Introduction
On 7 May 2009 the Permanent Mission of the People’s of Republic of China to the United Nations submitted notes verbale to claim the islands in the South China Sea (SCS) and their adjacent waters. It stated the following:

*China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. The above position is consistently held by the Chinese Government, and is widely known by the international community.*

In response to this, Indonesia submitted a Note Verbale 104 to the UN Secretary-General on 8 July 2010 in which emphasised Indonesia is non-claimant state to the sovereignty dispute in the SCS and whether Chinese claim was consistent with United Nations Convention on the Law of the Sea (UNCLOS). Furthermore Indonesia’s position on the SCS dispute is unchanged.

The South China Sea dispute is just like a thorn in the side of ASEAN – China relations. Therefore, the task of managing and crafting a peaceful settlement has to be exercised carefully and wisely to ensuring that the dispute does not escalate into armed conflict in order to maintain

peace and security in the region. The paper will foresee how the situation in the SCS could develop in the coming decade in the areas of legal jurisdiction, political negotiations and the prospects for joint resource exploitation. Initially the paper will highlight the strategic importance of the SCS' geographic position. Then, it will describe evolution of the dispute and finally, it will conclude with assessment of three possible pathways to dispute settlement.

**Geo-Strategic Importance Of The South China Sea**

There are three significant evidences that the SCS poses geo-strategic important which are cantilever of global economics, security necessity and arena of major powers' geo-politics. First, it has not proven through exploration, yet some believed that the SCS is estimated to possess a large quantity of oil and gas reserves. Besides, the water around the SCS has a very high shipping density compared to other areas and it is host to a series of Sea Line of Communications (SLOCs) of regional and global significance. Meanwhile, the tonnage of oil shipped through the Malacca Strait en route to East Asia through the SCS is about 35 percent of world consumption. Tanker traffic through the Malacca Strait leading into the SCS is more than three times greater than Suez Canal traffic and fifteen times the amount than transits the Panama Canal.

Second, the SCS has played important role for some littoral states. Historically during colonial era, World War II and the Cold War, some ASEAN states such as Vietnam, Malaysia, Indonesia and Brunei faced direct military threats which came from the seas. Hence, capability to master and command the SCS area is still security necessity for these states. Third, the SCS is realm of rivalry between China and the U.S. Growing tension between U.S's allies in the region such as Japan and South Korea with China is creating U.S's concern to increase military present in the region in particular in the SCS. Furthermore, the SCS dispute has also dragged U.S into indirect rivalry with China that resulted from the disruption of its interest in the SCS in particular in holding FON (Freedom of Navigation) policy.

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Dispute Evolution

Though the first China made claim to the SCS was in 1951 in response to the signing San Francisco Treaty\textsuperscript{12}, in 1947 the Nationalist government of the Republic of China (Kuomintang) published an Eleven-Dash Line Map which subsequently became the basis of the nine-dash-line claim after China removed two dashes as concession to (North) Vietnam in 1953\textsuperscript{13}. Nine-dash-line, China's claim to more than 60 percent of the SCS area\textsuperscript{14}, occupation of several islands and reclamation activities on several reefs and rocks, including building airstrips and adding military fortifications in the SCS, will generate a significantly changed environment within the SCS, the legality of which is still controversial as the changes will generate new territorial waters and EEZs. It is expected that man-made islands will not be recognised by the majority of the international community because of their legal ambiguity. Meanwhile, China solidified its claim (Nine-dash-line) as an historical claim when it released the Chinese Government's Position Paper on a Matter of Jurisdiction in the South China Sea Arbitration initiated by the Philippines, stating as follow:

\textit{Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them.}\textsuperscript{15}

That China's claim based on historical discovery could be true that China discovered and named some features within the SCS, but simple discovery without effective governance extending over long period of time was immaterial as a matter of law as shown on the precedent of Palmas Island dispute between U.S and the Netherlands, in which U.S as the discoverer of Palmas Island was lost in the arbitration to the Netherlands as the administrator of the island. Similarly, China fails to assert lawful claim in the SCS.\textsuperscript{16}

Furthermore, other important events in the SCS from 1955 to March 2015 as follow;\textsuperscript{17} after the establishment of People's Republic of China

\begin{itemize}
  \item \textsuperscript{12} Jian Zhang, ‘China’s Growing Assertiveness In The South China Sea: A Strategic Shift?’, in Leszek Buszynski and Christopher Roberts (Eds.), \textit{The South China Sea And Australia’s Regional Security Environment}, National Security College Occasional Paper No. 5 September 2013, p. 19. (pp. 18-24)
\end{itemize}
(PRC) on 1 October 1949, in 1956 Taiwan trailed the effort of the government of Republic of China by claiming Taiping (Itu Aba) Island in the Spratly and garrisoning permanent troops on the island. In 1970, the Philippines claimed the western portion of the Spratly islands group by occupying five features of the Spratly. This was quickly followed by South Vietnam occupying six features in the Spratly and officially claiming the Spratly Islands as a Vietnamese province in 1974. Meanwhile, in that year, China took control of the crescent group of the Paracel Islands from Vietnam. Then, in 1983 Malaysia occupied three features in the Spratly Islands and in 1986 claimed two additional features. Furthermore, in 1988, China took control Fiery Cross Reef.

In addition, China became involved in a territorial claim with the Philippines when China occupied the Philippines-claimed Mischief Reef and built several structures on it in 1994. China and the Philippines also competed for the Scarborough Shoal by placing flags and erecting markers in 1997. In 2012 China virtually annexed Scarborough Shoal by deploying maritime law enforcement vessels there on a permanent basis. Then, in May 2014 the deployment of Chinese oil rig Haiyang Shiyou 981 (HYSY-981) into Vietnam's claimed EEZ resulted in incidents and triggerd major crisis in Sino-Vietnam relations and raised tensions in the SCS the highest level since the end of the Cold War.

While overlapping claim territories are continuing, reclamation projects are also taking place within the SCS. Some countries including, Taiwan, Vietnam and Malaysia have also expanded their territory by land reclamation, but not on the reef – China is the only country that has changed reef to become an artificial island in the SCS. Such man-made constructions do not fall under the legal framework in regard to Article 60 of UNCLOS. Therefore, China's projects to create artificial islands will generate complicated legal issues under international law or UNCLOS that are unlikely to be settled for years to come. Consequently, the SCS waters is being classified as high-risk waters resulting in increased insurance premiums for shipping and the current world order being challenged as a result of the disregard of international law.

ASEAN took its first effort to create positive atmosphere for eventual pacific settlement by adopting 1992 ASEAN Declaration on the SCS, which urged all parties to exercise self restraint. Whilst, to facilitate formulating dispute resolution in the SCS in particular between ASEAN disputant states with China, Indonesia as neutral party on the dispute initiated an informal diplomacy by organising workshops. From 1990 to 2009 Indonesia has organised

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nineteen workshops involving the Chinese under the auspices of the Policy Planning and Development Agency within the Indonesian Department of Foreign Affairs on managing potential conflict in the SCS. But, the only existing conflict management mechanism for the SCS dispute is the Declaration on the Conduct of Parties in the South China Sea (DOC).

In addition, the 1992 Declaration on the South China Sea was not a legal binding rather an example of ASEAN’s internal diplomacy. ASEAN states and several disputes were solved by bilateral agreement or through a third party. For example, the conflict settlement between Indonesia and Malaysia in 2002 regarding Sipadan Island and Ligitan Reef, and the conflict settlement between Malaysia and Singapore in 2008 over Pedra Brance/Pulau Batu Puteh, Middle Rocks and South Ledge were settled by utilising a third party such as the International Court of Justice (ICJ). Meanwhile, the Agreement of 1997 between Thailand and Vietnam on delimitation of their continental shelf and EEZ boundaries in the Gulf of Thailand; the 2003 Agreement between Indonesia and Vietnam on delimitation of their continental shelf boundaries in an area to the north of the Natuna Islands; and the 2014 Agreement on the EEZ Boundary in the Mindanao Sea and Celebes Sea between Indonesia and the Philippines are several examples of bilateral negotiation to solve dispute among ASEAN’s states within the SCS area.

The DOC was stillborn that because it has not been implemented at all although guidelines to implement the DOC that has been agreed and adopted since July 2011. Development on the ground such as land reclamation by disputant states within the area of dispute reflected such failure in particular point five of DOC. Besides, the point ten of DOC states that the parties agreed to adopt COC (Code of Conduct in the SCS) to promote peace and security in the region, unfortunately thirteen years on the disputant countries have not been successful to actualise it. China is not interested in creating the COC in which China stated it would discuss the COC with ASEAN at an “appropriate timing” or when “appropriate conditions” were met.

29. Thayer, 'ASEAN's Code of Conduct In The South China Sea: A Litmus Test For Community Building?'
30. Ibid.
What Does The Future Hold?

Pessimistically, it seems that several claimants involved in the SCS dispute are coming to the conclusion no negotiated settlement is possible to achieve dispute resolutions. As the Philippines government indicated in its Notification and Statement of Claim submitted to the Arbitration against the Chinese government: 'over the past seventeen years of such exchanges of views, all possibilities of a negotiated settlement have been explored and exhausted.' Notwithstanding the gloomy prospects for a possible settlement, ASEAN should encourage to continue making any effort to settle the dispute which mitigates escalation and prevents armed conflict in the region. The failure of such efforts will adversely affect peace and security in the region significantly. In analysing how this situation may evolve over the coming decade, it is possible to identify the following three different options that might be pursued by the involved parties as they seek a peaceful settlement of the issue. These are based on: legal avenues, diplomatic or political negotiations and joint development.

Predicting how this issue will play out in the legal field is difficult, particularly as China has ruled out using legal arbitration as the basis for dispute settlement. Obviously, the territorial disputes between China and other disputants in the SCS might still possibly be resolved by adopting UNCLOS as a legal framework since the dispute has its origins in the ownership of islands or reefs or other insular features, and it is UNCLOS that has the international authority to adjudicate on the rules governing a coastal state's entitlement to maritime zones.

China's nine-dash-line claim is a vague claim, not only because it contains no notations and coordinates, but also because no legal arrangement for this kind of claim (claiming an area of water, including all the islands inside it), is recognised. However, China has rejected UNCLOS as a legal basis in resolving the dispute and does not believe in arbitration as stated on its position paper, since China bases its claim on historical right. It will be a set-back for international law if UNCLOS is not used to rule on the SCS dispute because UNCLOS had a long journey in its formulation and is now the internationally recognised authority for resolving disputes over territorial claims. For that reason, it is believed that, regardless of China's objections, it is likely that within the next decade, UNCLOS will make a definitive ruling on a SCS case.

Since all ASEAN states are parties to UNCLOS, it is also likely that ASEAN will continue to promote UNCLOS as the legal framework for assessing maritime claims or disputes as stated on ASEAN Charter Chapter I Article 2 Principle 2. (j). In addition, the majority of parties to UNCLOS in the region such as Japan, South Korea and Australia also support UNCLOS as legal framework in resolving dispute in the SCS. Hence, within the next decade, it is likely that UNCLOS will be accepted as a legal framework to solve dispute in the SCS. The Philippines has shown this prediction.

Having exhausted negotiations with China, on 22 January 2013, the Philippines served China with a Notification and Statement of Claim with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea. Since neither the Philippines nor China expressed any preferred third-party dispute settlement mechanism in their ratification, both are deemed to have selected arbitration under UNCLOS Annex VII as the means to settle the dispute. On 27 August 2013 the Order designating the Permanent Court of Arbitration (PCA) to act as registry of proceedings and adopted the Tribunal’s Rules of Procedure. Thus, the Tribunal process has been initiated.

However, according to PCA Press Release No. 1 on 19 February 2013, China presented the Philippines with a diplomatic note in which it described the Position of China on the South China Sea issues, rejected and returned the Philippines' Notification.34 Following the PCA's Procedural Order, the Philippines filed a supplemental submission on 15 March 2015. According to PCS Press Release No. 4, China still takes the position that the arbitral tribunal lacks jurisdiction to consider the Philippines submissions. Three years on after six hearings (at the time of writing), the case is still far from the conclusion.35 Meanwhile the Philippines expects a ruling by early 2016,36 China has made it very clear that it will not change its position on the SCS due to the Philippines's case, regardless of what the tribunal decides.37 In the case of China’s absence from the tribunal, under UNCLOS Annex VII Article 9 – Default of Appearance, the proceedings will not be deferred. Hence, whenever a decision is made by the tribunal it can be interpreted that the award is lawful. Since China has announced that it will not actively participate in the arbitration, the tribunal is not easy to make any judgment.

As ASEAN has a divided view on the SCS issue, other disputants from ASEAN may decide to take the same actions as the Philippines in coming years, particularly if the Tribunal is successful. This would be beneficial to all parties as a Tribunal ruling (or any other legally recognised form of dispute resolution decision), would provide clarity to the case and, ideally, a satisfactory resolution for all parties. While ever the dispute negotiation process is prolonged though, the situation benefits China and gives it time to finish its 'Great Sand Wall', forever changing the facts on the ground.

Furthermore, claimants may face complications pursuing a legal means of resolution in coming years. One is that China is

strongly opposed to this route and may ignore any decisions that do not go in its favour. This will result in even more serious incidents than have occurred in the past. Another problem is all ASEAN states have a heavy economic dependency on China. Any legal action may affect their diplomatic relations with China bilaterally, while if ASEAN takes up the case, ASEAN member-states do not have a unity view on China. If disputants do take the same route as the Philippines, then the Tribunal will eventually make a ruling based upon the merits or otherwise of the complainant’s case. This will be a long legal process however, and in the interim, it is expected that China will continue all efforts to cement its claim in the SCS so that it achieves a dominant position to be able to militarily respond to any perceived threats to its sovereignty or territorial integrity by the end of the next decade.

Second possibility way of pursuing a settlement is through political negotiation, but this route too is likely to have many problems in the coming decade. No ASEAN states possess the 'soft power' strengths such as political or diplomatic power to negotiate forcefully with China, and none can match its 'hard power' especially in economic and military strength. Historically, the only Southeast Asian state that had a similar political system to China was Vietnam. Notwithstanding its adoption of the communist system, Vietnam is not a true ally of China in regard to the SCS issue as evidenced during the deadly anti-Chinese riot in May 2014, which was triggered by China's deployment of an offshore drilling rig in Vietnam's EEZ. In fact, it was that the trigger for Vietnam to request the US to give assistance in dealing with China, while some argued that it is unlikely for them to join forces against China. So, reaching a political settlement with China using diplomatic efforts is unlikely to be successful for ASEAN claimant-states in the coming decade, yet ASEAN will pursue this pathway as mandated on ASEAN Charter, Chapter VII Decision Making, Article 20 Consultation and Consensus.

ASEAN has long been aware that China is reluctant to discuss the SCS issue multilaterally, and even when is does, there is a lack of consistency and commitment in any political negotiations. The creation and signing of the DOC and internal meetings between ASEAN and China to discuss implementation of DOC and discussing the COC have not resulted in any concrete advancement on the issue. It seems that China has adopted a 'hedging strategy', and it is anticipated that this lack of a full commitment will continue over coming years until such time as China is confident is has secured its national interests in the SCS. Therefore, the prospective outcome of any future political negotiation

remains the same as in the past – more marking time. However, the stalling of political negotiations will have serious disadvantages for ASEAN, while political negotiations continue to end up in obscuration, China will continue its reclamation project in the SCS and finalise the setting up of military garrisons in the region.

In regard to the prospects for creating guidelines for implementation of the DOC and pushing China to agree to participate in COC negotiations, it is highly unlikely that any progress will be made quickly in coming years. China will remain suspicious that the COC is designed to prevent China conducting its activities in the SCS and that it is not an ASEAN formulation – China is aware of the US interest in the SCS, and of other disputants such as Vietnam and the Philippines seeking the US's support. As a result, China does not want an ASEAN draft to be the basis of negotiations, so it will continue to shy away from participating fully in future meetings on these issues.

Regarding land reclamation in the SCS, ASEAN strongly opposes Chinese reclamation works currently being undertaken and rebuked China that its activities have eroded trust and confidence and undermined peace, security and stability in the region as outlined on the chairman’s statement of the 26 ASEAN Summit. Predictably, China was offended by ASEAN’s strongest wording on the issue since 2012. A Chinese Foreign Ministry spokesman argued that ASEAN claimants, Vietnam, Malaysia and the Philippines have done the same thing in the SCS and China assumed that it is exercising its right within its sovereignty. But China has chosen to not understand the context of ASEAN’s concern which is Chinese intentions to build military garrisons in the disputed area. With no prospect of any claimant being in a position to forcefully prevent China from undertaking its reclamation works, it is expected that China will continue to construct artificial islands and build dual-purpose (civil and military) structures on the islands until such time as its interests in the SCS are secure.

Final pathway to analyse is the prospects for joint development of SCS resources. This could be undertaken even while international arbitration action is proceeding because it is consistent with Article 74 (3) of UNCLOS that allows such activity during transition periods before agreement is reached. The arrangement for joint development normally defines the limits of disputed area and includes a means to share the resources in a way that is independent of the relative strengths of the claims. There are some prospects that in the next decade, in the absence of a sovereignty dispute (as distinct from a territorial claim) over islands, joint development ventures could be considered by claimants, but it will not be possible in areas which are subject to sovereignty and nationalism issues by the countries concerned.

Joint development may be possible in areas which are subject to competing claims for the first time, but which have not been claimed or occupied previously and therefore have no specific historical attachment to the claimant countries. However, for the disputed islands or territories that historically have been part of a single country’s sovereign territory (such as in the Indonesian EEZ area of the Natuna islands that is overlapped by China’s nine-dash-line claim in the southern part), joint development remains a controversial issue and is most unlikely to proceed in the next 10 years. However, any joint development initiatives that are agreed will create benefits not only in promoting peace, security and stability to the region but also by providing economic prosperity to the countries concerned. As Keyuan argues, once a form of joint development has been reached amongst disputants, long-term peace and security in the SCS can be definitely guaranteed. 

Conclusion

Long-standing disputes entailing overlapping territorial and sovereignty claims in the SCS region have persistently defied resolution and are now adversely impacting upon the security and stability to the Indo-Pacific region. Recent concern centres on current developments on the ground especially reclamation issue has also significantly escalated tensions in the region. Meanwhile, progress in resolving the dispute at the political level of negotiations has shown no significant development; indeed there are even signs indicating a decreasing effort by China evidenced by the lack of implementation of agreed points of the DOC, the absence of guidance implementation and stagnancy of the continuation discussions on the COC agreement.

In assessing how the SCS issue is likely to evolve over the coming decade, this paper considered how the dispute might develop within three specific areas. In regards to legal action, it seems remains a controversial issue and is most unlikely to proceed in the next 10 years. However, any joint development initiatives that are agreed will create benefits not only in promoting peace, security and stability to the region but also by providing economic prosperity to the countries concerned. As Keyuan argues, once a form of joint development has been reached amongst disputants, long-term peace and security in the SCS can be definitely guaranteed. 

Conclusion


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