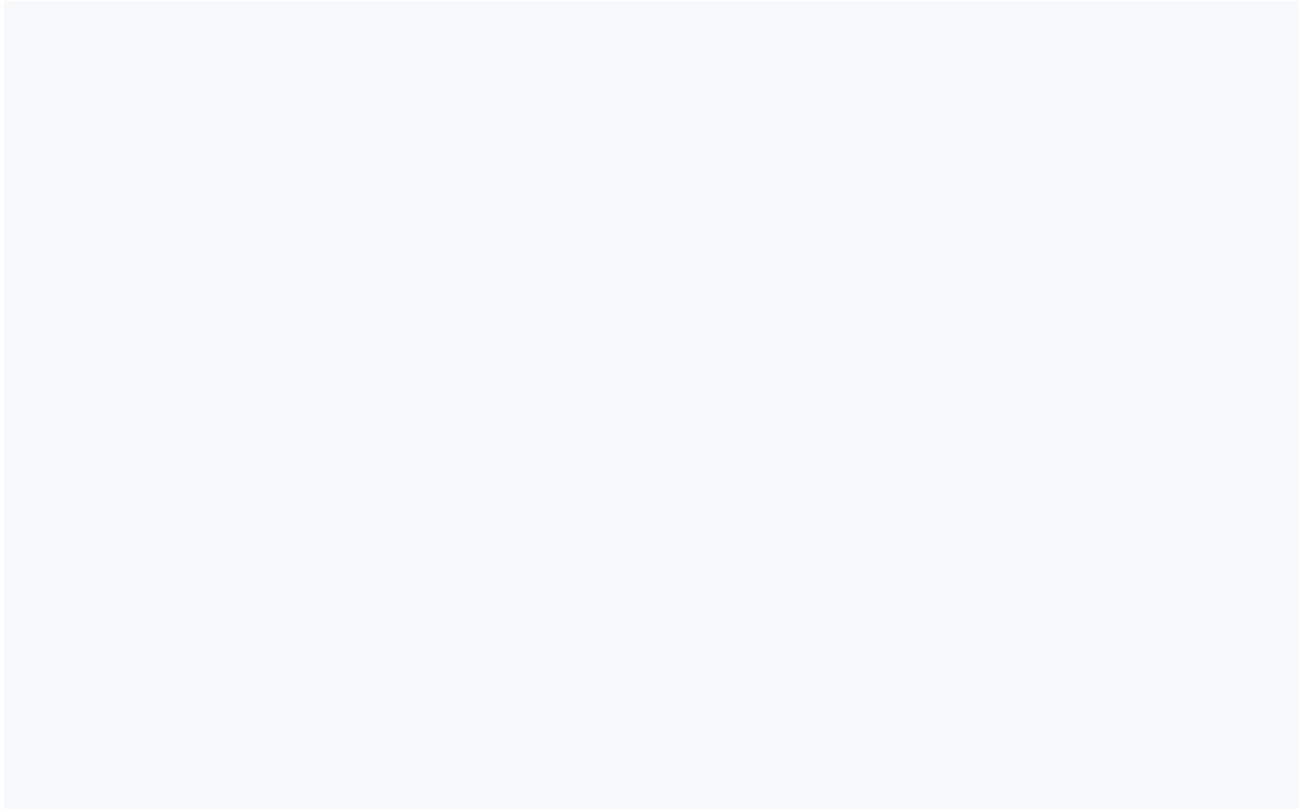
At the same time, it is clear that US warships will continue to pass through these waters, as their mission is to assert freedom of navigation in the South China Sea area closed by China. America's actions are not only aimed at demonstrating its military capabilities, but are also closely tied to the entire US-China relationship. Washington continues to believe that the destroyers' passage has a real impact on China, and in the event of an escalation, this is a most important opportunity to remind Beijing of the US fleet's military capabilities. Perhaps, that's why when Trump came to power, he did not cancel Obama's order on the regular passage of warships through the waters that China declared banned, but even stepped up the implementation. It should be noted that US warships are often sent to the restricted waters when trade negotiations with China have reached a dead end and the Chinese side refuses to make concessions, or at a time when there is a dispute over the possibility of a trade compromise has reached its peak., Trump, like Obama, had clearly failed to find other ways to project American power over China. Immediately following the events with Luyang and Decatur, in May 2019, shortly after China at the last moment decisively abandoned the trade deal imposed by Trump, two naval missions were sent to the South China Sea at the same time. First, two American warships passed through the restricted areas at the same time, as if to protect each other, and then, sensing the restraint of the Chinese military, another warship was dispatched on a new mission, passing within 12 nautical miles of Scarborough Shoal.

In July 2022, the United States decided that it was necessary to remind the People's Republic of China who was to determine the rules of navigation in the South China Sea. Another US destroyer sailed into waters where China had declared a ban for military ships. The guided-missile destroyer, Benfold, moving along a familiar path, entered the South China Sea near the Paracel Islands controlled by Beijing. As the US 7th Fleet later released, "Benfold defends the rights and freedoms of navigation in the South China Sea near the Paracel Islands in accordance with international law, challenging restrictions on innocent passage imposed by the People's Republic of China".

In response, Tian Junli, a spokesman for the PLA Southern Combat Command, accused the US Navy of violating China's sovereignty and security. He stated, "The US guided-missile destroyer, Benfold, without the proper permission of the Chinese government, illegally entered the territorial sea of the Xisha Islands," the Chinese

military command, using used the Chinese name for the Paracel Islands. Tian Junli assured that the Chinese military is determined to "defend peace in the region, prevent US hegemony and militarize the South China Sea."

Therefore, the dangerous games around the islands in the South China Sea continue and have no end.



CURRENT SITUATION IN THE EAST SEA (SOUTH CHINA SEA) AND PROPOSAL ON STRENGTHENING INTERNATIONAL COOPERATION

*Dr. Lai Thai Binh**

While countries in the region respond to Covid-19 and the many social and economic consequences, ensuring peace and stability in the South China Sea has become even more important due to its role in connecting continents, fostering international trade and ensuring supply chains are not broken. This will allow the economies of the region to quickly recover from the pandemic and address the legitimate needs of the peoples. However, regional maritime security continues to face many uncertainties such as:

Great power competition continues to intensify, about Taiwan in addition to security challenges posed by the militarization of the South China Sea (SCS).

China-U.S.-Taiwan tension is mounting, particularly as former U.S. House Speaker Nancy Pelosi visited the island in August 2022. China responded by holding military drills surrounding Taiwan and it sent 21 fighter jets into Taiwan's Air Defense Identification Zone (ADIZ). In addition, the president of Taiwan visited Washington D.C. in March 2023.

It is difficult to know what will happen in the future, but should China opt to ignite an armed conflict, the SCS will become a theater of war. It is in the interests of all parties, SCS states and outsiders, that no escalation occurs and that no war be fought over Taiwan.

In March, 2022, U.S. Indo-Pacific Command (INDOPACOM) Chief Admiral John Aquilino stated that China has fully militarized at least three islands in the SCS, arming them with anti-ship and anti-aircraft missile systems, laser and jamming equipment and fighter jets. In April, China announced the deployment of its 5th-gen J-20 fighter jets for patrol operations in the SCS. Many South China Sea watchers, including Asia Maritime Transparency Initiative (AMTI) and Japan's Ministry of Defense (MOD), reported that China continues to build up the islands it controls. That means the process will not conclude any time soon. As of now, militarization "only" occurs in the Paracel and some islands in the Spratly, but new projects could soon begin in the Scarborough Shoal or Whitsun Reef, further complicating the situation.

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The islands' strategic location allows China to quickly deploy military/coastguard/militia vessels across the region to exercise its claims. This means that China now has a solid base of operation to exert actual control in the South China Sea and further pressure the littoral states. Thus, there are shared concerns for both Viet Nam and the international community. It particularly impacts Viet Nam since this is not simply a matter of security threats but also a violation of its sovereignty.

China has been the quickest among SCS states at military modernization and, more importantly, it has deployed its modern equipment to the region as mentioned above.

The modernization of other states, though occurring at a slower pace, is nevertheless a matter of concern. Indonesia recently bought 36 F-15s from the United States and 42 Rafales from France to bolster its air fleet. The Philippines purchased Brahmos supersonic missiles which has anti-ship capability and can be deployed in the SCS.

Although improved defense capability for SCS states is a welcome development, it can also present a disturbing side effect. Defense capability is also offense capability, providing countries with a greater ability to assert their power. This means they will be more willing to employ forces in the service of national interests should push come to shove. An arms race between SCS states should not be ruled out, especially when the presence of outsiders is also increasing, further pushing certain nations to amplify their might.

The Covid-19 pandemic brought about an observable increase in transnational crimes such as smuggling (first, pandemic-related medical material, then later food) as well as illegal drug trading and human trafficking. Piracy and armed robbery of ships, a perennial maritime security challenge in Southeast Asia, remains a problem. In 2021, the Singapore Strait saw a six-year high in incidents, although most of them were not ship-jacking episodes and did not involve serious loss of property or casualties.

China's grey zone tactic is a newish development in the SCS, serving as a novel way to assert control over the SCS through non-military means. At the forefront of this tactic is China's massive (300-strong) maritime militia fleet, employed to maintain constant presence in the SCS. It has even created major incidents such as the Scarborough Shoal incident and the recent Whitsun Reef standoff. The whole point of grey zone is to provoke a response from the affected state that would lead to escalation, thus achieving its goal(s) as states stand down for fear of mismanagement.

China has regularly conducted numerous maritime scientific surveys in the SCS within nations' exclusive economic zones (EEZ) without permission, in violation of international law. In light of this illegality, SCS nations are legally entitled to send law enforcement vessels to engage with Chinese survey ships, but this carries the risk of causing an incident and/or escalation with China. Likewise, China itself can (and has) sent its own law enforcement ships to engage with other's science vessels that "illegally" operate within "its" waters. Thus, maritime survey in the SCS, though itself not a security matter, nonetheless presents a risk of sparking one.

The region appreciates the cooperation of countries to enhance maritime security. It is anticipated that new forms of international cooperation will help improve the situation.

Many countries expressed their opposition to unilateral actions that complicate the situation and threaten peace, stability, safety and maritime security in the SCS. These include China's militarization of some structures in the Truong Sa archipelago and the issuance of a fishing ban for more than three months (from May 1) in the South China Sea, including the waters of Viet Nam. In a joint statement after the Germany-India high-level talks, German Chancellor Olaf Scholz and Indian Prime Minister Narendra Modi also affirmed the need to ensure unimpeded trade and freedom of navigation in accordance with international law, especially the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in all seas, including the South China Sea.

A recent study by the U.S. State Department concluded that China's claims in the SCS have no basis under international law, and found that these claims seriously affect many regulations of international law as enshrined in the 1982 UNCLOS. The State Department said on June 2, 2022 that China's unilateral fishing ban in the SCS was inconsistent with the 2016 arbitration award and international law. "We urge China to comply with its obligations under international law," State Department spokesman Ned Price said.

On May 31, 2022, the Philippines sent a diplomatic note to protest China's unilateral imposition of a fishing ban in the SCS, including the waters within the EEZs of the Philippines and Viet Nam.

In several meetings between national leaders in 2022, press reports indicate that they emphasized the importance of ensuring security, safety and freedom of navigation and overflight in the SCS. They also vowed to resolve disputes by peaceful means, including full respect for diplomatic and legal processes, without the use or threat of

use of force, on the basis of international law, especially 1982 UNCLOS; fully, comprehensively and effectively implement the Declaration on the Conduct of Parties in the South China Sea (DOC); and finalize the Code of Conduct in the South China Sea (COC). This demonstrates that the consistency of countries in the SCS continues to increase.

Developments such as the Quad (a diplomatic network between Australia, Japan, India and the U.S.) and AUKUS (the security arrangement linking Australia, the U.S. and the UK) appear to offer new forms of cooperation that will help support the centrality of the Association of Southeast Asian Nations (ASEAN) in promoting comprehensive development in the region. While more thought can be given to how “minilateral” initiatives and multilateral institutions can manage regional disputes or potential conflicts in the long term, economic initiatives and cooperation towards regional development are of equal importance to achieve the same ends. Many people in Viet Nam are highly appreciate of the activities of the United Kingdom, Australia and other countries either on their own or in cooperation with other partners to promote stability and development in the region, including to support the capacity building of regional countries.

However, uncertainties persist. Challenges include the continuous and unusual presence of survey ships operating in the overlapping exclusive economic zones of the various claimants as well as the presence of aircraft in the declared air defence identification zones of other countries. The risk of local conflict remains, complicated by other issues such as piracy, human trafficking, lack of coordination in maritime scientific cooperation, dealing with climate change, and humanitarian assistance and disaster relief.

The actual situation in the South China Sea in general as well as in ensuring maritime security in particular requires countries to continue making great efforts to serve the goal of building a peaceful and secure South China Sea region in compliance with international law and 1982 UNCLOS.

Vietnamese and international scholars have generally agreed on the situation in the SCS in recent years, including China's maritime behavior, particularly its militarization and unreasonable law enforcement in the sea. The scholars also basically believed that these actions could be prolonged and agreed that it is necessary to further strengthen international cooperation to promote compliance with international law and maintain a rules-based order and peaceful negotiations to resolve disputes.

On the other hand, the scholars may also have differences in assessing the severity of acts at sea, the impact on other countries, and the level of specific responses to those behaviors.

In general, Vietnamese and international scholars believe that states should continue the multi-layer joint efforts we have witnessed recently to maintain regional maritime security. In addition to the need to continue to strengthen cooperation in many fields to simultaneously (i) ensure economic development and (ii) solve traditional maritime security issues, the parties should continue to focus on (iii) promoting the clarification of policies in compliance with international law and contribute to building a rules-based regional maritime order.

WILL INDIA REVISIT ITS STANCE ON SOUTH CHINA SEA

*Dr. Jagannath Panda**

The geo-political conflict in the South China Sea (SCS) has new momentum with the rising United States-China rivalry and China's assertiveness in the region. The official U.S. position rejects China's claims to offshore resources in the SCS as "unlawful" and questions the legality of the "Nine-Dash Line" - a set of line maps that reflect China's claim to 90 percent of the SCS. The United States says that the Chinese predatory world view has little space in current world politics. This official U.S. stance has intensified the SCS frontline debate among the non-claimant countries, including India.

India is one of the world's fastest growing economies and the third largest energy consumer. As SCS is a major sea corridor for naval and commercial shipping, and one of the world's most important energy trade routes, it is vital for India's access to the region. India's growing energy needs make it necessary for the emerging economy to explore potential sources of energy - including oil and gas expedition in the SCS. As India is heavily dependent on sea trade, any disruptions in the sea lanes of communications (SLOC) or impediments to accessing the region's maritime passages can be profoundly detrimental to India's development.

For a long time, New Delhi has maintained a strategic neutrality on the SCS dispute, reaffirming that it should be resolved peacefully through "legal" means. As a non-claimant country, India has advocated "freedom of navigation" and protection of "overflight" and "unimpeded lawful commerce." This position is commensurate with India's Act East Policy, allowing it to form deeper strategic and economic engagements with Southeast/East Asian countries. After the release of the U.S.'s "position paper," the Indian Ministry of External Affairs restated that New Delhi considers the SCS a part of "global commons" and that it has an "abiding interest in peace and stability in the region."

But will India revisit its tactical neutral position on the SCS in the face of rising tensions with China? What potential factors could shape this policy change?

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Any alteration in India's stance on SCS would require a nationalist and revisionist resolve on its part as well as strategic foresight vis-à-vis China. In fact, this renewed position would likely be heavily conditional upon India's future relationship with China, and the response of other non-claimant countries towards the SCS dispute. For instance, Indian Prime Minister Narendra Modi's willingness in 2019 to expand India's footprint in the SCS by proposing a maritime route with Russia that would partly pass through the contested waters showed signs of this resolve.

India-China ties are undergoing strategic confrontation, bilaterally and regionally. While largely implausible before, strategic circles in post-Galwan India have begun thinking about a revision to India's "One China" policy, which has pointedly gone unmentioned in joint statements between the two nations over the last decade. If revised, India's re-consideration of its current stance on SCS would be decisively linked to a renewed outlook on the issue of Tibet. This could happen if China continues its aggressive claim to Indian territories - like the whole of Arunachal Pradesh - and revises its the "One India" policy.

Another scenario that would require India to revisit its neutrality is if the People's Liberation Army (PLA) forcefully occupied Taiwan, leading to a war-like situation between China and the United States, creating massive regional instability. Further, as almost 55 percent of India's trade passes through SCS, disruption of this trading connection might encourage India to revise its outlook. These changing perspectives would also depend upon how the United States, other major powers including the Quad countries like Japan and Australia, and claimant countries in the SCS respond to developments in the region.

The PLA has played a shrewd role in recent years by creating a strategic divide between India and its two Himalayan neighbors, Bhutan and Nepal. During the 2017 Doklam incident, the Chinese military created a fissure between India and Bhutan while the Kalapani-Lipulekh dispute between India and Nepal has seen Chinese backing. The persistence of such tension and the PLA's recent aggressive posturing in the Western sector (around the Ladakh region) to claim new Indian territories are also factors that could induce a review of India's neutral position. New Delhi realizes that the SCS is a core issue for Beijing.

India might also revisit its position if China decides to engage with Pakistan to create a double front conflict with India. Beijing has consistently opposed India's joint oil exploration with Viet Nam in the SCS, asserting its "sovereignty" in the disputed region and citing "historical" claims. However, Beijing shrugs off India's "sovereignty"

over Pakistan Occupied Kashmir (POK), overlooking India's historical claim to the region. China's involvement in the POK through investment and infrastructure projects - especially the China-Pakistan Economic Corridor under the Belt and Road Initiative - is emblematic of a hypocritical stance as perceived by India. A mini-scale/limited war either between India and China, or between India, China and Pakistan may prompt a change in India's SCS position.

Beijing's strategic goal to control much of the oil-rich seabed in SCS is another important factor. This might lead to soaring regional tensions, spurring claimant and non-claimant countries into collective action at some point. In such circumstances, India could play a decisive role given its substantial exploration efforts with Vietnamese oil companies. The presence of ONGC Videsh (the National Oil Company of India) in Viet Nam is not a new development; it began in 1988. Until now, India's diplomatic position on the SCS had been grounded in a desire to avoid repercussions from China. But if China was to replicate its 2019 attempts to stop India's oil exploration in the SCS, a post-Galwan India, amidst mounting political and public pressure, may as well abandon its persistent neutrality in favor of a bolder outlook. India's recent decision to ban Chinese apps and restrict Chinese access to Indian public procurement projects is a sign of a stronger posture by New Delhi.

Support for a larger coalition vis-à-vis China and the SCS could be another motivating factor. The non-claimant countries share little in terms of strategic compatibility over the SCS dispute. Consequently, there exists no coalition amongst them to address the disputed maritime region. The different - and at times, overlapping - maritime claims by Malaysia, Brunei, Viet Nam, Philippines and Taiwan, which have asserted sovereignty over contested areas in the region, only adds to the complexity of the situation. These fragmented perspectives have thus far discouraged many countries, including India, from taking a specific position. If India's (already considerable) commercial activities in the SCS receive diplomatic and military support from its non-claimant, Quad partners, as well as from the Southeast Asian claimant countries, India may boldly seize the opportunity to review its neutral position.

India's least tangible and yet most significant stake in the SCS is to support a "rules-based" order consistent with India's vision of the Indo-Pacific. To India, this means strengthening certain foundational principles such as the endurance of sovereign rights, discarding unilateral territorial expansion, upholding international law, and protecting the global commons including the sea-lanes. Given the rising

significance of the SCS in the Indo-Pacific calculus, Indian foreign policy may no longer remain apolitical by maintaining a China-cautious position.

With India's worldview on China rapidly changing post-Galwan, New Delhi will not hesitate to revisit its SCS policy of avoiding provocation of China's wrath if pushed by Beijing's undue aggression. The outcome of this new outlook in India's foreign policy will profoundly influence, if not completely shape, the trajectory of the South China Sea dispute in the future.

A PHILIPPINE PERSPECTIVE ON THE SITUATION IN THE SOUTH CHINA SEA FROM 2019 TO THE PRESENT

*Frank Lloyd Tiongson**

The release of the Ruling in July 2016 of The Hague-based Arbitral Tribunal on the Philippine's case against China concerning the latter's sweeping claims over 90% of the South China Sea (SCS) was a watershed moment in the history of the SCS dispute. It propelled long-standing calls for a rules-based order in the waters in the face of China's aggressive militarization of the region, the corresponding interventions of extra-regional powers, and constant employment of gray-zone tactics in cases of confrontations. However, the Ruling was met with a lukewarm response by the administration of former Philippine President Rodrigo Duterte who assumed office in 2016 and thereafter pursued a policy of appeasement towards China in exchange for billions of dollars in investments and assistance.

Failure to deliver

Duterte's policy of appeasement towards China, however, had proven to be ineffective not only in hampering China's expansionist project in the South China Sea, but also in delivering the economic benefits pledged to result from the said policy, leading to a seeming cooling off of relations in 2019 when the Philippines' Department of Foreign Affairs reported lodging multiple diplomatic protests against unabated Chinese incursions in Philippine territorial waters as well as its exclusive economic zone (EEZ).¹

Speaking before the United Nations (UN) General Assembly in September 2020, Duterte asserted that the 2016 Arbitral Ruling "is now part of international law, beyond compromise and beyond the reach of passing governments to dilute, diminish or abandon" and that the Philippines "reject(s) attempts to undermine it".²

However, this apparent change in attitude was short-lived as Duterte, in May 2021, described the 2016 Ruling as "just a scrap of paper" that he could throw in the

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¹ Helen Flores and Paolo Romero, *Diplomatic protest filed over Chinese warships*, Philstar.com (20 August 2019), available from: <https://www.philstar.com/headlines/2019/08/20/1944894/diplomatic-protest-filed-over-chinese-warships>.

² Jelly Musico, *Duterte affirms arbitral ruling on SCS before UN General Assembly*, Philippine News Agency (23 September 2020), available from: <https://www.pna.gov.ph/articles/1116296>.

wastebasket.³ In the same speech, he harked back on the supposed economic assistance that China extended to the Philippines as a source of the country's debt of gratitude (*utang na loob*).⁴

It was not until the tail-end of Duterte's administration that the purported Chinese largesse behind the Philippines' softened stance against Chinese incursions in the country's territorial waters and EEZ were demystified as mere pledges. Transportation officials, in the first few months of the administration of current Philippine President Ferdinand Marcos, Jr., reported that loan negotiations for three big-ticket rail projects in the Philippines have been scrapped after Beijing failed to act on the former's applications.⁵ Negotiations for these loans began in 2018 and was envisioned to be funded mainly by official development assistance (ODA) loans from China, which pledged up to \$24 billion in investments during Duterte's first visit to Beijing in 2016.⁶ While the Marcos Jr. government sought to revive stalled projects worth \$5 billion, it has also expressed concerns over more onerous loan terms with China compared to those imposed by alternative creditors such as Japan.⁷

Notably, in the twilight months of the Duterte administration, the Philippine government terminated talks with China over joint oil and gas assets exploration in the Philippine's EEZ. Former Philippine Foreign Affairs Secretary Teodoro Locsin admitted that the talks were stymied by constitutional constraints and sovereignty issues.⁸ He noted, "We got as far as it is constitutionally possible to go. One step forward from where we stood on the edge of the abyss is a drop into constitutional crisis." Philippine maritime law expert Jay Batongbacal remarked that the scrapped negotiations "show the lack of a sufficient common ground for the two countries to

³ Genalyn Kabling, *Arbitral ruling on West PH Sea just a scrap of paper, Duterte says*, Manila Bulletin (06 May 2021), available from: <https://mb.com.ph/2021/05/06/arbitral-ruling-on-west-ph-sea-just-a-scrap-of-paper-duterte-says/>.

⁴ *Id.*

⁵ Tyrone Jasper Piad, *PH scraps China loan deals for Duterte rail projects*, Inquirer.net (16 July 2022), available from: <https://newsinfo.inquirer.net/1628804/ph-scraps-china-loan-deals-for-duterte-rail-projects>.

⁶ Richard Javad Heydarian, *In a reset, Marcos scraps Duterte's China loans*, Asia Times (19 July 2022), available from: <https://asiatimes.com/2022/07/in-a-reset-marcos-scraps-dutertes-china-loans/>.

⁷ *Id.*

⁸ *Philippines abandons joint energy exploration talks with China*, Nikkei Asia (23 June 2022), available from: <https://asia.nikkei.com/Business/Energy/Philippines-abandons-joint-energy-exploration-talks-with-China>.

agree on basic principles and mutually-acceptable foundations for joint development”.⁹ He added, “Despite the Philippines’ openness to explore joint development, China apparently insists on the former surrendering its rights and changing its legal position while China preserves its own”.¹⁰

Changing courses

Backed by the political clout of Duterte in his campaign for the presidency, Marcos Jr. was expected by observers to continue pursuing the former’s soft-pedal approach towards China in relation to its incursions and military buildup in the West Philippine Sea (WPS) - coined by the Philippines to refer to its EEZ in the SCS region. This seemed to be the case initially as Marcos Jr., a few weeks before his presidential inauguration, referred to China as the Philippine’s “strongest partner” in its efforts to recover from the COVID-19 pandemic.¹¹

Philippine political observer Richard Heydarian, however, wrote: “Despite these early indicators, Marcos Jr. has in fact adopted a far more uncompromising position on the South China Sea disputes while pressing Beijing on unfulfilled investment pledges. Crucially, the new Filipino leader has overseen a revival of frayed ties with traditional partners, especially the United States. If anything, the new administration in Manila has welcome expanded security cooperation with Washington on shared regional concerns, including the Fourth Taiwan Straits crisis.”¹²

To cite, in the sidelines of the September 2022 UN General Assembly, Marcos Jr. met with United States (US) President Joe Biden where the former assured the latter that the Philippines would remain as the US’ ally in “maintaining the peace in Asia” as they discussed the situation in the SCS and “underscored their support for freedom of navigation and overflight, and the peaceful resolution of disputes” in the region.¹³

⁹ Pia Ranada, *Scrapped West PH Sea oil talks with China give Marcos ‘clean slate’*, Rappler.com (27 June 2022), available from: <https://www.rappler.com/nation/scrapped-west-philippine-sea-oil-talks-china-gives-marcos-jr-clean-slate-lesson/>.

¹⁰ *Id.*

¹¹ Dexter Cabalza and Kathleen de Villa, et al., *China ‘strongest partner’ in PH recovery – Marcos*, Inquirer.net (12 June 2022), available from: <https://newsinfo.inquirer.net/1609451/marcos-china-strongest-partner-in-ph-recovery>.

¹² Richard Heydarian, *Marcos Jr. and ASEAN: Minilateralism in the South China Sea*, Asia Maritime Transparency Initiative (18 October 2022), available from: <https://amti.csis.org/marcos-jr-and-asean-minilateralism-in-the-south-china-sea/>.

¹³ Dona Z. Pazzibugan, *Biden raises rights, Marcos cites security, vax aid*, Philippine Daily Inquirer (24 September 2022), available from: <https://globalnation.inquirer.net/207250/biden-raises-rights-marcos-cites-security-vax-aid>.

Aside from rejuvenating ties with Washington, Marcos Jr. also appears to look towards enhancing cooperation with the Philippine's neighbors with respect to the situation in the SCS. In a September 2022 state visit to Indonesia, Marcos Jr. inked key agreements with his Indonesian counterpart, Joko Widodo, including renewing a 1997 Agreement on Cooperative Activities in the Field of Defense and Security amid the "very volatile" geopolitical dynamics in the region.¹⁴ Similarly, in Singapore, Marcos Jr. and Singaporean Prime Minister Lee Hsien Loong signed a joint statement likewise in September 2022 reiterating the Association of Southeast Asian Nation's (ASEAN) position on the SCS and reaffirming "the importance of maintaining peace, security, stability, safety, and freedom of navigation and overflight in and above the South China Sea".¹⁵

During the recent ASEAN Summit held in Cambodia, Marcos Jr. also appeared to advocate for the reassertion of "ASEAN Centrality" in defining the security architecture in the region, including the SCS. "This [is] in the face of geopolitical dynamics and tensions in the region and the proliferation of Indo-Pacific engagements including the requests of our dialogue partners for closer partnerships."¹⁶ Meanwhile, he welcomed the purported support of the Quadrilateral Security Dialogue (Quad), a strategic security dialogue between Australia, India, Japan, and the US, to the idea of ASEAN Centrality. "We regard as of primary import Quad's assurance of unwavering support for ASEAN unity and Centrality with the view that such minilateral mechanisms should complement the ASEAN-centered regional security architecture," he said.¹⁷

Marcos Jr.'s rhetoric is set to be put to the test as he is set to meet with Chinese President Xi Jinping, recently elected by the Chinese Communist Party to a precedent-breaking third term as China's leader, in a confirmed state visit to Beijing in January

¹⁴ Resty Woro Yuniar, *An eye on China? Indonesia, Philippines set to boost ties amid 'very volatile' regional geopolitics*, South China Morning Post (05 September 2022), available from: https://www.scmp.com/news/world/russia-central-asia/article/3199454/russia-says-west-seeking-militarise-southeast-asia?module=perpetual_scroll_2&pgtype=article&campaign=3199454

¹⁵ Anna Felicia Bajo, *Philippines, Singapore reaffirm keeping peace, stability in South China Sea*, GMA News Online (07 September 2022), available from: <https://www.gmanetwork.com/news/topstories/nation/844050/philippines-singapore-reaffirm-keeping-peace-stability-in-south-china-sea/story/>.

¹⁶ Bea Cupin, *SUMMARY: Marcos' interventions at the ASEAN Summit in Cambodia*, Rappler.com (12 November 2022), available from: https://www.rappler.com/nation/summary-marcos-interventions-2022-asean-summit-cambodia/?cx_testId=2&cx_testVariant=cx_1&cx_artPos=0&cx_experienceId=EX4CPNoG1RJL#cxrecs_s.

¹⁷ *Supra* note 16.

2023. En route to the ASEAN Summit in Cambodia, Marcos, Jr. had declared that it would be “impossible” for him not to discuss the SCS issue when he meets with Xi.¹⁸

Testing waters

Whatever the outcome of Marcos, Jr.’s interventions on the SCS issue and the Philippine’s apparent rebalancing of policy pertaining to its long-standing disputes with China, it will be tested on the basis of how the country will navigate recent significant developments in the SCS, namely, the enactment in 2021 by China of its new Coast Guard Law and the efforts of several coastal states in the SCS, including the Philippines, to exploit the maritime resources within their respective EEZs.¹⁹

Article 22 of China’s Coast Guard Law, which entered into effect on 01 February 2021, empowers the Chinese Coast Guard to “take all necessary measures, including the use of weapons, when national sovereignty, sovereign rights, and jurisdiction are being illegally infringed upon by foreign organizations or individuals at sea”.

The Philippines, through Locsin, its former Foreign Affairs Secretary, remarked: “While enacting law is a sovereign prerogative, this one - given the area involved, or for that matter the open South China Sea - is a verbal threat of war to any country that defies the law.”²⁰ Retired Philippine Supreme Court Associate Justice Antonio Carpio, a staunch critic of China’s posturing in the SCS, noted that the Coast Guard Law violates the 1945 UN Charter, which prohibits the threat or the use of force to settle disputes among states, and UNCLOS, which mandates that “States Parties shall settle any dispute concerning the interpretation or application of this Convention by peaceful means”.²¹ Other states and international legal experts have likewise condemned China’s Coast Guard Law for constituting a breach of the United Nations Convention on the Law of Sea (UNCLOS) and exacerbating tensions not only in the SCS, but also in the East China Sea.

Carpio, meanwhile, underlined the recent efforts of several coastal states, including the Philippines, to exploit the maritime resources within their respective EEZs as a significant development in the SCS. In May 2020, Malaysia sent a survey

¹⁸ Ruth Abbey Gita-Carlos, *PBBM set to visit China in January 2023*, Philippine News Agency (11 November 2022), available from: <https://www.pna.gov.ph/articles/1188360>.

¹⁹ Antonio Carpio, *Recent developments in the South China Sea: Perspective from the Philippines*, Rappler.com (11 November 2022), available from: <https://www.rappler.com/voices/thought-leaders/analysis-recent-developments-south-china-sea-perspective-from-philippines/>.

²⁰ Jim Gomez, *Philippines Protests China’s New Coast Guard Law as ‘Verbal Threat of War’*, The Diplomat (28 January 2021), available from: <https://thediplomat.com/2021/01/philippines-protests-chinas-new-coast-guard-law-as-verbal-threat-of-war/>.

²¹ *Supra* Note 19.

ship to explore in its EEZ off the coast of Borneo in an area falling within China's nine-dash line despite warnings from China not to proceed with exploration. To secure its survey ship and its crew, Malaysia had the vessel accompanied by its coast guard and navy vessels while three US warships and an Australian frigate conducted naval drills nearby.²² Subsequently, Malaysia in 2021 sent its drilling ship to the same spot. Despite almost daily harassments from Chinese coast guard vessels the drilling was completed by the Malaysian vessel, which was still accompanied by its coast guard and navy. In mid-2021, meanwhile, Indonesia sent its drilling ship to drill test wells in its EEZ off the coast of Natuna Islands also within China's nine-dash line. A four-month standoff ensued between the coast guard and navies of Indonesia and China, but the Indonesian vessel managed to complete its undertakings.²³

In contrast, in spite of the dire need for the Philippines to explore new sources of natural gas in the face of the depleting reservoirs of the Malampaya Gas Field - projected to be exhausted within three to five years - its service contractor engaged to look for new sources was effectively prevented to do so by China's harassment based on a 25 June 2022 statement released by the Philippine's Department of Energy (DOE).²⁴ The Malampaya Gas Field supplies 40% of the energy requirement of Luzon, the largest island of the Philippine archipelago. The US Geological Survey estimates that Reed Bank holds up to 5.4 billion barrels of oil and 55.1 trillion cubic feet of natural gas.

The pronouncement of the Philippine's DOE that it has lifted the moratorium on all gas explorations in the WPS and the impending resumption of exploration activities in the area is, thus, bound to test not only the mettle of Marcos Jr.'s recent rhetoric on the SCS, but also how he will concretely navigate through an expected confrontation with China which is armed with a spurious Coast Guard Law that authorizes the use of force to assert its invalidated sovereign claim over the WPS.

A question of interests

More importantly, whose interest is Marcos Jr. promoting as he engages in a rebalancing of the Philippine's position in the SCS issue by revitalizing alliances frayed during the Duterte regime, by advocating for ASEAN Centralism in resolving long-standing disputes in the SCS, and by calling on extra-regional parties' support? Is it a

²² *Id.*

²³ *Id.*

²⁴ *DOE Statement on the Announcement of the Termination of Joint Oil and Gas Negotiations with China*, Department of Energy (25 June 2022), available from: <https://www.doe.gov.ph/press-releases/doe-statement-announcement-termination-joint-oil-and-gas-negotiations-china?withshield=1>.

case of favoring one party in a geopolitical rivalry with the hope of garnering concessions from its Indo-Pacific pivot? Or is it a case of asserting the interests of the Filipino people who stand to benefit from the economic benefits of a stable, rules-based regime in the SCS, maintained by principled and mutually beneficial partnerships with regional stakeholders?

While Marcos Jr., according to Carpio, is purportedly “saying the right things” with regards to the situation in the SCS, he has yet to “walk the talk”.²⁵ For what the shift in policy suggests is that the Philippines has hardly any institutionalized position on the SCS issue despite being the prevailing party in the Philippines v. China arbitral ruling of 2016 and that its policy on the same issue is largely driven by geopolitical shifts and political-economic exigencies. So long as such is the case, the Philippine position will always remain tentative and tenuous until the country finally looks inward and advances the interest of its own people in the maintenance of peace and security in the disputed seas in partnership with neighboring stakeholders in the spirit of regional self-reliance.

²⁵ Ivel John Santos, *Carpio urges Marcos to protect Philippine oil exploration vessels in Recto Bank*, Vera Files (10 November 2022), available from: <https://verafiles.org/articles/carpio-urges-marcos-to-protect-philippine-oil-exploration-vessels-in-recto-bank>.

A FRAMEWORK PROPOSAL FOR MINILATERALISM IN THE SOUTH CHINA SEA

*Frank Lloyd Tiongson**

The most recent Association of Southeast Asian Nations (ASEAN) Summit held from 10 November to 13 November 2022 came at the heels of the 20th anniversary of the signing by ASEAN member-states and China of the 2002 Declaration on the Conduct of Parties in the South China Sea (“2002 Declaration”). That the summit was held in Phnom Penh, Cambodia, where the 2002 Declaration was likewise signed, imbued the event with high expectations that negotiations for the Code of Conduct (“COC”) on the South China Sea (“SCS”) would gain substantial headway especially in the wake of the adoption of the Framework of the COC in 2017 and the Single Draft Negotiating Text (“SDNT”) in 2018.

The 2002 Declaration stipulated that the COC “would further promote peace and stability in the region” and that the parties agree to “work, on the basis of consensus, towards the eventual attainment of this objective”.¹ The framework of the COC, endorsed by ASEAN and Chinese foreign ministers on 06 August 2017 in Manila, Philippines, delimited the objectives for the eventual crafting of the COC to: (a) establishing “a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea”; (b) promoting “mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favorable environment for the peaceful settlement of the disputes”; and (c) ensuring “maritime security and safety and freedom of navigation and overflight”. The SDNT, meanwhile, streamlined the framework into the essential elements of the COC.

Expectations, however, were easily quashed as the parties failed to reach any consensus regarding the drafting of the COC. In the meantime, China continues to ramp up its reclamation activities in the SCS as old and new geopolitical tensions develop or escalate in the region, pointing to an enduring imperative for the crafting of a legally binding instrument governing the conduct of parties embroiled in the SCS dispute.

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¹ Declaration on the Conduct of Parties in the South China Sea (04 November 2002), available from: <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>

Languishing for more than 20 years now, the COC is caught in an institutional gridlock, according to observers. Philippine political observer Richard Heydarian remarked that the “ASEAN-way” of deciding on key regional issues on the basis of consensus, that is, a unanimity-based decision-making mechanism, is “no longer up to the task”.² He noted the cited mechanism “unwittingly handed a de facto veto power to weaker links that are under the influence of external powers.”³

The crafting of the COC does not only look bleak in the context of the mentioned institutional conundrum. Experts also doubt that it will eventually be reduced in a form of a legally binding instrument. As cited earlier, the salient objective of the COC framework states that the COC shall be envisioned to establish “a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea”. Heydarian underlines that the operative term in the specified objective is “norms”, “which denotes the absence of a legally binding nature”.⁴

Owing to the continuing threat to regional peace and security of posed by the persistent dispute over the SCS, it can hardly be suggested that the situation over the volatile waters be left to fester for an indefinite time. As such, observers and commentators, skeptical that a binding COC is forthcoming in the near future, have trained their eyes towards an alternative mechanism that is unburdened by the constraints of ASEAN multilateralism - minilateralism.

Concept, constraints, and possibilities

In a seeming shift from the policy of appeasement generally adopted by the administration of former Philippine President Rodrigo Duterte, the current administration of President Ferdinand Marcos, Jr. appears to adopt a firmer stance in relation to the Philippine’s maritime dispute with China.

In the 2022 ASEAN Summit, Marcos, Jr. underlined, among others, that: “We regard as of primary import the Quadrilateral Security Dialogue’s, (Quad)⁵ assurance of unwavering support for ASEAN unity and Centrality with the view that such minilateral

² Richard Javad Heydarian, ASEAN needs to move to minilateralism, East Asia Forum (05 December 2017), available from: <https://www.eastasiaforum.org/2017/12/05/asean-needs-to-move-to-minilateralism/>

³ Id.

⁴ Supra Note 2.

⁵The Quad, or Quadrilateral Security Dialogue, is an informal group focused on security that dates back to the early 2000s. It has become more active in recent years as part of efforts to counter China’s reach and territorial claims in the Indo-Pacific.

mechanisms should complement the ASEAN-centered regional security architecture.”⁶ Although referring to ASEAN’s collaboration with extra-regional parties, this is the first time that a Philippine high official articulated a concept that experts and observers have been advocating as a viable alternative to multilateral solutions to the SCS dispute, particularly in the form of the languishing COC.

In contrast to multilateralism, which is “a formal effort by three or more states to build trust and avoid conflict by identifying, institutionalizing and observing rules and norms for a common vision of regional or international order”, minilateralism refers to “informal and more targeted initiatives intended to address a specific threat, contingency or security issue with fewer states (usually three or four) sharing the same interest for resolving it within a finite period of time”.⁷

Tirkey summarizes the advantages of minilateralism, thus:

*Such ad hoc approaches to international cooperation bring certain advantages, including speed, flexibility, modularity, and possibilities for experimentation. These arrangements are voluntary, and follow a bottom-up approach. With a smaller membership, they can expedite decision-making and facilitate policy coordination on important focus areas.*⁸

The approach, however, is not without its constraints:

*However, minilateralism also presents dangers of forum-shopping, undermining critical international organizations, and reducing accountability in global governance. Minilaterals promote voluntary and non-binding targets commitments, and not legally binding ones. For countries that are increasingly showing a preference for “soft law” mechanisms which are easier to negotiate, minilaterals make for an attractive alternative to multilaterals. However, this gives rise to compliance and accountability issues, which can in turn frustrate the objectives of global governance and international cooperation.*⁹

6 Bea Cupin, SUMMARY: Marcos’ interventions at the ASEAN Summit in Cambodia, Rappler.com (12 November 2022), available from: https://www.rappler.com/nation/summary-marcos-interventions-2022-asean-summit-cambodia/?cx_testId=2&cx_testVariant=cx_1&cx_artPos=0&cx_experienceId=EX4CPNoG1RJL#cxrecs_s.

7 Aarshi Tirkey, Minilateralism: Weighing the Prospects for Cooperation and Governance, Observer Research Foundation (01 September 2021), available from: <https://www.orfonline.org/research/minilateralism-weighing-prospects-cooperation-governance/>
8 Id.

9 Supra Note 6.

Teo likewise warned of the possibility that minilateralism could prove to undermine states' commitment to multilateralism.¹⁰ Moreover, she also noted the dangers posed by the exclusive nature of minilateralism, which means "that an initiative could be centered only on one major power that would have relatively free rein to assert its influence over the smaller participating countries."¹¹ Thus, in the context of the SCS dispute, "it is not too farfetched to argue that each major power could create its own sphere of influence in the Asia-Pacific and potentially side-line broad ASEAN-centric multilateralism".¹²

Nevertheless, Teo posited that a particular approach to minilateralism may serve to circumvent its pitfalls. This approach is grounded on assumptions that minilateral initiatives could serve as the "building blocks" of multilateralism and that it could supplement the inadequacies of existing multilateralism without delegitimizing it. "For instance, if minilateralism's strengths lie in its ability to achieve concrete results in a more time-efficient manner, then it could act as a useful operationalization of multilateral-level dialogue," she cited.¹³ Further: "Minilateralism and multilateralism could go hand-in-hand. The important thing would be to ensure that minilateralism is seen as part of and complementary with a broader multilateral process, not something that replaces it. In this way, minilateralism could help to fortify multilateralism in the Asia Pacific."¹⁴

ASEAN experience

The adoption of minilateralist approaches to regional security issues in the ASEAN is by no means new. An example of a minilateral agreement forged by a small group of ASEAN states in relation to issues of common concern is the 2016 Trilateral Cooperative Arrangement between Indonesia, Malaysia, and the Philippines in the Sulu-Sulawesi Sea, which featured joint patrols by the naval forces of the three countries in response to the increasing presence of Islamic extremist groups in the cited waters. Another example is the Malacca Straits Patrol between Indonesia, Malaysia, Singapore, and Thailand, which features a set of practical cooperative measures undertaken by the mentioned states to secure the Straits of Malacca and

10 Sarah Teo, Could Minilateralism Be Multilateralism's Best Hope in the Asia Pacific?, *The Diplomat* (15 December 2018), available from: <https://thediplomat.com/2018/12/could-minilateralism-be-multilateralisms-best-hope-in-the-asia-pacific/>.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

Singapore - where almost half of the world's total annual seaborne trade tonnage and 70% of Asia's oil imports pass – against piracy and sea robbery.¹⁵

These experiences highlight the readiness of states within ASEAN to enter into partnerships aimed at addressing common concerns outside the ambit of glacial consensus building at the multilateral level. Heydarian notes, referring to much earlier minilateral efforts of ASEAN member states such as in the case of the International Force for East Timor and the United Nations Transitional Administration in East Timor peacekeeping operations:

If there is one thing that history teaches us, however, is that ASEAN is not a monolithic body. Time and again, the regional group has shown its ability to rise to the occasion and overcome the inherent dysfunctions of Asian-style multilateralism. And ASEAN is often at its best when it adopts “minilateralism,” namely flexible, ad hoc yet decisive intervention by core members on sensitive geopolitical issues.

What these minilateralist interventions clearly show is there is more to ASEAN than dysfunctional multilateralism. If anything, the regional body has proven even more effective when it doesn't insist on artificial unanimity or snail's paced consensus-building. This is especially the case when the issue at hand is so sensitive that achieving consensus is close to impossible.¹⁶

Issues ripe for minilateralist resolutions

In the case of the SCS issue, what is often overlooked, at least in the broader discursive field, is the fact that the 2016 Hague Ruling in Philippines v. China, in which the Hague ruled in favor of the Philippines, determining that major elements of China's claim were unlawful, hardly constituted an adjudication of territorial delimitations or sovereign claims. Often buried under more provocative issues are the findings of the Arbitral Tribunal on less polarizing issues concerning, for example, respect for and recognition of traditional fishing rights and preservation of marine environments.

15 Fact Sheet: The Malacca Straits Patrol, Ministry of Defense Singapore (21 April 2015), available from: <https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2016/april/2016apr21-news-releases-00134/>

16 Richard Javad Heydarian, Time for ASEAN minilateralism on Myanmar and territorial disputes in the South China Sea, The Japan Times (06 July 2021), available from: <https://www.japantimes.co.jp/opinion/2021/07/06/commentary/world-commentary/asean-minilateralism-myanmar-territorial-disputes-south-china-sea/>.

With respect to traditional fishing activities in Scarborough Shoal, the Arbitral Tribunal pronounced:

*... the following discussion of fishing rights at Scarborough Shoal is not predicated on any assumption that one Party or the other is sovereign over the feature. Nor is there any need for such assumptions. The international law relevant to traditional fishing would apply equally to fishing by Chinese fishermen in the event that the Philippines were sovereign over Scarborough Shoal as to fishing by Filipino fishermen in the event that China were sovereign.*¹⁷

The Arbitral Tribunal explained that the legal basis for protecting artisanal fishing:

*... stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears.*¹⁸

It concluded:

In the Tribunal's view, it is not necessary to explore the limits on the protection due in customary international law to the acquired rights of individuals and communities engaged in traditional fishing. The Tribunal is satisfied that the complete prevention by China of fishing by Filipinos at Scarborough Shoal over significant periods of time after May 2012 is not compatible with the respect due under international law to the traditional fishing rights of Filipino fishermen. This is particularly the case given that China appears to have acted to prevent fishing by Filipinos, specifically, while permitting its own nationals to continue. The Tribunal is cognizant that April and May 2012 represented a period of heightened tensions between the Philippines and China at Scarborough Shoal. China's dispute with the Philippines over sovereignty and law enforcement at Scarborough Shoal, however, was with the Philippine Government. The Tribunal does not see corresponding circumstances that would have justified taking action against Filipino fishermen engaged in their traditional livelihood or that would have warranted continuing to exclude Filipino fishermen from Scarborough Shoal for months after the Philippines

¹⁷ Par. 793, Arbitral Award.

¹⁸ Par. 798, *id.*

*had withdrawn its official vessels. The Tribunal notes, however, that it would have reached exactly the same conclusion had the Philippines established control over Scarborough Shoal and acted in a discriminatory manner to exclude Chinese fishermen engaged in traditional fishing.*¹⁹

Promoting and protecting the rights of artisanal fisherfolk especially from the concerned coastal states may be undertaken through minilateral mechanisms such as the establishment of a regional fisheries management regime in the waters of the SCS where around 55 percent of global marine fishing vessels and an industry employing at least 3.7 million people operate.²⁰

The same management regime may also be explored with respect to the preservation of marine environments in the SCS on the basis of the 2016 Arbitral Award, especially considering that polarizing questions of sovereignty are deemed “irrelevant” given that states have the “duty to cooperate” in the preservation of the marine environment pursuant to Part XII, Article 197 of the United Nations Convention on the Law of the Sea (“UNCLOS”). As suggested by the Center for Strategic and Environmental Studies’ Expert Working Group on the South China Sea, this may be undertaken through the establishment of a Fishery and Environmental Management Area in the SCS²¹, which could very well be spearheaded by concerned coastal states through minilateral negotiations and arrangements.

The advantage of addressing these interim concerns, pending the resolution of more polarizing issues in the SCS, is that potential actors would be informed by two key instruments, namely, the UNCLOS and the 2016 Hague Arbitral Award. This has the potential of laying the groundwork for rules-based conduct stemming from specific concerns as opposed to broader contentious issues where dialogue is hard put to take off. Eventually, building on the relationships and confidence established, parties might be able to tackle even more contentious matters, including, for instance, the conduct of joint patrols by claimant states beyond territorial seas of the high-tide geologic features

¹⁹ Par. 812, *id.*

²⁰ Fish, not oil, at the heart of the South China Sea conflict, Fridtjof Nansens Institute (24 October 2017), available from: <https://www.fni.no/news/fish-not-oil-at-the-heart-of-the-south-china-sea-conflict-article1556-330.html>

²¹ South China Sea Expert Working Group, A Blueprint for Fisheries Management and Environmental Cooperation in the South China Sea, Asia Maritime Transparency Initiative (13 September 2017), available from: <https://amti.csis.org/coc-blueprint-fisheries-environment/>

in the Spratlys²² or even pushing for a COC in accordance with UNCLOS among claimant states which respect the 2016 Hague Arbitral Award.²³ Heydarian noted, “By enhancing their collective domain awareness and deterrence capabilities, ASEAN states will be in a better position to constrain China’s predatory behavior in adjacent waters, from the South China Sea to the North Natuna Sea and beyond.”²⁴

A framework proposal

In pushing for a minilateral approach to the SCS dispute, great care must be observed to circumvent the major pitfalls of minilateralism especially in relation to its tendency to undermine the work of multilateral institutions in establishing legally binding compliance and accountability mechanisms. Given this, it bears cautioning against overestimating minilateralism considering that minilateral opportunities “do not change the worrying structural dynamics that continue to be evident in the South China Sea today” including the inability to exact accountability for conduct violative of the UNCLOS from relevant parties.

Thus, it is important at the outset to affirm the following assumptions as earlier discussed:

- Minilateralism should be pursued as a building block of multilateralism;
- Minilateralism could be pursued as a useful operationalization of multilateral-level dialogue;
- Minilateralism ought to be seen as part of and complementary with broader multilateral processes, not something that replaces them;
- In the case of the SCS dispute, the basis of minilateral dialogue must be centered on compliance with the UNCLOS and respect for the 2016 Hague Arbitral Award; and
- Regional stakeholders must take the lead in minilateral initiatives and great care must be taken in engaging with regional and extra-regional geopolitical powers.

22 Sofia Tomacruz, Carpio offers 5 ways ASEAN can counter Chinese intimidation in South China Sea, Rappler.com (28 October 2019), available from: <https://www.rappler.com/nation/243570-carpio-ways-asean-counter-chinese-intimidation-south-china-sea/>

23 Richard Heydarian, Marcos, Jr. and ASEAN: Minilateralism in the South China Sea, Asia Maritime Transparency Initiative (18 October 2022), available from: <https://amti.csis.org/marcos-jr-and-asean-minilateralism-in-the-south-china-sea/>

24 Id.

Owing to the imperatives of peacefully resolving the SCS dispute, the institutional gridlock faced by the COC should not stymie the search for opportunities for dialogue over specific issues over the SCS. By carving out venues for negotiation and cooperation at every turn as opposed to being completely hampered by polarization in highly politically charged issues concerning the SCS, a peaceful and rules-based regime in the currently volatile waters may yet be realized.

CLOSING SPEECH

*Edre Olalia**

Distinguished guests,

Ladies and gentlemen,

First of all, I would like to congratulate on the success of the conference. On behalf of International Association of Democratic Lawyers (IADL), I would like to express my great gratitude to all distinguished guests and participants for your actively participating in the conference and sharing suggestions that help resolve conflicts in a peaceful way. We have had a very effective working day with 8 presentations from experts from Russia, India, the Philippines and Viet Nam. We also had a fruitful discussion among all the conference participants with lots of interesting and helpful ideas, which I believe will be valuable contributions to the process of peaceful settlement of the SCS (South China Sea) disputes.

Through the first session of the conference we have obtained a clear picture of the situation in the SCS, whereas we know that the situation continues to be a matter of concern not only for the region, but also for the international community as a whole. Contrary to some predictions that the situation in the SCS would become more stable, in fact over the past years the situation in the SCS has continued to be very complicated with new and old security challenges. The basic reason is that China has many activities to assert its sovereignty here, including the China Coast Guard Law that allows the use of force in contravention of international law; great power competition makes the SCS a battleground, and the fact that countries continue to resolutely assert their rights in the SCS in their own ways may cause conflict to erupt; meanwhile certain Governments like the Duterte Administration has not taken a clear position on the South China Sea issue...

In session 2, scholars emphasized an important trend that the solution to the situation in the SCS may have changes in the near future. The most basic reason is the fact that all parties agree upon the demand for maintaining the SCS a sea that brings legitimate interests to all parties, promoting peaceful settlement of disputes, and abiding by the law (especially the 1982 UNCLOS) while Beijing's relentless push for territorial and economic ambitions in the South China Sea makes the situation increasingly complicated. The fact that Beijing is increasing pressure on countries on

* *IADL President, Chairman of National Union of People's Lawyers of the Philippines*

other strategic issues is also the reason why countries can abandon their neutral policy on the SCS because they know this is China's core interest. On the other hand, the formation of action groups for common interests in specific areas like the Quad can also create impetus for changing common actions in the South China Sea.

IADL for many years has called for the peaceful resolution of disputes in the South China Sea in accordance with international law and will continue to monitor to make sure the region is moving toward peace and security. I therefore, I encourage all experts of this conference to come back to their respective countries and report the results of this conference to their Governments for consideration. I also request IADL to post the result of the conference on its website and bulletin to widen the impact of our work today.

IADL reaffirms and asks related parties to respect and completely adhere to the Declaration of Conduct in the SCS (DOC) as well as early establish and implement COC, which should be legally-binding and based on international laws, including United Nations Convention on Law of the Sea (UNCLOS) in 1982. The code of conduct should include legal obligations of related parties to secure freedom of navigation and airaviation in the South China Sea and require parties to resolve disputes by peaceful means on the basis of international laws and prohibits use of force or threat of using force. SCS should be monitored rigidly so that we can timely raise our concerns and consultations as well as having an early meeting to continuously assess the situation in SCS and discussing necessary subsequent actions.

Finally, I would like to extend my gratitude and thankfulness to our Russian host - the International Fund - the way for Peace, especially President Irina Umnova, who has spent lots of her time and energy for the peace process in general and for this conference in particular. I also thank experts from Russia, India, the Phillipnes and Viet Nam for their presentations at the conference and I hope to have your further support in the future.

Thank you all lawyers, legal experts and guests who have participated in this conference. Hope to see you all in the next SCS conference with positive feedback.