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THE CODE OF CONDUCT IN THE SOUTH CHINA SEA: THE INTERANTIONAL LAW PERSPECTIVE*

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Introduction

The Declaration of Conduct in the South China Sea (DOC) signed in Phnom Penh in 2002[1] has turned out to be much less effective than expected in reducing tension arising from competing activities *vis-à-vis* the territorial claims in the South China Sea (SCS). After a short hiatus following the signing of the Declaration, the situation in the SCS has kept boiling up since 2007. In particular, incidents in the first half of this year, which are considered as escalating the territorial disputes in the SCS to

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[1] "ASEAN - China Declaration on the Conduct of Parties in the South China Sea, signed during the 8th ASEAN Summit in Phnom Penh on the 14 November 2002", <http://www.aseansec.org/13163.htm>, reproduced in (2003) 2 *Chinese JIL* 418; Lowe, V. & Talmon, S. (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea*, (Oxford: Hart Publishing, 2009), 771-2.

their highest level ever since the Cold War,[2] serve as a wake up call that the SCS has always remained a significant security flashpoint.[3] These incidents also bear testimony to the fact that the DOC has now become a dead letter.

Against the current backdrop, the time is ripe for the negotiation of a Code of Conduct (COC) in the SCS which has already been envisaged in the DOC[4] and set as a task in the 'Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity (2011-2015)'.[5] But it is unclear how such a code will be negotiated in the time to come. One thing is nevertheless certain: the 'new' COC must depart fundamentally from the 'old' COC; otherwise success will hardly follow. While diplomatic negotiations are by and large a political process and there are different approaches in conceptualising the COC as a confidence-building instrument for the SCS, it is believed that international lawyers can play some role in and contribute to the adoption of the COC. This paper is an attempt to offer some thoughts on how a COC can be conceptualised from the perspective of international law - the discipline that both authors are most familiar with. This paper is composed of three parts. In the first part, we review briefly the recent tensions in the SCS with a

[2] See T Cook, 'Rising Tensions in the South China Sea: An Interview with Ian Storey', 17 June 2011 (The National Bureau of Asian Research) <http://www.nbr.org/research/activity.aspx?id=151> (accessed 19 June 2011).

[3] Cf R Emmers, 'The de-esclation of the Spratly dispute in Sino-Southeast Asian relations' 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 9, 128.

[4] DOC, paragraph 10.

[5] Adopted at the 13th ASEAN-China Summit, Hanoi, 29 October 2010. See point 1.5.1, text at http://www.aseansec.org/25554.htm. See also 'Chairman's Statement of the 13th ASEAN-China Summit, Hanoi, 29 October 2010', paragraph 17, text at http://www.aseansec.org/25481.htm.

view to demonstrating the fundamental flaws in the present DOC text. We will then offer some reflections upon what COC should address in the context of the SCS before concluding with some further thoughts about the way forward.

Background to the SCS

The territorial disputes in the SCS have long attracted attention of scholars and give rise to rich literature from different perspectives.[6] It is thus unnecessary to revisit here every aspect of these disputes. It suffices to recap some basic features of the SCS and the territorial disputes therein to provide the context for the present discussion.

The SCS is the second largest semi-enclosed sea in the world and bordered by China (including Taiwan) to the north and eight ASEAN countries, namely the Philippines to the east, Brunei, Indonesia, Malaysia and Singapore to the south and Cambodia, Thailand and Vietnam to the west. The SCS is of global significance in term of maritime trade as it is the crucial conduit of the world's trade volume for more than a quarter.[7]

[6] 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).

[7] 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. Maritime trade in turn accounts for about 90% of global trade. See 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), 7.

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, such as China, Taiwan (China), Japan and Republic of Korea who rely heavily on energy supply from the Middle East, Australia and Africa.[8] In military terms, the SCS is also important for naval powers, especially the United States who wishes to maintain its global military posture and depends on the SCS transit corridors for rapid deployments between the Western Pacific and Indian Ocean.[9]

In addition to the geo-strategic importance, the SCS also boasts important natural resources. It is generally recognized that living resources in the SCS are abundant[10] and provide important sources of protein, foreign currency and work for the coastal States.[11] It is also noteworthy that most of the fisheries resources in the SCS are either

[8] See 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), 8. 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, states that 70% of Japan's energy needs and 65% of China's traverse through these SLOS.

[9] 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), 1.

[10] T. Kivimäki (ed), *War or Peace in the South China Sea?* (NIAS Press, Copenhagen, 2002), 44, ranks the SCS fourth in the 19 richest fishing zones in the world.

[11] It is reported that 10% of global supply of fish comes from this area. See B Bland, 'Vietnam's fishermen on front line in China clash', *Financial Times*, 20 June 2011 <http://www.ft.com/intl/cms/s/0/0b4e8380-9b52-11e0-bbc6-00144feabdc0.html#axzz1PVz5IRNV> (accessed 21 June 2011). See also 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; 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* (Routledge, London, 2009), Chapter 4, 61.

highly migratory or transboundary stocks,[12] such as scad, mackerel and especially tuna - the most valuable and sought-after species.[13] The abundance of marine living resources in the SCS is attributed to its high biodiversity[14] with coral reefs being the important nursery and breeding grounds for regional fisheries. There is also a widespread perception that the seabed of the SCS holds significant amounts of oil and gas. While commercial discoveries at the margins of the SCS have been made, the oil and gas potential of the central part of the SCS, where exist two groups of disputed islands, remains speculative 'best guesstimate' due to the lack of sufficient exploration activities.[15] Nevertheless, the oil factor remains arguably the most important geopolitical calculation of States in the region, given their increasing energy demands and the surging oil prices.

Paradoxically, the SCS is also fraught with intractable territorial disputes.[16] Among these disputes, the most notorious are the sovereignty disputes over two groups of islands, namely the Paracels and the Spratlys,[17] which are situated to the central north and in the centre of the

[12] 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.
[13] 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* (Routledge, London, 2009), Chapter 4, 61, 62.
[14] 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".
[15] 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), Chapter 1, 7, 15-6.
[16] By this term we mean both disputes over island sovereignty and disputes relating to maritime zones.
[17] For these two disputes, see generally, R Emmers, *Geopolitics and Maritime Territorial Disputes in East Asia* (Routledge, London, 2009), Chapter 4.

SCS respectively. While the former is a bilateral dispute between China and Vietnam, the latter involves six parties, i.e. Brunei, China, Malaysia, the Philippines, Vietnam and Taiwan, the last one presently considered by all other claimants as a province of China.[18] The significance of these islands sovereignty disputes lies in the fact that these islands occupy strategic location in close proximity to the important SLOCs in the SCS.[19] From a geostrategic and military perspective, possession of the islands enables States to gain control over navigation and security in the SCS.

The scramble for natural resources, especially petroleum resources, of the SCS may also lead to another dispute, that is, the dispute over the status of the insular features within the Paracels and Spratlys.[20] This is a dispute over the interpretation and application of Article 121 of the United Nations Convention on the Law of the Sea (LOS Convention),[21] which provides that only 'islands' are capable of having an exclusive economic zone (EEZ) and continental shelf while 'rocks' are not. A particular entity can be classified as an island if it can sustain human habitation or economic life.[22] This definition of 'island' is however notoriously difficult to interpret[23] and opinions of writers not surprisingly

[18] For a recent and comprehensive treatment of Taiwan, see J Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press, Oxford, 2006), 198-220.
[19] 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), Chapter 1, 7, 18.
[20] As Schofield notes, the features of the Spratlys do not have much intrinsic value in themselves but the potential to generate large maritime zones and hence entitle claimant states to exploit marine natural resources there, particularly oil and gas. See ibid, 12-8.
[21] 'The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982' 1833 *UNTS* 396, entered into force 16 November 1994.
[22] LOS Convention, Article 121(3).
[23] For a useful discussion, see B Kwiatkowska and AHA Soons, 'Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *NYIL* 139.

differ as to the classification of the insular features in the SCS.[24] Meanwhile, not all States in the region have expressed their official positions as to whether and which of the insular features in the SCS are classified as islands.[25] If some insular features in the Paracels and the

[24] For the view that some features of the Spratlys may be classified as islands, 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; 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(2) *ODIL* 169. Cf M Gjetnes, 'The Spratlys: Are They Rocks or Islands?' (2001) 32(2) *ODIL* 191.

[25] China in its recent *Note Verbale* to the UN Secretary-General last April declares categorically that the Spratlys is entitled to an EEZ and continental shelf. 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) (in respose to the Note Verbale No. 000228 of the Permanent Mission of the Republic of the Philippines). It also appears that China treats the Paracels in the same way 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. The Philippine position on the status of the Spratlys is equivocal, stating generally that the regime of islands (under Article 121 of the LOS Convention) applies to its claimed features. See 'Philppines: 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. See also '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>, (in response to Note Verbale No. CML/17/2009 and CML/18/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China). 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 (S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore); TL McDorman, 'The South China Sea after 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation?' in M McConnell and others (eds), *Ocean Yearbook* (24, Martinus Nijhoff, Leiden, 2010), ch 507, 507, 516-17, 521. Indonesia, a non-claimant state in the island sovereignty disputes, makes it clear that none of the Spratly features is capable to generate an exclusive economic zone and continental shelf. See Point 3, '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) (in response to Note Verbale No. CML/17/2009 dated 07 May 2009 of the Permanent Mission of the People's Republic of China).

Spratlys are classified as islands under Article 121 of the LOS Convention there will be overlapping maritime zones generated by those features on the one hand and the opposite coasts of the States bordering the SCS on the other. There may be further maritime delimitation disputes involving the Paracels and the Spratlys in the SCS. In addition to these disputes, there possibly exists another dispute relating to maritime zone claim which however hardly arises from the LOS Convention provisions. This dispute concerns the China's *infamous* nine-dotted-line map, which was officially introduced to the international community for the first time in May 2009.[26] Yet China has not articulated what those lines actually mean[27] and thus a dispute relating to this claim has so far remained *pure* speculation.

In addition to the implications for both the freedom of navigation and economic exploitation in the SCS, the territorial disputes also affect

[26] These lines were depicted in the maps attached to *Notes Verbales* of China 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 in May 2009 under Article 4, Annex II of the LOS Convention, modified by *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea* (SPLOS/72, 29 May 2001). See 'Note Verbale No. CML/17/2009 dated 07 May 2009 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/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>, (English translation) (protesting Malaysia-Vietnam Joint Submission to the Commission on the Limits of the Continental Shelf)'Note Verbale No. CML/18/2009 dated 07 May 2009 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_2009re_vnm.pdf>, (English translation) (protesting Vietnam Submission to the Commission on the Limits of the Continental Shelf).

[27] Chinese scholars have been active in their discussion of the lines but their arguments divide on both its validity and meaning. Even among those who think the lines are defensible under international law, opinions deeply divide and even change over time.

the management of marine living resources in the SCS. Given the absence of well defined maritime boundaries, fisheries in the SCS are hardly properly managed. By the same token, environmental protection in the SCS is also fraught with difficulties.

DOC trial period runs out?

Recent tensions in the SCS

Since the situation in the SCS has been reviewed in depth and at length elsewhere,[28] this part will highlight the string of events that have recently occurred and raised the already high temperature of the SCS disputes.

The first one in this string of events is the so-called Reed Bank incident, which concerned the reported harassment on 02 March 2011 by two Chinese patrol boasts of a Philippines-chartered vessel carrying out seismic survey near Reed Bank,[29] which lies about 85 NM from Palawan. While the Philippines claims the area as part of its EEZ China asserts its 'indisputable sovereignty over the Spratlys and adjacent waters'.[30] There are two other controversial events relating to petroleum exploration activities reported of late. On 27 May and 09 June, Vietnam protested against China's violations of its sovereign rights and jurisdiction after the latter's vessels cut the cables of seismic survey ships operated by PetroVietnam, the Vietnamese National Oil Company, on the continental

[28] A succinct but comprehensive review of the SCC situation after the signing of the DOC up to 2009 is 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). The situation has been regularly reviewed in some recent regional and international conferences, including the present one.

[29] For a useful account of this event, see I Storey, 'China and the Philippines: Implications of the Reed Bank Incident' (2011) 11(8) *China Brief* 6.

[30] See ibid.

shelf of Vietnam.[31] In the first incident, China argued that the action of its ships was regular maritime law enforcement and surveillance activities in 'waters under the jurisdiction of China'.[32] In the second case, China however disputed the circumstances surrounding the incident, stating that its fishing vessel had been illegally chased by armed Vietnamese vessels before a fishing net snagged the cable.[33]

The quarrel over factual issues also occurred on other occasions. On 1 June, Vietnam charged armed Chinese vessels with firing warning shots at its fishing vessels near the Spratlys but China dismissed that claim as a fabrication.[34] In a different scenario, the spat between the Philippines and China over the latter's activities on Amy Douglas Bank was about both fact and law. The Philippines accused China of attempting to erect new structure on Amy Douglas Bank in early June

[31] Ministry of Foreign Affairs of the Socialist Republic of Vietnam, 'Foreign Ministry Spokesperson Nguyen Phuong Nga answers question from the media at the Press Conference on June 9th 2011 concerning the Viking II incident, 09 June 2011' <http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns110610100618/newsitem_print_preview> (accessed 13 June 2011); J Hookway, 'Tensions Flare Over Disputed Asian Sea' *The Wall Street Journal* (10 June 2011) <http://online.wsj.com/article/SB10001424052702304259304576375203724909870.html> (accessed 13 June 2011).

[32] Ministry of Foreign Affairs of the People's Republic of China, 'Spokesperson Jiang Yu's Remarks on China's Maritime Law Enforcement and Surveillance on the South China Sea, 28 May 2011' <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t826601.htm> (accessed 24 June 2011).

[33] See Ministry of Foreign Affairs of the People's Republic of China, 'Spokesperson Hong Lei's Remarks on Vietnamese Ships Chasing away Chinese Fishing Boats in the Waters off the Nansha Islands, 09 June 2011' <http://www.fmprc.gov.cn/eng/xwfw/ s2510/ t829427.htm> (accessed 24 June 2011). See also J Hookway, 'Tensions Flare Over Disputed Asian Sea' *The Wall Street Journal* (10 June 2011) <http://online.wsj.com/ article/ SB10001424052702304259304576375203724909870.html> (accessed 13 June 2011).

[34] Ministry of Foreign Affairs of the People's Republic of China, 'Spokesperson Hong Lei's Remarks, 03 June 2011' <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t828414.htm> (accessed 23 June 2011). See also B Bland, 'Vietnam's fishermen on front line in China clash', *Financial Times*, 20 June 2011 http://www.ft.com/intl/cms/s/0/0b4e8380-9b52-11e0-bbc6-00144feabdc0.html#axzz1PVz5IRNV (accessed 21 June 2011).

while China denied any intention to occupy or seize the reef and claimed the materials were used for scientific purposes.[35] The 'legal' issue is whether the DOC does prohibit the erection of new structure on uninhabited question, which will be discussed later.

Amid the escalating tensions in the SCS, China sent its largest patrol ship through the disputed waters and announced that the ship would conduct inspection of foreign-flag flying vessels operating in China's 'territorial waters'[36] while the Philippines also sent its biggest warship to the Spratlys.[37]

The above events alone are exemplary of the ineffectiveness or deficiencies of DOC, which are the subject of the next section.

Fundamental flaws of the DOC

It appears that the DOC text adopted by ASEAN and China in 2002 is not so much different from the COC draft originally agreed among ASEAN.[38] The two major differences between ASEAN's COC draft and

[35] J Mair, 'Analaysis: SE Asia wary of China as sea claim disputes intensify' *Reuterscom* (12 June 2011) <http://uk.reuters.com/article/2011/06/12/us-seasia-southchinasea-idUSTRE75B0TR20110612> (accessed 23 June 2011). It was reported that the Philippine Navy had removed the marker placed on this and two other features. See DZ Pazzibugan, 'Philippines pulls Spratlys 'foreign' posts' *Philippine Daily Inquirer* (16 June 2011) <http://newsinfo.inquirer.net/15230/philippines-pulls-spratlys-foreign-posts>(accessed 23 June 2011).

[36] See 'China's Patrol Vessel to Sail through South China Sea', *China Press*, 15 June 2011 <http://english.cri.cn/6909/2011/06/15/189s642942.htm> (accessed 21 June 2011).

[37] G Torode & T Ng 'Manila sends its flagship to shoal', *South China Morning Post*, 18 June 2011.

[38] The idea of having a COC in the SCS was first raised by the Philippines who was later entrusted with the task of jointly preparing with Vietnam the ASEAN draft as the basis for discussion with China. The ASEAN draft was adopted in November 1999. For history of the COC, see K Kittichaisaree, 'A Code of Conduct for Human and Regional Security Around the South China Sea' (2011)(32) *ODIL* 131; HT Nguyen, 'Vietnam and the Code of Conduct for the South China Sea' (2001) 32(2) *ODIL* 105.

the finally adopted DOC[39] are due to the irreconcilable positions between China and ASEAN concerning the geographical scope of the instrument and a ban on erecting new structures on uninhabited features, that latter being included within the concept of activity that further complicates the disputes.[40] In the event, China and ASEAN papered over their disagreements by leaving these two issues out of the final text and the COC was accordingly downgraded to a declaration. Ironically, that skilful but disingenuous negotiating technique now backfires. If China and ASEAN had reached an agreement on these two issues, some of the controversial events mentioned above could not have occurred.

Indeed, it can be argued that the disagreement between China and the Philippines over the former's construction on Amy Douglas Bank was partly caused by the absence of a hard and fast rule prohibiting the erection of new structures on uninhabited features.[41] Likewise, the petroleum exploration-related incidents can be considered attributable to the absence of geographical scope of the DOC. By glossing over this most important matter, the parties now suffer from the pitfalls of the absence of defined disputed areas. It is not difficult to understand that States are far from in agreement on this issue, not least because the claimant States have different views as to what features are in dispute and how much maritime zones they generate under the LOS Convention. Furthermore, the dubious status of China's nine-dotted lines also

[39] There are of course also few stylistic changes in the DOC. For a comparison of the two documents, see HT Nguyen and T Nguyen Dang, 'Một số suy nghĩ về Bộ Quy tắc ứng xử ở Biển Đông (Some thoughts on the Code of Conduct in the South China Sea)' presented at *Second National Workshop on the South China Sea: Disputes in the South China Sea: History, Geopolitics and International Law*, Hanoi, 26 April 2011, (in Vietnamese).

[40] The DOC however keeps the ban on *inhabiting* presently uninhabited features.

[41] Though China did not explicitly made that point.

exacerbates the situation. The absence of a common understanding as to the disputed waters in the SCS may, as will be shown, have further implications for all States bordering the SCS.

The old COC/DOC approach also contains some further inherent fundamental flaws. *First*, it is self-contradictory that the DOC is a confidence-building instrument but all the activities pursued to build trust and confidence, either unilaterally or jointly, are optional rather than 'mandatory'. It is therefore not surprising that all activities under paragraphs 5 and 6 have yet to be conducted.

Secondly, the duty to refrain from activities that may further complicate the disputes (so-called the duty of self-restraint) remains vague because the concept of 'complicated activities' itself is accompanied by only one single example without any further guidance. Not surprisingly the parties will have different interpretation of this nebulous concept, reiterating their positions during the past COC/DOC negotiations. This is unfortunate because the duty of self-restraint is one of the key obligations in the DOC. In fact, as will be shown, if the parties had elucidated the duty of 'self-restraint' in light of international law, incidents relating to petroleum exploration activities might not have occurred.

Thirdly, the absence of a mechanism to verify incident at sea seems to be a neglected issue when ASEAN and China negotiated the COC/DOC. While DOC operates in the same way as binding instruments, that is, its implementation relies on good faith, a mechanism to ensure its implementation seems desirable. The recent disagreements between parties over factual aspects of an incident are characteristic of this shortcoming.

On top of everything else, the whole notion of concluding a COC or DOC to regulate only activities relating to the disputed areas in the SCS is conceptually flawed. The SCS is above all a semi-enclosed sea which should be treated as an integral whole. That territorial disputes exist in the SCS does not change this geographical fact. On the other hand, the lack of a common understanding as to the geographical scope of the contested waters appertaining to the Paracels and the Spratlys means that the most of the SCS is disputed. This hinders the exploitation and management of natural resources in the SCS. Furthermore, the SCS is the link between the Pacific and Indian Oceans, serving as the crucial conduit for maritime trade. Any conflict arising from these territorial disputes will disrupt the SLOCs through the SCS and thus directly affect the interests of all user States, who are of course not limited to coastal States in the region. It is therefore without reasons that major SCS users voiced their concerns over the escalating tensions in the SCS.[42] In this connection, it should be noted in passing that the SCS is also the place of interactions between naval powers, which may lead to friction due to the different understanding of the applicable laws. The case in point is the conduct of military activities in the EEZ between China and the United States, which gave rise to tension between China and the United States as in the incidents like the EP-3E in 2001 and the USNS Impeccable in 2009.

[42] Even Singapore and Japan have voiced their concerns over the recent incidents. See 'Singapore Press Release 20/06/201: MFA Spokesman's Comments in responses to media queries on the visit of Chinese maritime surveillance vessel Haixun 31 to Singapore',<http://app.mfa.gov.sg/2006/press/view_press_print.asp?post_id=7070> (accessed 21 June 2011), see also 'Singapore urges China to clarify South China Seas claim', *BBC*, World, Asia-Pacific, 20 June 2011, <http://www.bbc.co.uk/news/world-asia-pacific-13838462> (21 June 2011); 'Indonesia leader talks ties, South China Sea tensions', *The Japan Times*, 18 June 2011 <http://search.japantimes.co.jp/print/ nn2011 0618a2.html> (accessed 21 June 2011).

Re-conceiving the COC for the SCS

The foregoing demonstrates the fundamental flaws of the old COC/DOC approach. It is therefore suggested that a new approach be adopted in the upcoming negotiations of a new COC for the SCS should ASEAN and China want to tap the benefits from the SCS and manage the potential conflicts of the territorial disputes there. In this part, are highlighted some issues worth considering by China and especially ASEAN Member States in conceptualising a new COC in the SCS. But before doing so, some words should be spent on the term 'code of conduct' as ASEAN is now talking about a *legally binding* COC for the SCS.

In ASEAN practice, the term code of conduct has been used to refer to a legally binding instrument, that is, the Treaty of Amity and Cooperation in Southeast Asia (TAC).[43] But the term 'code of conduct' in that context is perhaps used as a metaphor rather than a legal term of art. In the case of the old COC/DOC, initially the term 'code of conduct' as suggested by the Philippines was not intended to be a legally binding instrument.[44] This can be inferred from the fact that in the draft COC agreed by ASEAN the word 'undertake' was used instead of a more imperative language, i.e. the word 'shall'.[45] That perception is in line

[43] See, e.g., Hanoi Plan of Action, paragraph 7.4., text available at http://www.aseansec.org/8754.htm; Declaration of ASEAN Concord II (Bali Concord II), Preambular paragraph 8 and paragraph 5, at http://www.aseansec.org/15159.htm; Joint Communique of the 40th ASEAN Ministerial Meeting (AMM) "One Caring and Sharing Community", Manila, 29-30 July 2007, paragraph 28, at http://www. asean.org/20764.htm.

[44] See Kittichaisaree, Kriangsak "A Code of Conduct for Human and Regional Security around the South China Sea", *Ocean Development & International Law*, Vol. 32, No. 2 (2001), 131-32.

[45] See Note on the use of the word "shall" in SN Nandan, S Rosenne and NR Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol II, Martinus Nijhoff, Dordrecht, 1993), xlv-xlvi.

with the general state practice, according to which the term 'code of conduct' normally refers to a written non-binding set of rules developed to address a specific or general area of regulatory concerns.[46] Such a set of rules is comprised of both binding and non-binding norms under contemporaneous international law[47] and hence its compliance depends on the will of the signatories. A code of conduct as such is not binding[48] as opposed to a treaty, understood as a generic term, which is binding. It is however the voluntary nature that make the codes of conduct more attractive and easier to achieve than treaties in certain areas where the parties have genuine difficulty in implementing their obligations. If the regulatory instrument is a legally binding treaty, failing to comply with an obligation under that instrument entails international responsibility.[49] By contrast, a 'violation' of a provision in a code of conduct does not give rise to *responsibility under the code*[50] for the defaulting state. Yet the non-binding character does not render a code of conduct legally

[46] See generally J Friedrich, 'Codes of Conduct' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (last updated October 2010 edn, Oxford University Press, Online Edition, 2010).

[47] In this sense, codes of conduct can be considered as falling within the concept of 'soft law'. See ibid. . For 'soft law', see generally A Boyle, 'Soft Law in International Law-Making' in MD Evans (ed) *International Law* (3rd edn, Oxford University Press, Oxford, 2010), ch 5, 122; AE Boyle and C Chinkin, *The making of international law* (Oxford University Press, Oxford, 2007).

[48] Of course, a rule, is embodied in a code of conduct but reflective of existing rules of international law is binding upon the parties to the code on its own right.

[49] See *Articles on Responsibility of States for Internationally Wrongful Acts* (UN General Assembly Resolution 56/83, 12 December 2001), Article 1, reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, Cambridge, 2002).

[50] This does not mean that every violation is without legal effect; if the provision in question contains an international obligation under other sources of international law, independently of the code, a breach of it still entails responsibility.

insignificant.[51] After all, the implementation of both treaties and codes of conduct rests on good faith of the parties.[52]

That being said, as a matter of principle, the nomenclature of an instrument does not determine its bindingness or otherwise.[53] Rather, it is the intention of the parties as seen from the substance of the instrument that renders it legally binding. ASEAN and China are at free will to conclude a binding treaty and designate it as a 'code of conduct'. The above observation of the *popular* use of the term "codes of conduct" is in point in so far as it serves to emphasize the merits of a non-binding code of conduct. In any event, the process of negotiating a code of conduct, regardless of its legal force, is akin to that of a treaty.[54] And a clear understanding of *lexlata* and *lexferenda* is important in both processes.

Common themes

Given the characters of the SCS, where there exists many territorial disputes, there are three common themes that the SCS should address, that is, freedom of navigation, settlement of disputes and sustainable use of the SCS.

[51] J Friedrich, 'Codes of Conduct' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (last updated October 2010 edn, Oxford University Press, Online Edition, 2010) states that empirical studies indicate that codes of conduct are taken seriously.

[52] 'Convention on the Law of Treaties, Vienna, 23 May 1969' 1155 *UNTS* 331, Art 26. The difference between a treaty and a code of conduct lies in the consequences arising from the violations of these two instruments. A breach of treaty provision gives rise to international responsibility while a breach of a code of conduct does not.

[53] Ibid, Art 2(1)(a).

[54] J Friedrich, 'Codes of Conduct' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (last updated October 2010 edn, Oxford University Press, Online Edition, 2010).

Respect for the freedom of navigation in the South China Sea should not be underestimated. This is a matter whose significance is beyond the Southeast Asian region. Every user of the South China Sea has an interest in maintaining the SLOCs in the SCS. While the DOC, as well as its parties, reaffirms that the freedom of navigation in and overflight above the SCS is respected, the connotations of such freedom are not free from uncertainty.[55] The new COC thus should go further than the DOC by putting flesh on the bones of the freedom of navigation and overflight.

Since the SLOCs are close the disputed islands in the SCS, it is necessary to properly manage these disputes so that conflicts will not arise. Thus, two fundamental principles of international law are also highly relevant in the context of the SCS, that is: (i) States settle their international disputes by peaceful means and (ii) States refrain from the use or threat of force. These two interrelated principles are enshrined in

[55] For example, a military aircraft flies over a disputed feature can be classified as either within the freedom of overflight or a hostile act, amounting to threat of force. See ASP Baviera, 'The South China Sea Disputes after the 2002 Declaration: Beyond Confidence-Building' in S Swee-hock and others (eds), *ASEAN-China Relations: Realities and Prospects* (Institute of Southeast Asian Studies, Singapore, 2005), ch 23, 344, 349. At a higher level, the incidents like the EP-3E in 2001 and UNSC Impeccable in 2009 are the inevitable results of different interpretations of such freedom in the EEZ by maritime powers. For a useful summary of the views of China and the United States, see E Franckx, 'American and Chinese Views on Navigational Rights of Warships' (2011) 10 *Chinese JIL* 187. For more extensive discussion, see Raul (Pete) Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' 9 *Chinese JIL* (2010) 9; Haiwen Zhang, 'Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States? Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ' 9 *Chinese JIL* (2010) 31.

both global and regional instruments.[56] The COC should reaffirm these principle as does the COC but also needs to go further with regard to implementation by providing for an appropriate compliance mechanism.

The last but by no means least theme, namely sustainable use, of the SCS, is more relevant to the coastal States. Indeed, if economic interests figure prominently in the calculations of the coastal States in the SCS, it is reasonable that the utilization of the SCS must be sustainable. The absence of well defined boundaries in the SCS are inimical the management of the SCS natural resources and environment. While the territorial disputes in the SCS cannot be settled overnight, it is imperative to understand which part of the SCS is disputed and which is not for proper allocation of management functions.

[56] Charter of the United Nations, Art 2(3)-(4); Treaty of Amity and Cooperation (TAC), Art 2(d)-(e), text available at http://www.aseansec.org/1217.htm. The International Law Commission in drafting the Convention on the Law of Treaties gave the principle of non-use of force as a clear example of the peremptory norm of international law. See [1964] II *Yb ILC*, 247. The ICJ in the Nicaragua case appears to approve this statement. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment, 27 June 1986, [1986] *ICJ Reports* 14, paragraph 190. The Court also declared that unequivocally that 'no threat of force' is part of the principle of non-use of force. See, *ibid*., paragraph 277. See also N Stürchler, *The Threat of Force in International Law* (Cambridge University Press, Cambridge, 2007). Amid the recent tension in the South China Sea, ASEAN and China declared to adhere to these principles in handling their disputes. At the 21st Meeting of the States Parties to the LOS Convention, seven ASEAN countries issued a joint statement calling for peaceful resolution of the disputes in the South China Sea. See Lee-Brago, Piea '6 ASEAN states join call for peaceful resolution' *The Philippine Star*, 19 June 2011, available at http://www.philstar.com/Article.aspx?articleId=697660&publicationSubCategoryId=63. See also 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference, 14 June 2011', available at http://www.fmprc.gov.cn/eng/xwfw/s2510/t831355.htm, for China's statement in the same vein.

The above three common themes should form the common thread running through the future COC, which in turn inform its subject-matter, scope of application and substantive contents.

Subject-matter and guidelines

In a sense, the new COC is not different from the existing DOC: both are confidence building and conflict preventing instruments. Furthermore, given the high stakes involved in any definitive settlement,[57] the future COC, just like the existing DOC, does not aim to solve the sovereignty dispute over islands and the related issue of maritime delimitation. Both the COC and the DOC are concluded without prejudice to the existing positions of the States on their territorial disputes in the SCS.[58]

On the other hand, the COC should depart from the DOC in one important way. While the DOC aims to regulate activities relating to, in one way or the other, the disputed islands, the future COC should go beyond that, having as its subject-matter all activities in the South China Sea which *are not readily regulated* by the LOS Convention. Though the LOS Convention is considered as 'a Constitution for the Oceans'[59] in the sense that it provides a comprehensive framework for all activities at sea,

[57] 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), p. 643, 664.
[58] Cf Articles 74(3)/83(3) of the LOS Convention.
[59] 'A Constitution for the Oceans' Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea (adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montenegro Bay)', reprinted in *The Law of the sea: official text of the United Nations Convention on the Law of the Sea with annexes and index* (United Nations, New York, 1983), xxxxiii.

it is our belief that there are many areas the regulations of which are either ineffective or contestable.[60] Broadening the subject matter of the COC has the rationale that the SCS boasts not only intractable territorial disputes but also economic potentials.

Furthermore, the framers of the future COC should glean lessons from the failure of the present DOC as far as compliance is concerned. To this end, the COC should be as detailed as possible, especially with regard to prohibitive and permissible activities in the disputed areas. There should also be in place a stringent mechanism to ensure compliance and settle dispute relating to the interpretation and application of the COC.

Scope of application

With the above subject matter, it is conceivable that the geographical coverage of the future COC will be the whole SCS. Focusing only on the disputed areas from the SCS runs counter to the idea that the SCS is a semi-enclosed sea and needs to be treated as an integral whole. On the other hand, having the COC applying to the whole South China Sea does not mean it is no longer necessary to define the contested waters relating to the disputed offshore islands and the legitimate and undisputed maritime zones of the States bordering the SCS. On the contrary, such an exercise is necessary because the implementation of rights and obligations of States under the law of the

[60] E.g., IUU fishing, activities in disputed areas and freedom of navigation. The problem of IUU fishing is especially acute due to the absence of well defined maritime zones in the South China Sea. With regard to freedom of navigation, it should be noted that China and the United States have different views as military activities in the EEZ. For discussion, see below.

sea predicates upon the well defined boundaries of their national maritime jurisdictional zones.

Despite the fact that the claimant States have yet to reach a common understanding on the status of the disputed insular features in the South China Sea, it is submitted that the relevant rules of the international law of the sea, including the principles relating to maritime delimitation, already provide a solution as to how the legitimate and undisputed maritime zones of the coastal States can be defined. The aim of maritime delimitation is that of equitable solution with the principle of proportionality being a test for equitableness. Therefore, for the sake of argument, if we accept that the insular features in the South China Sea are classified as islands under Article 121 of the LOS Convention,[61] the length of the combined coasts of these features is much lesser than that of the respective opposite mainland coasts. It follows that the insular features cannot compete with the relevant coasts of the literal States in generating their respective EEZs and continental shelves (CS). There is indeed authority to support the view that the features in the South China Sea have limited effect in comparison with the relevant mainland coasts

[61] Opinions of writers on this point remain divided. For the view that certain features of the Spratlys, including those occupied by the Philippines, meet the requirements to have their own EEZ and CS, 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(2) *ODIL* 169. For contrary view, M Gjetnes, 'The Spratlys: Are They Rocks or Islands?' (2001) 32(2) *ODIL* 191. However, if the claim to disputed insular features in the South China Sea is in fact to acquire further basis for maritime claims, it is politically improbable that *all* the claimant states will limit the potential maritime zones of the disputed islands. See 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, 12-18, stating that the features of the Spratly Islands do not have much intrinsic value in themselves but the potential to generate large maritime zones.

in generating maritime zones.[62] In other words, regardless of whatever status these features in the South China Sea may attain, the coastal States can always extend their EEZs and CS to the maximum extent possible. Whether this maximum extent is 200 nautical miles or less depends on the distance between the insular features and the respective opposite coasts. However, if this principle, which is legally sound in light of the case law of the international courts and tribunals, is accepted, it is not difficult to work out the exact coordinates of the limits of these coastal States' legitimate and undisputed maritime zones.

What will be the status of the maritime space in the centre of the South China Sea beyond the national maritime jurisdictional zones generated by the mainland coasts? This is a legal question relating to the interpretation and application of Article 121 of the LOS Convention which is best answered by an independent judicial body. States concerned may think of having recourse to the dispute settlement mechanism under the LOS Convention to find a legal answer to it.

Pending an authoritative determination of the status of the Paracels and Spratlys and for the purposes of the COC, which is without prejudice to the positions of the parties, it is suggested that this maritime space can be treated as the waters appertaining to the disputed insular features in SCS. In other words, some of these features are treated as islands under Article 121 of the LOS Convention so that there will be no high seas or Area in the SCS. Of course, an agreement by the parties to the COC that

[62] See JV Dyke, 'Disputes Over Islands and Maritime Boundaries in East Asia' in S-Y Hong and JM Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2009), ch 3, 39, 39-75, 73. 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, 666, even claim that the features in the Spratlys generate *not much more than territorial seas*.

there are no high seas in the SCS necessarily impinges upon the rights of third States. But this is perhaps the only solution acceptable to China who already States that these islands can have EEZ and CS of their own. On the other hand, if the freedom of navigation in the SCS is respected, such an agreement should not be impugned.

With regards to the above scope of application, there will arise several critical substantive questions that need to be addressed by the future COC to which we now turn.

Substantive contents: some thoughts

A future COC should go far beyond a mere statement of general principles on conflict prevention. More importantly, it needs to take into account the geopolitical context of the SCS. A set of detailed principles, which is exactly what a code of conduct means in practice, will facilitate implementation. Furthermore, the instrument should also envisage some kind of monitoring or compliance mechanism. In this part, we would like to offer some thoughts on three issues: unilateral activities in the SCS, cooperative activities and compliance procedure.

Permissible and prohibitive activities

That the SCS with abundant natural resources is important to economic development of coastal States makes the idea of a comprehensive moratorium in disputed areas in the SCS incomprehensible.[63] It is the case, given the fact that a solution to the

[63] Cf *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname*, Award, 17 December 2007, available at full text available at http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf, paragraph 470.

SCS disputes is not in the immediate prospect. Furthermore, the idea of an absolute moratorium is also vulnerable to abuse when States may act in bad faith and make extravagant claim to expand the disputed areas.[64] On the other hand, when there exists a real dispute, the prospective interests of claimant States need to be protected. Thus a more comprehensible approach is to make a distinction between what States can do unilaterally in the disputed areas and what State cannot.

While an exhaustive list of prohibited activities is impossible, the mentioning of only a single example in the DOC is regrettable. Worse still, without any further guidance, the definition of complicated activities is therefore left in the eye of the beholder. On the other hand, there are rules, as will be explained immediately below, from which analogy may be drawn to shed light on this issue. Thus, while it is necessary to list, as long as possible, the prohibitive activities in the disputed areas, the future COC should also set out a benchmark against which States may establish whether a particular act complicates the situation or not. As far as the activities in the disputed areas is concerned, the case law of international courts and tribunals are highly instructive and already provide answers to some recent controversies relating to petroleum exploration activities in the SCS. In particular, according to the dictum in the Guyana/Surinam Tribunal,[65] it is permissible to pursue unilaterally those activities, such as seismic tests, which do not cause a permanent physical change to the

[64] See T Nguyen Dang, 'Fisheries Cooperation in the South China Sea and the (ir)relevance of the sovereignty question', (2011) *Asian JIL* (forthcoming).

[65] *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname*, Award, 17 December 2007, available at full text available at http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf.

marine environment.[66] By contrast, activities, which lead to permanent physical change, can only be conducted pursuant to an agreement between the parties.[67] The point here is not to say that the recent incidents relating petroleum exploration vessels contracted by Vietnam and the Philippines occurred in the disputed waters. Rather it emphasizes that there are existing standards of conduct that all claimant States should follow in areas they consider as disputed.

The rationale for the *Guyana/Suriname* Tribunal to make a determination on the permissibility of a particular unilateral petroleum exploration activity is the impact of that activity on the environment, that is, whether the activity in question results in a permanent change to the marine environment or not.[68] Though the dictum was made in the context of petroleum exploration and exploitation activities, it is submitted that the distinction between prohibitive and permissible activities elucidated has wider scope of application. By analogy, such a distinction may be applicable to the question of erection of new structures on uninhabited features and more importantly to the already extensive fishing activities in the SCS. As to the former, a newly erected structure clearly alters physically the feature in question. In this connection, it should be pointed out in passing that from a legal point of view, the occupation of new feature after the dispute crystallize does not help bolster the argument of the parties. As to this latter question, while sustainable fisheries activities are permissible, overexploitation which may lead to depletion should be

[66] *Guyana/Suriname Award* paras 466-7, 481. The Tribunal borrowed this standard in the *Aegean Sea Continental Shelf Case*, Interim Protection, Order, 11 September 1976, [1976] *ICJ Reports* 3.

[67] Guyana/Suriname Award, paras 466-7.

[68] This in turn determines whether 'the other party's rights are affected in a permanent manner. See *Guyana/Suriname Award*, paragraph 470.

prohibited.[69] Of course, what can be considered as overexploitation is a scientific question which requires survey and cooperation between the parties.

The permissible of certain activities in disputed areas *a priori* give rise to the need for a common understanding as to the law enforcement scheme in the disputed waters in particular and the whole SCS in general. This is desirable, given the fact that the body of rules in this field is less clear under international law.[70] The most easily accepted rule perhaps is that the use of force against civilians in disputed areas is generally prohibited. This follows from the principle that force can be used but only in exceptional circumstances in enforcement activities (in non-disputed area).[71] Other rules on law enforcement, e.g. whether it is possible to enforce one disputant's laws and regulations against the other disputant's vessels, is less explicit.[72] Nor is there any dictum of an

[69] See further Nguyen Dang, 'Fisheries cooperation in the South China Sea' *supra* note 64.
[70] This is because law enforcement at sea presupposes the existence of boundaries.
[71] The Guyana/Suriname Arbitral Tribunal, relying on previous cases, opined that "in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary." See *Guyana/Suriname Award*, paragraph 445 (emphasis added), citing S.S. "I'm Alone" (Canada/United States), 3 RIAA 1615 (hereinafter "I'm Alone" case), Red Crusader (Commission of Enquiry, Denmark-United Kingdom), 35 International Law Report 199 (hereinafter Red Crusader case), The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea) ITLOS List of Cases: No 2 (hereinafter SAIGA case). This is arguably a customary rule. See D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009), 277-82. The SAIGA case, also emphasizes that in using force in law enforcement activities "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law" and that these considerations dictate that "all efforts should be made to ensure that life is not endangered." See SAIGA case, paras 155-56, the later paragraph citing "I'm Alone" case and Red Crusader case.
[72] Though one of the authors is of the view that a rule may be derived from the existing jurisdiction principles of international law. See T Nguyen Dang, 'The Elephant in the Room: Law Enforcement in Maritime Disputed Areas, with Special Reference to the EEZ and Continental Shelf', *SSRN Working Paper Series*, 23 April 2011 <http://ssrn.com/abstract=1871071 >.

international court of tribunal in this regard.[73] Given the fact that the disputing States are dispatching more and more patrol vessels to the disputed area, an agreement or arrangement on this matter is highly desirable. In this connection, state practice in concluding provisional arrangements of practical nature to manage maritime disputed areas will provide helpful guidance.[74]

Cooperative activities

While elaborate provisions on prohibitive and permissible activities in the disputed areas can be considered as conflict preventing measures, provisions on cooperative activities can be considered as confidence building ones. In fact, the DOC does envisage in a non-exhaustive manner certain activities which parties should cooperate.[75] Yet, that provision falls prey to the absence of scope of application when the DOC itself provides that '[t]he modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.'[76] It is suggested that the COC should continue to emphasize the need for cooperation as does the DOC. Furthermore, parties to the COC should also take into the

[73] The *Guyana/Suriname* Tribunal however glossed over this issue despite Suriname's statement that it was normal for coastal states to undertake law enforcement activities in disputes areas (usually in relation to fisheries) and also to do so against vessels under foreign flags including the flag of the other party to the dispute, unless specific arrangements exist. See Suriname's Rejoinder, 4.33; *Guyana/Suriname Award*, paragraph 441.
[74] For a review of state practice, see Nguyen Dang, 'The Elephant in the Room' *supra* n 72.
[75] DOC, paragraph 6, which includes: marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operation and combating transnational crime.
[76] DOC, para 6.

special characters of the SCS and their corresponding obligations under the LOS Convention.

As noted above, the biological context of the SCS is that valuable fish stocks in the SCS are highly migratory, which mandates cooperation between coastal States according to Article 63(1) of the LOS Convention when the boundaries are established. In a sense, the existence, *velnon*, of territorial disputes in the SCS is irrelevant.[77] Finally, that the SCS is a semi-enclosed sea means coastal States *should* cooperate with each other in the implementation of their rights and obligations under the LOS Convention as envisaged by Article 123. The said article also points out several activities which call for cooperation, including living resources management, environmental protection, scientific research… States bordering enclosed and semi-enclosed seas are also encouraged to invite 'other interested states or international organizations' to cooperate with them in implementing the article.[78] Though Article 63(1) only provides for an obligation to negotiate, which is weak,[79] and Article 123 is only hortatory in nature,[80] it is submitted that the political and economic considerations of the coastal States should come to the fore, which dictate the field and method of cooperation.

[77] See further Nguyen Dang, 'Fisheries cooperation in the South China Sea' *supra* note 644.
[78] LOS Convention, Article 123(d).
[79] See SN Nandan, S Rosenne and NR Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol II, Martinus Nijhoff, Dordrecht, 1993), 646. See also Nguyen Dang, 'Fisheries cooperation in the South China Sea' *supra* note 644 and literature cited therein.
[80] SN Nandan, S Rosenne and NR Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol III, Martinus Nijhoff, Dordrecht, 1995), 366.

Compliance procedure

The development of a COC for the SCS, regardless of how elaborate it is, will be of little significance unless accompanied by appropriate means for ensuring its compliance. In fact, one of the major flaws of the DOC is the absence of a mechanism tosettle or help parties settle disputes arising from the implementation of that instrument. On the other hand, the character of the SCS, i.e. a region fraught with many territorial disputes and still wanting in maritime boundaries, should be borne in mind. International courts and tribunals more often than not show hesitation in making any findings on a breach of obligation in territorial dispute situations and in ruling on the consequences arising from such a breach.[81] Furthermore, Asian States are notoriously in favour of soft, diplomatic methods, e.g. negotiation, over judicial means to settle their disputes, especially those relating to sensitive issues such as sovereignty and territories.[82] Finally, if the future COC remained a non-binding instrument, there would be, strictly speaking, no international responsibility arising from a breach of its provisions as such.[83]

Against that background, it is suggested that non-confrontational procedures which do not entail binding decisions should be established to

[81] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Merits, Judgement [2002] *ICJ Reports* 303 (where the ICJ refrained from making a finding as to Nigeria's responsibility arising from its occupation of the territory that the Court ruled to belong to Cameroon); and to a lesser extent, *Guyana/Suriname* arbitration (where the Tribunal, though declaring Suriname had violated of its obligation, declined to rule on compensation for damages).
[82] See TTB Koh, 'International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges' (2011) 1(1) *Asian JIL* 1.
[83] Of course, it does not mean that there is no international responsibility if the obligation breached is an obligation under international law.

settle or, more properly, help the parties settle their disputes arising during the implementation of the COC.

In so far as many disputes relating to the future COC involve factual issues, the institution of inquiry appears to be very appropriate a mechanism. Inquiry here is understood as an independent institutional arrangement[84] which does not settle the dispute but helps facilitate bridging a disagreement on issues of fact. Though not a popular method for dispute settlement,[85] it is interesting to note that inquiry has worked effectively in some cases of disputes related to incidents at sea.[86] A recent regional example is the Singapore's land reclamation case[87] which was settled amicably by Malaysia and Singapore upon the recommendations of a group of experts appointed by them to investigate the impact of Singapore's land reclamation activities.[88] The institution of inquiry is in fact not alien to the region. The TAC, to which China is also a party,[89] already envisages the possibility that the High Council constitutes itself into a committee of inquiry upon the agreement of the parties (Article 15).[90]

[84] Inquiry may also mean a process to assist a third-party settlement to resolve a matter of fact. See JG Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press, Cambridge, 2010), 41.
[85] Ibid., 54-57, points out three reasons for the unpopularity of inquiry.
[86] For summary of these cases, see ibid. 42 ff.
[87] *Case concerning Land Reclamation by Singpore in and around the Stratits of Johor (Malaysia v Singapore)*, Award on Agreed Terms, 1 September 2005, available at http://www.pca-cpa.org/upload/files/MASI%20Award.pdf.
[88] Ibid.
[89] China's 2003 Instrument of Accession available at <http://www.aseansec. org/15271. htm>.
[90] In 2001, the High Contracting Parties of the TAC adopted the Rules of Procedure of the High Council, text athttp://www.aseansec.org/3718.htm . This Rule 3 provides for the possibility that China participates in the High Council should a dispute involving it arises.

A logical extension of the inquiry or fact-finding procedure above, which is also a non-confrontational mechanism and worth considering in the context of the SCS, is the so-called non-compliance procedure (NCP) most well known in multilateral environmental treaties.[91] Let's take a closer look at the NCP under the Montreal Protocol[92] which is considered as the most advanced model established so far. Under the Montreal Protocol, any party to the protocol, the protocol secretariat or even the defaulting party itself can invoke the NCP whenever there appears to be problem with regard to compliance. The matter will be then investigated by an Implementation Committee, which will consider all the submissions, information and observations it receives or requests through the Secretariat in order to find an amicable solution of the matter based on the provisions of the Protocol. A report is made by the Implementation Committee to the full Meeting of the Parties, which decides what steps to take in order to bring about full compliance.

Of course, the COC is not an environmental treaty, but in a sense both instruments share the same characteristic, that is, preventative in nature, albeit different in terms of subject matter. For a NCP to work in the context of COC, certainly more studies need to be undertaken but it is fitting that between ASEAN and China there are in place certain institutional arrangements for the NCP to work.[93] Most importantly, the

[91] See generally C Redgwell and MA Fitmaurice, 'Environmental non-compliance procedures and international law' (2000) 31 *NYIL* 35. See also P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press, Oxford, 2009), 245-50.
[92] 'Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987' 1522 *UNTS* 3. The Montreal Protocol is to elaborate and implement the 'Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985' 1513 *UNTS* 293.
[93] E.g. there are annual high-level meetings between ASEAN and China, ASEAN also has a secretariat which can function as a secretariat for the COC.

merit of the NCP is that it is better conceived of as a 'dispute avoidance' or 'alternative dispute settlement', which helps avoid binding third party procedures.[94]Thus, the NCP is applicable not only to treaties, i.e. legally binding instrument, but also to non-binding instrument.[95]

Finally, in addition to the two institutions for the settlement of disputes established within the COC itself, parties to the COC should also consider the possibility of having recourse to existing dispute settlement mechanisms which have competence to deal with law of the sea issues. It should be noted that the International Tribunal for the Law of the Sea actually has greater potential than it is normally believed. In addition to its traditional function of settling international disputes, the Tribunal also plays a very useful role of giving advisory opinion on a legal question raised by, *inter alia*, states in the implementation of their rights and obligations under the Convention. This is an innovative function which was not expressly provided for in the LOS Convention but developed during the drafting of the Rules of the Tribunal.[96] Rule 138(1) of the adopted Rules of the Tribunal provides that '[t]he Tribunal may give advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'. Of course, an advisory opinion is not binding. But it is perhaps the non-binding character of such an opinion, which is after all rendered by the foremost law of the sea experts, that has the greatest merit in the context of Asian territorial disputes.

[94] See C Redgwell and MA Fitmaurice, 'Environmental non-compliance procedures and international law' (2000) 31 *NYIL* 35.
[95] See generally D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International System* (Oxford University Press, Oxford, 2000).
[96] See P Chandrasekhara Rao and P Gautier, *The rules of the International Tribunal for the Law of the Sea: a commentary* (Martinus Nijhoff Publisher, Leiden, 2006), 393-94.

By way of conclusion: some further thoughts on the way forward

One of the proposed themes of the future COC is freedom of navigation and this is an issue of concern to not only States bordering the SCS but also all other SCS users outside the region. In fact, it is generally agreed that the SCS issue is an international one, not least because of this issue. Thus, it is necessary to take into account the views of all major users of the SCS when ASEAN and China deliberate this concept in their future COC negotiations. It is even ideal for other major users of the SCS to be involved in elucidating this very concept. If ASEAN and China agree to a freedom of navigation concept which is different from that held by third States, the COC will be of little avail in preventing conflicts arising from the real different perceptions of this very concept among the major SCS users. Furthermore, ASEAN and China may also need to think of the possibility that the COC can be opened to other SCS users to participate in. The basic rule in the implementation of treaty law is the *pactatertiis* rule according to which a treaty can only be binding upon its states parties.[97]

We also believe that the role of Taiwan should be addressed in any future arrangement relating the SCS. Though legally, Taiwan is not recognized as a State, it is a matter of fact that Taiwan also borders the SCS and is situated in close proximity to major SLCs through the SCS. Most importantly, Taiwan is occupying the largest feature in the centre of the Spratly Islands and hence is arguably an indispensible partner in any cooperative arrangement relating to the SCS. While it is not absolutely necessary that Taiwan participates directly in the negotiations of the

[97] 'Convention on the Law of Treaties, Vienna, 23 May 1969' 1155 *UNTS* 331, Article 34.

COC, an appropriate mechanism that allows Taiwan to implement the future COC would be commendable. To this end, lessons may be gleaned from Taiwan's membership in regional fisheries organizations as well as the WTO.[98]

Finally, as a follow-up to the DOC, the COC should be best negotiated by ASEAN and China.[99] It is however not difficult to predict that China might not be enthusiastic about concluding another SCS instrument, let alone a new COC with more stringent provisions than the DOC.[100] Thus, the prospect for ASEAN and China to sign the COC is bleak.[101] It is suggested that ASEAN be receptive to the idea of signing a COC among themselves.[102] Such a COC is, of course, open for accession

[98] For a full account of Taiwan's participation in regional fisheries organizations and the WTO, see A Serdy, "Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity" (2005) 75 *BYIL* 183.
[99] See DOC, paragraph 10.
[100] It is recalled that China was lukewarm about the previous COC/DOC negotiations and has held an intransigent view on Rule 2 of the Guidelines for the Implementation of the DOC.
[101] T Cook, 'Rising Tensions in the South China Sea: An Interview with Ian Storey', 17 June 2011 (The National Bureau of Asian Research) <http://www.nbr.org/research/activity.aspx?id=151> (accessed 19 June 2011), Ian Storey commented that the chance that ASEAN and China could agree on a binding COC was little to zero.
[102] The present authors first floated this idea in a paper written in Vietnamese early this year. See HT Nguyen and T Nguyen Dang, 'Một số suy nghĩa về Bộ Quy tắc ứng xử ở Biển Đông (Some thoughts on the Code of Conduct in the South China Sea)' presented at *Second National Workshop on the South China Sea: Disputes in the South China Sea: History, Geopolitics and International Law*, Hanoi, 26 April 2011, (in Vietnamese). It is an interesting coincidence that Professor Thayer expressed the same view recently. CA Thayer, 'Recent Developments in the South China Sea' presented at *Maritime Security in the South China Sea*, Washington, D.C., 20-21 June 2011, audio link at <http://csis.org/multimedia/audio-maritime-security-south-china-sea-afternoon-panel> (accessed 23 June 2011) and CA Thayer, 'Security Cooperation in the South China Sea: An Assessment of Recent Trends', paper presented at the First Manila Conference "The South China Sea: Toward a Region of Peace, Cooperation and Progress", Makati City, 5-6 July 2011, co-organized by the Foreign Service Institute (The Philippine Foreign Affairs Department), Diplomatic Academy of Vietnam and the National Defense College of the Philippines (on file with authors).

by other States, including, first and foremost, China. While this idea has been considered elsewhere as a most provocative one,[103] there are both practical reasons and legal grounds for such a course of action. It is recalled that ASEAN was established to pursue dual aims, that is, economic collaboration and regional peace and stability in the face of lingering disputes among some of its original members.[104] ASEAN is formed not to be against anyone but to align the national interests of individual members with regional interests.[105] A DOC which maintains the sustainable use of the SCS in the interests of eight out of ten ASEAN countries who are littoral States can be considered as within the broader aims of ASEAN. Furthermore, the substantive principles envisaged in the COC are to constrain activities of the parties rather than bestowing upon them more extensive rights. Most importantly, the normative framework for the conclusion of the COC is the LOS Convention, to which all claimant States in the SCS territorial disputes are parties. It is hoped that ASEAN member countries will, by their actions, demonstrate the merits of a new COC such that China will reconsider its position and accede. In this connection, China's accession to the TAC may be a precedent.

In any event, even if ASEAN member countries have yet to accept the idea that a COC can be signed among themselves, they should be ready to take the necessary preparatory steps and to start thinking about a draft of their future COC - a process similar to what they did with regard to the now defunct DOC. And in that process, international lawyers hopefully may play a useful role./.

[103] Ibid.
[104] For a brief history of ASEAN, see 'The Founding of ASEAN' <http://www.aseansec.org/20024.htm> (accessed 23 June 2011.
[105] See ibid.