

**PEACEFUL SETTLEMENT OF DISPUTES IN  
THE SOUTH CHINA SEA  
THROUGH FISHERIES RESOURCES**

Metadata, citation and

Law

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## ABSTRACT

The South China Sea dispute is complicated in terms of its nature, the sovereignty issues of the islands, delimitation issues, resources utilization as well as other matters concerning security (both traditional and non-traditional). In order to solve the dispute, cooperation is one of the main considerations. However, the practice has not been realized.

In order to solve the dispute and promote cooperation in the South China Sea region, the author suggests that conserving and managing fishery resources could be established as a starting point. There are a great number of management means, institutions, and international instruments (such as conventions, treaties and arrangements), which have been developed to protect fish stocks. Nonetheless, these policies should be practiced in an integrated mechanism at the national, regional, and international levels, so that the policy objectives could be accomplished.

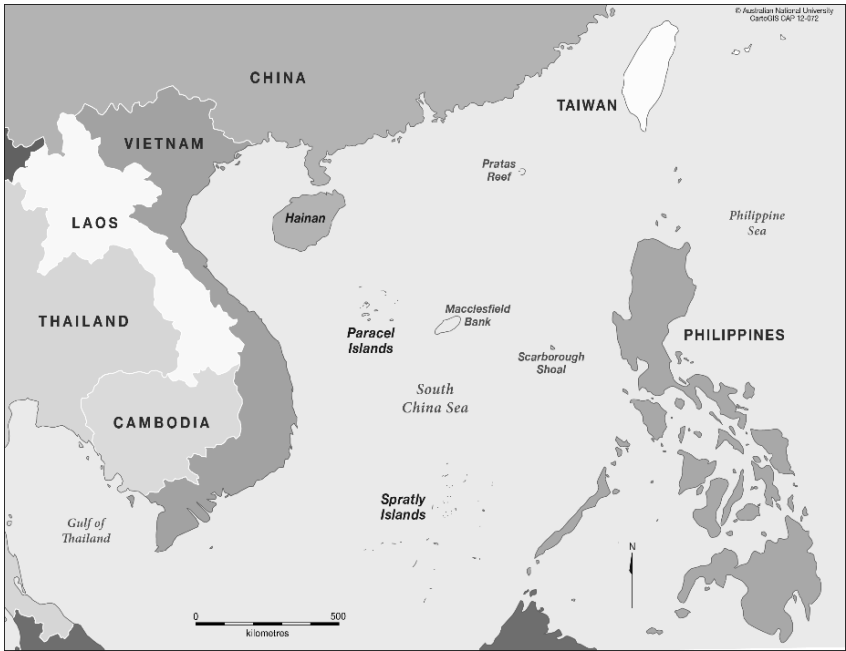
The South China Sea, the East China Sea, and Yellow Sea comprise a large marine ecosystem (LME) in East Asia. In other words, any change of the marine ecosystem could create a serious impact on other maritime areas. This paper suggests that a regional fisheries management organization is needed in order to conserve and manage the fishery resources in the South China Sea, which could also influence other maritime areas. Furthermore, it is also the purpose of this paper that such a model could contribute the solution to the dispute in the South China Sea.

## I. INTRODUCTION

The South China Sea carries more than half of the world's annual merchant fleet and lots of tonnage passes through the Straits of Malacca, Sunda, and Lombok, with the majority continuing on into the South China Sea. Tanker traffic through the Strait of Malacca leading into the South China Sea is more than three times greater than Suez Canal traffic, and well over five times more than the Panama Canal.<sup>1</sup> Unfortunately, the South China Sea is also the world's most contested maritime area, and the interested parties include not just the claimant states, but also the region's major trading nations (Australia, Indonesia, Japan, and South Korea) and the United States.

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1. GlobalSecurity.org, "South China Sea Oil Shipping Lanes," <http://www.globalsecurity.org/military/world/war/spratly-ship.htm>.



**Map 1: the South China Sea<sup>2</sup>**

Because of this, some of the islands and straits have considerable strategic importance. Exercise of sovereign control over some of these islands presents the opportunity for gaining a central and commanding position in the region. For this reason, the Pratas Reef, the Paracel Islands, and the Spratly Islands are the most important island groups in the South China Sea. The straits that separate these islands are important not only because restrictions upon passage would seriously disrupt international commerce, but also because controlling them permits a country to have influence over a much larger area on either side of the strait.

Apart from the transportation routes, marine resources are also the targets for those littoral states. Hydrocarbons are the most important and attractive non-living resources in the South China Sea.<sup>3</sup> Many littoral states have occupied islands in the area in order to claim sovereign rights for possible exploration of oil and gas, as well as gaining more negotia-

2. <http://asiapacific.anu.edu.au/mapsonline/base-maps/south-china-sea>

3. According to the U.S. Energy Information Administration, it is estimated that there are approximately 11 billion barrels (bbl) of oil reserves and 190 trillion cubic feet (tcf) of natural gas reserves in the South China Sea. Please refer to U.S. Energy Information Administration, "South China Sea," *U.S. Energy Information Administration*, February 7, 2013, [http://www.eia.gov/countries/analysisbriefs/South\\_China\\_Sea/south\\_china\\_sea.pdf](http://www.eia.gov/countries/analysisbriefs/South_China_Sea/south_china_sea.pdf).

tion power in the future. Competition for these resources could conceivably trigger serious conflicts.

On the other hand, so far as the living resources are concerned, the South China Sea is one of the most important and abundant commercial fisheries in the world. Shared stocks such as scad and mackerel, and highly migratory species such as tuna and tuna-like fish, are the most common commercial stocks in this region.<sup>4</sup>

The disputes in the South China Sea could be categorized into two parts: one is on the sovereignty of those island features, and the other is the maritime zones that could be claimed. It is understandable that the best way to solve the disputes might be delimiting boundaries so that the areas of sovereignty and jurisdiction could be clearly decided. However, such a situation is not always possible. It is mainly because negotiation and adoption of a maritime boundary between the related States is always focused on political considerations, and there are no well-established laws for making such boundaries. Although it is recognized that an “equitable solution” is one of the most important principles in making a boundary. However, there are no definite elements which have been decided. The geographical and geological factors, the coastal length, the traditional fishing activities, the relative impact on the livelihood, and the economic dependency are the considerations recognized in different cases.

Under such circumstances, the joint development then could be treated as a way to solve the disputes. According to Article 74(3) and Article 83(3) of the 1982 the United Nations Convention on the Law of the Sea (UNCLOS),<sup>5</sup> both contain the term “provisional arrangements,” which can be applied to a situation before the boundary lines are formally made. The term “provisional arrangement” could be interpreted to mean “joint cooperation,” which is a popular term that has been quoted and cited by the leaders of the parties in the South China Sea. However,

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4. “The average per capita consumption of fish in East and Southeast Asia during the period 2000-2003 was 26.1 kg/year. This is much higher than the world average of 16.3 kg/year. False . . . This reflects the importance of fish in food security, as well as the general preference for fish as a source of protein in the region.” Please refer to Pakjuta Khemakorn, “Sustainable Management of Pelagic Fisheries in the South China Sea Region,” United Nations, November 2006, [http://www.un.org/depts/los/nippon/uniff\\_programme\\_home/fellows\\_pages/fellows\\_papers/khemakorn\\_0607\\_thailand.pdf](http://www.un.org/depts/los/nippon/uniff_programme_home/fellows_pages/fellows_papers/khemakorn_0607_thailand.pdf).

5. UNCLOS Article 74(3) provides “Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into *provisional arrangements* of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” [italics added]

no practical exercises are realized. Lack of political will might be the reason.

It is not difficult to locate opportunities for joint cooperation in the South China Sea region. Joint military exercises, joint development on hydrocarbon resources, marine scientific research, marine environmental protection and fisheries cooperation are options to this end. To date, however, disputes surrounding possible hydrocarbon resources in the area and actions in favour of conservation and management of fishery resources have been delayed. Nevertheless, conservation and management of fishery resources could be the starting point for cooperation in this region and could have a “spillover effect” into other areas of cooperation.

In this respect, cooperating to manage and conserve fisheries resources is especially significant because fish are migratory, and even some of them are highly migratory. Moreover, overfishing is a serious and pressing problem in the region. In this regard, a maritime boundary cannot entirely protect a state’s fishery resources from encroachment because fishery resources can migrate beyond the state’s jurisdiction, and overfishing beyond its borders could also have great impact on the fish stocks within its territorial boundaries.

Therefore, a proper management mechanism, subject to natural conditions, is necessary for the coastal states to keep stocks at sustainable levels. This is especially important for the littoral states around the South China Sea. Because this region is a semi-enclosed sea,<sup>6</sup> any change in the fishery policy-making could have far-reaching effects on the fishery resources in this area.

## II. CONTESTING CLAIMS

The South China Sea, with an area of more than one million nautical square miles, is not only the largest maritime area in the Southeast Asian region, but is also the 26<sup>th</sup> largest basin in the world. In terms of its geographic setting, the South China Sea is also a “semi-enclosed sea” bounded on the east by the Philippine Deep and the Pacific Ocean, on the west by the Sunda Shelf and the Indian Ocean, on the south by the Indonesian archipelago, and on the north by the Taiwan Strait. The littoral states surrounding the South China Sea, in clockwise order, are Taiwan,

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6. UNCLOS Article 122 provides that “[E]nclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

the Philippines, Malaysia, Brunei, Indonesia, Singapore, Thailand, Cambodia, Vietnam, and the PRC. However, six of them are the claimants who have overlapping maritime claims, including claims of sovereignty over certain land features and overlapping maritime area. They are Taiwan, the Philippines, Malaysia, Brunei, Vietnam, and the PRC.

### A. China

In their basic legal arguments, the two Chinese governments, i.e. the Republic of China (ROC) and the People's Republic of China (PRC), have similar ground towards the islands in South China Sea, because they draw on the same historic evidence:<sup>7</sup>

1. More than 2,000 years ago, Chinese people were already sailing on the South China Sea, as recorded in ancient Chinese literature. By the time of the Western and Eastern Han dynasties (206 B.C.-220 A.D.), the South China Sea had become an important navigation route for the Chinese people.<sup>8</sup>
2. In order to commemorate the reigns of the two Ming Emperors, Cheng-tsu (1403-1424 A.D.) and Hsuan-tsung (1426-1435 A.D.), Yung-lo and Hsuan-teh were attached to the Paracels' two sub-groups of islands, Amphitrite and Crescent.<sup>9</sup>
3. In 1877, China's first ambassador to Britain, KUO Sung-tao, made an official statement to express the Paracel Islands 'belong to China.'<sup>10</sup>
4. In 1883, Germany carried out surveys on the Paracel and Spratly Islands, but these surveys ceased after the Ching government protested.<sup>11</sup>
5. According to the 1887 Sino-French 'Convention Respecting the Delimitation of the Frontier between China and Tonkin,' France

7. Steven K. T. YU, "Who Owns the Paracels and Spratlys? – An Evaluation of the Nature and Legal Basis of the Conflicting Territorial Claims", *Chinese Yearbook of International Law and Affairs*, Vol. 9 (1989), pp. 5-6; *Beijing Review* (12 December 1975), quoted from Choon-ho Park, *East Asia and the Law of the Sea*, Seoul: Seoul National University Press, 1983, p. 212. For the history of Chinese people in the South China Sea, see John K. T. CHAO, "South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands," *Chinese Yearbook of International Law and Affairs*, Vol. 9 (1989), pp. 73-77; Marwyn S. Samuels, *Contest for the South China Sea*, Methuen: New York and London, 1982, pp. 9-50.

8. Park, *East Asia and the Law of the Sea*, *ibid*.

9. Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels-Spratlys-Pratas-Macclesfield Bank*, Wiesbaden: O. Harrasowitz, 1976, p. 23.

10. Samuels, *Contest for the South China Sea*, *supra* note 7, p. 52.

11. *Ibid.*; CHAO, "South China Sea: Boundary Problems Relating to the Nansha and Hsisha Islands," *supra* note 7, pp. 76-77; Heinzig, *supra* note 9, pp. 25-26.

recognized that the Paracel (and Spratly) Islands were part of China.<sup>12</sup>

6. The Ching Dynasty's first official patrol to the Paracels was launched in 1902 by three warships from its Canton fleet, which was led by Admiral LI Chun and Vice-Admiral WU Ching-yung. During their stay on the Paracel Islands, they planted imperial flags and a stone tablet to commemorate the arrival of formal Chinese authority. This tablet was discovered in 1979 by the PRC's People Liberation Army stationed on the North Island.<sup>13</sup>
7. After the Pratas incident of 1907,<sup>14</sup> the second official patrol was launched in 1908 by a 'Special Provincial Commission for the Management of the Area.' The Commission was instructed to perform an official reconnaissance of the islands, and to establish sites for the construction of houses, roads, a radio station, and phosphate processing plants. Upon their return after a one-month stay on the Paracels, the Commission submitted an Eight-Point-Program Report recommending, *inter alia*, the administrative absorption and economic development of the Paracel Islands. This Report was later approved first by Governor-General Chang of Guangdong, then by Kwan-Hsu Emperor, and finally, carried out by the Chinese government in 1911 by incorporating the Paracels into Guangdong Province, to be administered by the Prefectural Authority of Hainan Island.<sup>15</sup>
8. The issuance and withdrawal of licenses for exploitation of the Paracel Archipelago: From 1921-1932, five such licenses were issued by the ROC Provincial government of Guangdong.<sup>16</sup>
9. Early in 1928, the ROC government appointed a commission to investigate the Paracel Islands. On 22 May 1928, members of the commission boarded a navy battleship and sailed to the Paracels. Upon their return, they published a final report titled

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12. Hungdah CHIU and Choon-ho Park, "Legal Status of the Paracel and Spratly Islands," *Ocean Development and International Law*, Vol. 3 (1975), pp. 11-13; Samuels, *Contest for the South China Sea*, *supra* note 7, p. 71.

13. Samuels, *Contest for the South China Sea*, *supra* note 7, p. 53.

14. In 1907, a Japanese entrepreneur-adventurer named Nishizawa Yoshiji, together with one hundred followers, occupied Pratas Island and renamed it for himself. The occupation ended in 1908 when China paid Nishizawa an indemnity of 130,000 silver dollars and Japan formally recognized Chinese sovereignty over the Pratas group. See Samuels, *supra* note 7, p. 53.

15. Samuels, *Contest for the South China Sea*, *ibid.*, pp. 53-54; YU, "Who Owns the Paracels and Spratlys?" *supra* note 7, pp. 5-6.

16. YU, *ibid.*, p. 6.

‘Text of the Report on the Investigation of the Paracel Archipelago (Tiao-Cha Hsi-sha Chun-tao pao-kao shu).’ According to this Report, the whole area around the Paracels, especially Woody Island, had been investigated thoroughly.<sup>17</sup>

Therefore, both Chinese governments claim that the Paracel and Spratly Islands have always belonged to China in their entirety. This attitude has been shown on several occasions, although never jointly. The following two sub-sections will discuss the two Chinese governments’ separate actions concerning the South China Sea after 1949.

### 1. *The Republic of China (Taiwan)*

The ROC government was the first in the twentieth century to claim sovereignty over the Pratas Islands, Macclesfield Bank, the Paracel Islands, and the Spratly Islands, basing its claim on the first discovery and used by the Chinese in the Western Han dynasty (in the first century BC).<sup>18</sup> When the Spratly Islands were recovered by the ROC in 1946, the Guangdong Provincial government was granted jurisdiction over them.<sup>19</sup> In 1947, the ROC Ministry of Interior’s subsequent proposal to the central government to “transfer jurisdiction of the islands to the ROC Navy” was approved.<sup>20</sup> In addition, an official map was released, which showed the Pratas Islands, Macclesfield Bank, Paracel Islands, and Spratly Islands within the U-shape lines.

In 1948, the ROC dispatched warships to the archipelago to conduct surveys and erect landmarks.<sup>21</sup> In 1949, the ROC President promulgated the Organizational Statutes Governing the Office of the Special Administrator of Hainan and transferred the jurisdiction of the Spratly Islands from the Guangdong Provincial government to the Hainan Special Administrative District.<sup>22</sup> Owing to its defeat in the civil war in May 1950, the ROC government withdrew its forces from Hainan Island and the Paracel and Spratly Islands to Taiwan. In the 1952 Treaty of Peace between the ROC and Japan,<sup>23</sup> Japan “renounce[d] all right, title, and claim to the Spratly Islands, Paracel Islands, Pratas Islands, and Maccles-

17. Samuels, *Contest for the South China Sea*, *supra* note 7, pp. 57-60.

18. Remarks by President Ma on Taiping Island, 28 January 2016. <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=36616&rmid=2355>.

19. Government Information Office, ROC, “The Republic of China’s Sovereignty over the Spratly Islands,” *Reference: ROC on Taiwan*, No. RR-93-02, 30 April 1993, p. 2.

20. *Ibid.*

21. Pao-Min CHANG, “A New Scramble for the South China Sea Islands,” *Contemporary Southeast Asia*, Vol. 12 (1990), p. 22.

22. ROC, Government Information Office, *Supra* note 19.

23. *United Nations Treaty Series*, Vol. 138, p. 38.



field Bank.”<sup>24</sup> Although no sovereign successor was named in the Peace Treaty, the ROC claims that this Treaty is substantive proof that the ROC henceforth exercised complete sovereignty over these island groups.<sup>25</sup>

When, on May 15, 1956, a Philippine named Tomas Cloma claimed ownership over islands and reefs in the Spratly Islands by discovery and occupation, and subsequently declared the establishment of the “Free Territory of Freedomland,” the ROC government immediately protested to the Philippine government.<sup>26</sup> A naval contingent was sent to patrol the Spratly Islands but found the Philippine had already left. Later a Taiwanese garrison force of about 600 troops was sent to Taiping (also known as Itu Aba) Island, the biggest island in the Spratly Islands,<sup>27</sup> and has remained there since then.<sup>28</sup> In 1990, the Executive Yuan granted jurisdiction of Tungsha (Pratas) Island and Taiping Island to the Kaohsiung City government. They also established a postal system on the islands, and maintained them under the administrative system.<sup>29</sup>

## 2. *The People’s Republic of China*

Chinese leaders of the PRC maintain that China has ‘undisputable sovereignty’ over all the islands in the South China Sea. Although the PRC was not invited to attend the San Francisco Peace Conference in 1951 and did not sign the Treaty of Peace with Japan, its Foreign Minister, ZHOU En-Lai, emphasised that<sup>30</sup>

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24. See discussion in Gerardo M. C. Valero, “Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?” *Marine Policy*, Vol. 18 (1994), p. 319.

25. CHIU and Park, “Legal Status of the Parcel and Spratly Islands,” *supra* note 12, p. 14.

26. Ministry of the Interior, *Compilation of Historical Archives on the Southern Territories of the Republic of China*, Taipei: Ministry of the Interior, 2015, pp. 130-133.

27. Itu Aba Island is 1,301 meters long and 419 meters wide, the total area is about 0.51 sq. km. See Southern Coastal Patrol Office, Coast Guard Administration, <http://www.cga.gov.tw/GipOpen/wSite/ct?xItem=81498&ctNode=8140&mp=9991>.

28. Coast Guard Administration had taken over the garrison since its establishment on 28 January 2000.

29. Ministry of the Interior, *supra* note 26, pp. 188-191.

30. *Collected Documents on the Foreign Relations of the People’s Republic of China*, Vol. 2 (Peking, 1961) p. 32. For discussion, see Valero, “Spratly Archipelago Dispute,” *supra* note 24, p. 319.

[T]he Paracel Archipelago and Spratly Island, as well as the whole Spratly Archipelago, and the Chung-sha (Macclesfield Bank), and Tung-sha (Pratas) archipelagos have always been Chinese territory . . . The Central People's Government of the People's Republic of China declares herewith: The inviolable sovereignty of the People's Republic of China over Spratly Island and the Paracel archipelago will by no means be impaired, irrespective of whether the American-British draft for a peace treaty with Japan should make any stipulations and of the nature of any such stipulations.

On September 4, 1958, in its Declaration on Territorial Sea, the PRC proclaimed that the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands belonged to it.<sup>31</sup>

The legal action taken by the PRC was on February 25, 1992, when it adopted the 'Law on the Territorial Sea and the Contiguous Zone' to legalise its claim. This Law provides that the Dongsha Islands (the Pratas Islands), the Xisha Islands (the Paracel Islands), the Zhongsha Islands (Macclesfield Bank), and the Nansha Islands (the Spratly Islands) are a part of its land territory.<sup>32</sup>

The PRC declared that it would resort to any measure to solve the territorial issues with other littoral states in the South China Sea region. The PRC Premier, LI Peng, made it known in Singapore in 1990 that China was willing to shelve the sovereignty issue and co-operate with the concerned countries in Southeast Asia to develop the resources around the Spratly Islands.<sup>33</sup> Likewise, the PRC President YANG Shangkun proposed in his ASEAN (the Association of Southeast Asian Nations) trip in June 1991 that there should be consultations among the rival countries for joint economic exploitation of the South China Sea. According to Yang, China 'in due time,' would be prepared to solve the dispute

31. "Declaration on China's Territorial Sea" in Office of the Geographer, Bureau of Intelligence and Research, US Department of State, *Limits in the Seas*, No. 43, Straight Baselines: People's Republic of China, 1 July 1972.

32. *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*, 25 February 1992, Article 2, see [http://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](http://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/CHN_1992_Law.pdf). For the analysis of the Chinese territorial sea law, see Hyun-Soo Kim, "The 1992 Chinese Territorial Sea Law in the Light of the UN Convention," *International and Comparative Law Quarterly*, Vol. 43 (1994), p. 894; Li-Yu WANG and Peter H. Pearse, "The New Legal Regime for China's Territorial Sea," *Ocean Development and International Law*, Vol. 25 (1994), pp. 431-442.

33. Lai To LEE, "Domestic Changes in China Since the 4 June Incident and Their Implications for Southeast Asia," *Contemporary Southeast Asia*, Vol. 13 (June 1991), p. 39.

over the islands ‘through friendly consultations with the other countries.’<sup>34</sup>

The PRC currently occupies the whole Paracel Islands and the following maritime features in the Spratlys: Cuarteron Reef, Gaven Reef, McKennan Reef, Hughes Reef, Johnson Reef, Fiery Cross Reef, Mischief Reef, and Subi Reef.

## B. Malaysia

Malaysia did not claim any section of the Spratly Islands until 1978, when a senior Malaysian official visited and claimed a number of islands in the southern region of the Spratlys, including Amboyna Cay, Commodore Reef, and Swallow Reef.<sup>35</sup> The next year, maps published by Kuala Lumpur showed the continental shelves off the east coast of the Malaysian peninsula, Sarawak, and Sabah as well as the boundary enclosing the Amboyna Cay, Commodore Reef, and Swallow Reef.<sup>36</sup> In May 1983, Kuala Lumpur, for the first time, landed troops on the Swallow Reef and has since maintained a platoon of soldiers there.<sup>37</sup> Since November 1986, two more platoons have been dispatched, one to Mariveles Reef and another to Dallas Reef.<sup>38</sup>

The legal grounds for Malaysia to claim those islands are based on the following actions: Continental Shelf Act of 28 July 1966,<sup>39</sup> Proclamation of the Economic Zone of 25 April 1978,<sup>40</sup> and Exclusive Economic Zone Act of 1984, Act No. 311.<sup>41</sup>

Malaysia considers those islands as a part of its territory. This attitude can be seen in its document defending its action in garrisoning Swallow Reef. The Malaysian Foreign Ministry issued a statement on September 9, 1983 claiming that whilst “the Malaysian Government has

34. *Straits Times* (9 June 1991) p. 6.

35. D. J. Dzurek, “Boundary and Resources Disputes in the South China Sea,” *Ocean Yearbook*, Vol. 5 (1985), p. 260.

36. Alan J. Day, ed., *Border and Territorial Disputes*, London: Longman, 1982, p. 126.

37. *Far Eastern Economic Review*, 28 September 1983, pp. 40-41.

38. *Straits Times*, 29 June 1988, p. 11.

39. Continental Shelf Act 1966- Act No. 57 of 28 July 1966, as Amended by Act No. 83 of 1972, see [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS\\_1966\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1966_Act.pdf).

40. Proclamation of the Economic Zone of 25 April 1978, see [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS\\_1978\\_Proclamation.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1978_Proclamation.pdf).

41. Exclusive Economic Zone Act, 1984, Act No. 311 - An Act pertaining to the exclusive economic zone and certain aspects of the continental shelf of Malaysia and to provide for the regulations of activities in the zone and on the continental shelf and for matters connected therewith, see [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS\\_1984\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf).

no claim whatsoever over the ‘Spratly Islands,’” the Swallow Reef “has always been and is part of the territory of Malaysia.”<sup>42</sup> Moreover, according to the Malaysian Continental Shelf Act of 1966, those islands and reefs are located within the continental shelf of Sabah, thus, Malaysia’s rights to them are a simple matter of geography. To reinforce such claims, Malaysia erected obelisks on the Louisa and Commodore reefs.<sup>43</sup>

Malaysia occupies Amboyna Cay, Commodore Reef, and Swallow Reef.<sup>44</sup>

### C. The Philippines

The Philippine government claim to sovereignty over the Spratly Islands is based on occupation, which has been one of the important methods to seize sovereignty on a particular piece of *terra nullius* land since the nineteenth century. The Philippines considered the archipelago as a *terra nullius* till 1956 when a Philippine fisherman and navigator, Tomas Cloma, claimed discovery of the archipelago.<sup>45</sup> Tomas Cloma, the owner of a fishing fleet and the Philippine Maritime Institute, set out with his brother and a crew of forty men to take formal possession of some of the Spratly Islands on May 11, 1956. They raised the Philippine flag on various islands, most of them being the major islands of the Spratlys, including Spratly Island, Taiping Island, Nam Yit Island, and Thi Tu Island. A few days later, he proclaimed their new possession as the “Archipelago of Freedomland (Kalayaan).”<sup>46</sup> He emphasised that the claim was based on ‘rights of discovery and/or occupation,’ because those islands are outside Philippine waters and not within the jurisdiction of any country.<sup>47</sup> In other words, *res nullius naturaliter fit primi occupantis* is Cloma’s view on the occupation of those islands. On July 6, 1956, Cloma declared the establishment of a separate government for the ‘Free Territory of Free-

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42. Statement of the Malaysian Foreign Ministry, 9 September 1983. Similar attitude can be seen from Malaysian Foreign Ministry’s statement in 1988 after the armed conflict between the PRC and Vietnam. *New Straits Times*, 25 February 1988, cited from R. Haller-Trost, *The Spratly Islands: A Study on the Limitations of International Law*, University of Kent at Canterbury, Centre of South-East Asian Studies, Occasional Paper No. 14, Kent: University of Kent, 1990, p. 65.

43. Although it is believed that these monuments on Commodore Reef were destroyed by the Philippines authorities. See J. R. V. Prescott, *The Maritime Political Boundaries of the World*, London & New York: Methuen, 1985, p. 222.

44. Cf. Haller-Trost, *The Spratly Islands*, *supra* note 42, pp. 67-70.

45. From the Philippine point of view, the Spratly Islands were *terra nullius* because, in the 1951 Peace Treaty, Japan only renounced its rights to the islands, but did not specify recipients of the abandoned title.

46. Samuels, *Contest for the South China Sea*, *supra* note 7, pp. 81-82.

47. Samuels, *ibid.*, p. 82.

domland,' with a capital at Pag-asa Island, and with himself as 'Chairman, Supreme Council of State.'<sup>48</sup>

In response to Cloma's proclamation, in December 1956, Filipino Vice-President Garcia announced the Philippine government's position.<sup>49</sup>

Insofar as the Department of Foreign Affairs is concerned, it regards the islands, islets, coral reefs, shoals, and sand cays comprised within what you call 'Freedomland', with the exclusion of those belonging to the seven-island group known internationally as the Spratlys, as *res nullius*, some of them being newly-risen, others marked on international maps as uncharted and their existence doubtful, and all of them being unoccupied and uninhabited; which means, in other words, that they are open to economic exploitation and settlement by Filipino nationals, who have as much right under international law as nationals of any other country to carry on such activities, so long as the exclusive sovereignty of any country over them has not been established in accordance with the generally accepted principles of international law, or recognised by the international community of nations.

As regards the seven-island group known internationally as the Spratlys, the Philippine government considers these islands under the *de facto* trusteeship of the victorious Allied Powers of the Second World War, as a result of the Japanese Peace Treaty, signed and concluded in San Francisco on September 8, 1951, whereby Japan renounced all its rights, title and claim to the Spratly Islands and to the Paracel Islands, and there being no territorial settlement made by the Allied Powers, up to the present with respect to their disposition. It follows, therefore, that as long as this group of islands remain in that status, it is equally open to economic exploitation and settlement by nationals or any members of the Allied Powers on the basis of equality thereto.

In view of the *geographical location* of these groups of islands and islets embraced within 'Freedomland', their *proximity* to the western territorial boundaries of the Philippines, their historical and geological relations to the Philippine archipelago, their immense strategic value to our national defence and security, aside from their economic potential which is admittedly considerable in fishing, coral and sea products, and in

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48. *Ibid.*

49. *Ibid.*, pp. 82-83.

rock phosphate, assuredly the Philippine government does not regard with indifference the economic exploitation and settlement of these uninhabited and unoccupied groups of islands and islets by Philippine nationals so long as they are engaged in furtherance of their legitimate pursuits. [emphasis added]

The Philippines took an equivocal position in dealing with Cloma's proclamation. In order to avoid any possible confrontation with other concerned states, Garcia combined 'the seven-island group known internationally as the Spratlys' with 'Freedomland' in order to imply that they were *res nullius* on the assumption that the status of the Spratly Islands was still undetermined. The Philippine attempt is understandable if we examine its geographical situation. The Philippines has virtually no physical continental shelf along its western coast. The 200-meter isobath line on the southeast running very close along Palawan and Luzon islands,<sup>50</sup> which creates the 'natural prolongation' principle, is simply unhelpful to the Philippines if it wants to claim its jurisdiction over the Spratly Islands. Thus, based on the theories of 'occupation' and 'proximity,' the Philippine government could be better placed to claim control over those islands.<sup>51</sup> Obviously, Garcia's announcement is a tactful arrangement for any further claim in the future.

On July 10, 1971, the Philippine government, claiming that an unarmed Philippine vessel operating in the Spratly Islands had been fired upon by an ROC naval patrol unit,<sup>52</sup> sent a diplomatic note to Taipei demanding the withdrawal of a Chinese garrison from Taiping Island on the grounds that:<sup>53</sup>

1. The Philippines has a legal title to the island group as a consequence of the occupation by Tomas Cloma;
2. The presence of the Chinese forces in Itu Aba (Taiping Island) constituted a serious threat to the security of the Philippines;
3. The Chinese occupation of some islands in the Spratly group constituted *de facto* trusteeship on behalf of the

50. Park, *East Asia and the Law of the Sea*, *supra* note 7, p. 179.

51. Milton Watler Meyer, *A Diplomatic History of the Philippine Republic*, Honolulu, Hawaii: University of Hawaii Press, 1965, p. 198; Diane C. Drigot, "Oil Interests and the Law of the Sea: the Case of the Philippines," *Ocean Development and International Law*, Vol. 12 (1982), pp. 41, 44.

52. Samuels, *Contest for the South China Sea*, *supra* note 7, p. 89.

53. "Government States Position," *New Philippines* (10 July 1971), p. 10; Jorge R. Coquia, "Philippine Position on the South China Sea Issues," in Theresa C. Carino, ed., *The South China Sea Disputes: Philippine Perspectives*, Manila, the Philippines: Philippine-China Development Resource Center and Philippine Association for China Studies, 1992, p. 53.

World War II allies which precluded the garrisoning of the islands without the allies' consent;

4. The Spratly group is within the archipelagic territory claimed by the Philippines.

This was the first time that the Philippines articulated an official claim to part of the Spratly Islands.

On June 11, 1978, President Ferdinand E. Marcos declared Presidential Decree No. 1599, which enclosed an area constituting a distinct and separate municipality of the Province of Palawan and which was to be known as Kalayaan.<sup>54</sup> In addition, the Philippines also declared its archipelagic baselines by amending its relevant legislation.<sup>55</sup>

Manila has seven Spratly islands under its control: Flat Island, Lankiam Cay, Loaita Island, Nanshan Island, Northeast Cay, Thi Tu Island, and West York Island.<sup>56</sup> Manila still maintains a runway on the Thi Tu Island.

#### D. Vietnam

Vietnam is situated on the eastern coast of the Indochina Peninsula, and has a 2,828 nm of coastline.<sup>57</sup> Given this geographical location, it is easy to understand why Vietnam is eager to extend its claim on the vast maritime waters in the South China Sea. On October 21, 1956, the Republic of Vietnam (South Vietnam) assigned the Spratlys to Phuoc Tuy Province by Decree No. 143/NV.<sup>58</sup> This was followed by two more decrees, No. 76/BNV/HC 9 ND of 21 March 1958 and No. 34/NV of 27 January 1959, whereby the 1956 decree was either reconfirmed or adjusted.<sup>59</sup> In order to counter South Vietnam's claim, the government of the Democratic Republic of Vietnam (North Vietnam) supported the PRC's claim to the Spratly Islands. Also on the occasion of the PRC's declaration on territorial sea in 1958, the then Prime Minister Pham Van

54. Philippine Presidential Decree No. 1599 of 11 June 1978 establishing an Exclusive Economic Zone and for other purposes, see [http://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/PHL\\_1978\\_Decree.pdf](http://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/PHL_1978_Decree.pdf).

55. For example, 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 Purposes. *Law of the Sea Bulletin*, No. 70 (2009), p. 32.

56. Prescott, *The Maritime Political Boundaries of the World*, *supra* note 43, p. 218.

57. Mark J. Valencia and Jon M. Van Dyke, "Vietnam's National Interests and the Law of the Sea," *Ocean Development and International Law*, Vol. 25 (1994), p. 217.

58. CHIU and Park, "Legal Status of the Paracel and Spratly Islands," *supra* note 12, p. 9.

59. *Ibid.*

Dong again repeated this attitude.<sup>60</sup> This statement by the North Vietnamese government seriously weakened its position on its claim of sovereignty over the Spratly Islands.

The Vietnamese attitude to the Paracel and the Spratly island groups is that they have ‘from time immemorial’ been part of their territory. They argue that:<sup>61</sup>

From time immemorial, these islands have been frequented by Vietnamese fisherman who went there for tortoises, sea slugs, and other marine creatures . . . the Spratlys are closest to Vietnam geographically and have been part of her territory early in history. In 1834, under the reign of Emperor Minh Mang, the Spratlys appeared in the first Vietnamese map as an integral part of the national territory.

In order to strengthen its position, on September 28, 1979, the Vietnamese government released a White Book, ‘Vietnam’s Sovereignty Over Hoang Sa and Truong Sa Archipelagos,’ which listed nineteen items of evidence, including official records, maps, decrees, administrative decisions, and statements made by the former French colonial government and the South Vietnamese government. Furthermore, it stated that Vietnam was the first country to survey, explore, occupy, and claim sovereignty over those islands.<sup>62</sup>

Vietnam currently occupies at least 29 maritime features in the Spratly Islands.

### III. RECENT DEVELOPMENT OF THE DISPUTES

On January 22, 2013, the Philippines initiated a Notification and Statement of Claim at the International Tribunal for the Law of the Sea (ITLOS), seeking to invalidate China’s nine-dash line.<sup>63</sup> The Philippines argue that the Chinese claims within the nine-dash line are contrary to the provisions of the UNCLOS. Under such reasoning, what China occu-

60. The PRC was then a strong ally of the North Vietnam. See Haller-Trost, *The Spratly Islands*, *supra* note 42, pp. 50-51.

61. *Fact Sheet*, No. 2/74, South Vietnamese Embassy, Washington, D.C., 28 January 1974. Cited from Park, *East Asia and the Law of the Sea*, *supra* note 7, p. 212.

62. Pao-Min CHANG, “Sino-Vietnam Territorial Dispute,” *Asia Pacific Community*, Vol. 28 (1985), pp. 74-87.

63. Republic of the Philippines Department of Foreign Affairs, Notification and Statement of Claim, No. 13-0211 (January 22, 2013). Available at <https://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos/216-sfa-statement-on-the-unclos-arbital-proceedings-against-china>.



pies in the South China Sea are just mere rocks and Chinese structures on those submerged features are illegal. In addition, the Philippines argue that China's maritime law enforcement actions would constitute an unlawful interference with Manila's rights to exploit resources in its sector of the South China Sea.

China rejects the Notification filed by the Philippines. Their reason is that a declaration made by China in 2006, pursuant to Article 298 of the Convention, excluded disputes regarding such matters as those related to maritime delimitation from compulsory dispute settlement procedures, including arbitration. Moreover, Chinese analysts believe Manila's effort to push for the establishment of a tribunal of arbitration not only abuses the UNCLOS, but is also politically motivated.<sup>64</sup>

On August 27, 2013, the Tribunal of Arbitration issued its first Procedural Order, establishing an initial timetable for the arbitration and adopting the Rules of Procedure. In the first Procedural Order, the Tribunal of Arbitration formally adopted the Rules of Procedure and fixed March 30, 2014 as the date on which the Philippines should submit its Memorial. The Tribunal of Arbitration directs the Philippines to fully address all issues, including matters relating to the jurisdiction of the Tribunal of Arbitration, the admissibility of the Philippines' claim, as well as the merits of the dispute.<sup>65</sup> The Philippines filed a memorial on March 30, 2014 with the Permanent Court of Arbitration. The Arbitral Tribunal then issued its second Procedural Order on June 3, 2014 establishing the next steps in the timetable for the arbitration. In Procedural Order No. 2, the Arbitral Tribunal fixed December 15, 2014 as the date for China to submit its Counter-Memorial responding to the Philippines' Memorial.<sup>66</sup> China obviously refused because it argues that the arbitration matters raised by the Philippines are under the comprehension of the Declaration filed by mainland China in 2006 in accordance with Article 298 of the UNCLOS, which excludes disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.

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64. "Beijing rejects Manila move," *China.org.cn*, April 27, 2013, [http://china.org.cn/world/2013-04/27/content\\_28674405.htm](http://china.org.cn/world/2013-04/27/content_28674405.htm).

65. Permanent Court of Arbitration, "Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable," *Permanent Court of Arbitration*, August 27, 2013, [http://www.pca-cpa.org/showfile.asp?fil\\_id=2311](http://www.pca-cpa.org/showfile.asp?fil_id=2311).

66. Permanent Court of Arbitration, Press Release on Arbitration between the Republic of the Philippines and the People's Republic of China, June 3, 2014. [http://www.pca-cpa.org/showfile.asp?fil\\_id=2638](http://www.pca-cpa.org/showfile.asp?fil_id=2638).

After the first hearing on July 7, 2015, the Arbitral Tribunal issued its award on jurisdiction and admissibility on October 29, 2015. The Philippines made 15 Submissions requesting the Tribunal to find the following:<sup>67</sup>

- 1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");
- 2) China's claims to sovereign rights and jurisdiction, and to "historic rights," with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
- 3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;
- 4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;
- 5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;
- 6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyt and Sin Cowe, respectively, is measured;
- 7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;
- 8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

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67. Permanent Court of Arbitration, Award on Jurisdiction and Admissibility, <http://www.pcacases.com/web/sendAttach/1506>.

- 9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;
- 10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
- 11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;
- 12) China's occupation and construction activities on Mischief Reef:
  - (a) violate the provisions of the Convention concerning artificial islands, installations and structures;
  - (b) violate China's duties to protect and preserve the marine environment under the Convention; and
  - (c) constitute unlawful acts of attempted appropriation in violation of the Convention;
- 13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;
- 14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
  - (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
  - (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and
  - (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
- 15) China shall desist from further unlawful claims and activities.

The Arbitral Tribunal found that it had jurisdiction to consider the Philippines' Submissions No. 3, 4, 6, 7, 10, 11, and 13. However, the Tribunal reserved consideration of its jurisdiction to rule on Submissions No. 1, 2, 5, 8, 9, 12, and 14 to the merits phase. In addition, it also directed the Philippines to clarify the content and narrow the scope of its

Submission 15, and reserved consideration of its jurisdiction over Submission No. 15 to the merits phase.<sup>68</sup>

The second hearing took place on November 24 through November 30, 2015.<sup>69</sup> In the second hearing, the Philippines raised a question to the Tribunal that Taiping Island is not an island in terms of the UNCLOS Article 121's interpretation of the "sustain[able] human habitation." The Philippines argued that there is no water supply, topsoil, or natural vegetation.<sup>70</sup> However, these are controversial issues, which will be discussed later.

Apart from the legal conflicts between China and the Philippines, countries from outside the region also make China uncomfortable in dealing with the issues of the South China Sea. The United States and its diplomatic policy on rebalancing is especially the case, although the United States reiterates that China is not the target of such a policy. Nonetheless, according to a recent interview with General Herbert "Hawk" Carlisle, chief of U.S. Air Force operations in the Pacific, by *Foreign Policy*, the idea behind the "rebalancing" is simple: ring China with U.S. and allied forces, just like the West did to the Soviet Union, back in the Cold War. In other words, the U.S. Air Force dispatching fighters and tankers to Darwin, Australia on a rotational basis, and sending jets to Changi East air base in Singapore, Korat air base in Thailand, a site in India, and possibly to bases at Kubi Point and Puerto Princesa in the Philippines and airfields in Indonesia and Malaysia would be the realization of its "rebalancing strategy" which would be a "containment" of China.<sup>71</sup> Such a statement obviously would enhance China's skepticism.

On April 28, 2014, the Philippines and the United States signed an Enhanced Defense Cooperation Agreement which will provide U.S. troops with greater access to military bases in the Philippines.<sup>72</sup> This agreement would be a clear gesture to reassure the U.S. Asian allies in-

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68. *Ibid.*

69. Permanent Court of Arbitration, Press Release No. 8: "The Tribunal Commences Hearing on Merits", 24 November 2015, <http://www.pcacases.com/web/sendAttach/1521>; and Press Release No. 9: "The Tribunal Concludes Hearing on the Merits", 30 November 2015, <http://www.pcacases.com/web/sendAttach/1524>.

70. Permanent Court of Arbitration, Day 2 (25th November 2015), Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility. For transcript on Day 2, see <http://www.pcacases.com/web/sendAttach/1548>, pp. 107-118.

71. John Reed, "U.S. Deploying Jets around Asia to Keep China Surrounded," *Foreign Policy*, 29 July 2013, [http://killerapps.foreignpolicy.com/posts/2013/07/29/us\\_deploying\\_jets\\_around\\_asia\\_to\\_keep\\_china\\_surrounded](http://killerapps.foreignpolicy.com/posts/2013/07/29/us_deploying_jets_around_asia_to_keep_china_surrounded).

72. Carl Thayer, "Analyzing the US-Philippines Enhanced Defense Cooperation Agreement," *The Diplomat*, 2 May 2014, <http://thediplomat.com/2014/05/analyzing-the-us-philippines-enhanced-defense-cooperation-agreement/>.

volved in territorial disputes on the South China Sea with China, and give the U.S. more flexibility to carry out its rebalancing strategy in the region. Nonetheless, there will be more criticism and skepticism from China, and opposition to more U.S. presence in the South China Sea region.

In the meantime, senior ASEAN (the Association of Southeast Asian Nations) officials and the Chinese foreign minister met in Suzhou, China on September 15, 2013 to formally discuss the possibility of establishing a Code of Conduct (COC) for the South China Sea. According to the Chinese Ministry of Foreign Affairs, the meeting ended positively with an agreement to seek “gradual progress and consensus through consultations,”<sup>73</sup> although no deadlines or details about the joint working group that will carry out the task were made available. From the results of the meeting, it seems China might have agreed in principle to a COC.

Notwithstanding, it might be still be immature to presume China would accept a document with legal binding force, especially when China has a different opinion as to the Philippines initiating the tribunal of arbitration. Furthermore, the conflict between Vietnam and China flared in May 2014 when China’s National Offshore Oil Corporation (CNOOC) moved the drilling rig near Paracels, thus making the situation more intricate and relations between China and Vietnam highly tense.<sup>74</sup> More than that, riots in southern Vietnam lead to a serious loss for Taiwanese companies and businessmen. According to a preliminary estimate by the Council of Taiwanese Chambers of Commerce in Vietnam, the protesters set fire to at least 16 Taiwanese owned factories, and 500 Taiwanese-owned plants were damaged. Such a development surprised international community especially when China and Vietnam showed amicable inter-relations last year.

Oil rig 981 is located 17 nautical miles from Chinese-occupied Triton Island (Zhongjian Dao in Chinese), which is the most southwestern island of the Paracels and about 120 nautical miles from Vietnamese coastline. Both parties claim sovereignty over the Paracel Islands, but China have successfully controlled these land features after it expelled the South Vietnamese forces in 1974 at the Battle of the Paracels. However, in terms of the legal basis, China believes the oil rig is located in its claimed Paracels waters as well as in its nine dashed line water area. China has expressed that the rig operation was interfered by a large num-

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73. Press Conference, Chinese Foreign Ministry, 16 September 2013, <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1077263.shtml>.

74. Hilary Whiteman, “China Uses Vietnamese Textbook to Back Claim in South China Sea Dispute,” CNN: International, Asia, 11 June 2014, <http://edition.cnn.com/2014/06/11/world/asia/china-vietnam-paracels/>.

ber of Vietnamese vessels, which infringes on China's sovereignty, its sovereign rights and its jurisdiction. On the other hand, Vietnam insists that oil rig 981 intruded into its 200 nautical miles of exclusive economic zone measured from its coastline. Vietnam claims that China's action is against the 1982 United Nations Convention on the Law of the Sea (UNCLOS). For the nature of this recent standoff, it is an entanglement of sovereignty claiming and resource demanding, which make this stand-off itself more complex and harder to reach a satisfied solution.

Judging from the timing for China to deploy oil rig 981, it is criticized that China destroys the friendly atmosphere with Vietnam. In recent years, China and Vietnam have maintained a relatively good relationship. Especially when the Philippines filed its arbitration case, China seems to take amicable diplomacy towards Vietnam. During Chinese Premier LI Keqiang's visit to Vietnam last October, both parties agreed to set up a working group to jointly explore their disputed waters in the South China Sea and both vowed to move beyond the territorial row and enhance bilateral ties. For this, many critics argue that China was making an over assertive movement which shows its brutality on claiming jurisdiction over South China Sea. However, the reality might not be so.

However, according to the Chinese explanation, the CNOOC has been conducting seismic operations and well site surveys in the area for the past 10 years and the drilling operation has been a continuation of the process of explorations and falls well within China's sovereignty and jurisdiction. Secondly, China might perceive the surrounding diplomatic situation as becoming more arduous in the coming years since it has misgivings about the U.S. rebalancing strategy. Moreover, China is an energy importing country and desperately hunger for hydrocarbon resources. It will try every possible ways to solve its demands for energy.

Nonetheless, China might have erred in this standoff. Firstly, the deployment of oil rig 981 might push Vietnam into the coalition with the U.S. or at least, Vietnam will be more cautious when considering future China's market access and foreign investment from China. Secondly, according to coded document HN0034 titled "South China Sea Drilling Work by M/V 'Hai Yang Shi You 981'" and publicized by Chinese Hainan Maritime Safety Administration, "in the area with[in] 3 nautical miles radius of 15-29.58N 111-12.06E from 04 May to 15 August entering [is] prohibited." This is an ordinary announcement for maritime safety, but the "3 nautical miles radius" is a sensitive distance when compared with the "cannon rule" in measuring a traditional territorial sea. Thirdly, the standoff might encourage Vietnam to file an arbitration against China, just like the Philippines did last January, and this would

align Vietnam, the Philippines or even other claimants together. Obviously this will put China into another troublesome predicament.

Another issue that was triggered by the Philippine-initiated arbitration mentioned above is the legal status of Taiping Island, which is under the jurisdiction of Taiwan. In the second hearing of the arbitration, the Philippines challenged the status of Taiping Island (Itu Aba), which is a part of the sovereign territory of Taiwan, by claiming that Taiping Island constitutes only a rock rather than an island.

In 1946, the Republic of China (Taiwan) recovered the islands and geological features in the Nansha (Spratly) Islands from Japan, including the largest naturally formed island—Taiping Island. According to transcripts from the two hearings, the Philippines attempted to characterize Taiping Island as a rock by indicating that it has an area of less than 0.43 square kilometers, no permanent population, no potable water, and is capable of generating limited quantities of agricultural produce.

Contrary to Philippine statements, however, Taiping Island possesses an adequate water supply. There are several groundwater wells on the island, some of which were in use long before Taiwan's Coast Guard Administration took over management of Taiping Island in 2000 from the ROC Ministry of National Defense. In a more detailed description, personnel stationed on the Island have routinely relied on drinking water from the wells since the Taiping Island was restored to the ROC government's jurisdiction in 1946. Apart from well water, there are water-retaining facilities mainly used for farming.<sup>75</sup>

Taiping Island, which in fact has a land area of 0.50 square kilometers, has consistently sustained more than 120 people, and is home to a functioning farm that produces a wide variety of fruits and vegetables including corn, sweet potatoes, mangoes and guavas. Furthermore, it has a hospital to provide emergency medical treatment to the personnel stationed there as well as foreign fishermen operating in the area.

It is evident that Taiping Island qualifies as an island in accordance with Article 121 of the UNCLOS. So why then does the Philippines argue that it is a rock? Distance is the answer.

The distance between Taiping Island and the Philippine island of Palawan is about 199.6 nautical miles. As each is entitled to an exclusive economic zone (EEZ) of 200 nautical miles, this would create a wide area of overlap. Furthermore, if Taiping Island is deemed capable of gen-

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<sup>75</sup> ROC Ministry of the Interior, Press Release "ROC Minister of the Interior Chen Wei-zen presides over a ceremony marking the opening of a wharf and lighthouse on Taiping Island", 12 Dec 2015. See <http://maritimeinfo.moi.gov.tw/marineweb/LayFrom0.aspx?icase=T03&pid=0000001989>.

erating a 200 nautical mile EEZ and a continental shelf, a delimitation of maritime boundaries would need to be conducted for the entire overlapping area, which is not within the jurisdiction of the Tribunal.

Obviously, the claim that Taiping Island is a rock is fallacious. The Philippines raises the issue so it can contend that the EEZ around Palawan does not overlap with any maritime zone that could be generated by other maritime features. Under this claim, the Philippines argues that Taiping Island's maritime area should be confined to 12 nautical miles. By citing judgments from ICJ *Territorial and Maritime Dispute, (Nicaragua v. Colombia, 2012)*,<sup>76</sup> as well as ITLOS *St. Martin's Island (a dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, Bangladesh/Myanmar, 2012)*,<sup>77</sup> the Philippines jumps to the conclusion on the definition of the maritime area for Taiping Island. The Philippines deliberately ignores the fact that these cases are concerning maritime delimitation.

The Philippines' argument regarding Taiping Island is simply a legal tactic that does not contribute to the practical resolution of disputes in the South China Sea. In addition, its position might further escalate tensions. This paper argues that there is risk from different perspectives, especially when the issue touches upon national interests, and that the best way of managing the risk might be containing it under a manageable mechanism. With this conception, organizing a living resources management mechanism would be a good start for the peace and stability of the South China Sea.

#### **IV. LIVING RESOURCES MANAGEMENT IN THE SOUTH CHINA SEA**

##### **A. Economic Development and Environmental Pollution**

The issues of environmental pollution in the South China Sea are generally due to population growth and urbanization in coastal cities, economic growth and increased material consumption, and highly polluting technologies for energy production and primary resource extraction. In addition, there has been an increase in oil spills and waste dumping by

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76. International Court of Justice, *Judgement of Territorial and Maritime Dispute (Nicaragua v. Colombia)*, 19 November 2012, <http://www.icj-cij.org/docket/files/124/17164.pdf>.

77. International Tribunal for the Law of the Sea, *Judgement of Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/ Myanmar)*, 14 March 2012, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf).



transit vessels as a result of increasing trade and transport of raw materials, fossil fuels, and commodities across the region's shipping lanes.<sup>78</sup>

The South China Sea has been undergoing serious environmental degradations caused by land-based pollution, sea-based pollution, habitat loss, etc.<sup>79</sup> In terms of land-based pollution, the South China Sea is surrounded by quite a few large and rapidly growing cities, e.g. Guangzhou, Hong Kong, Ho Chi Minh City, Bangkok, Manila, Jakarta, and Singapore. Wastewater from those cities has been flowing into the sea without being appropriately treated due to insufficient sewage treatment facilities. Additionally, pesticides are used epidemically so that they become one of the major contributors to environmental degradation in the South China Sea region.<sup>80</sup>

As for sea-based pollution, the major causes of oil pollution are ships, oil and gas exploration, and production platforms. However, under the situation of the rapid growth of Asian economies, such as Taiwan, Japan, Korea, or China, growth of oil demand will bring on the growth of oil transportation via the sea,<sup>81</sup> which will definitely increase the risk of oil spills. The UNEP has recognized the risk of oil spills in the region and has raised this issue, in particular in 2006 at the second East Asian Seas Congress held in Haikou, Hainan, China.<sup>82</sup>

For the aforementioned situation in the region, as the countries around the South China Sea expand their economies and consume more fossil fuel resources, they also produce more pollution and damage the marine environment. According to research over the last 70 years, the area of mangroves bordering the South China Sea has been reduced by nearly 70 percent. At this reducing rate, all mangroves will be lost by the year 2030. The main losses result from conversion of land to other uses, e.g., shrimp farms, urban development and massive logging.<sup>83</sup> Many of these countries are now making important decisions about technology and infrastructure with critical implications for long-term environmental

78. David Rosenberg, "Environmental Pollution around the South China Sea: Developing a Regional Response", *Contemporary Southeast Asia* (1 April 1999). See <http://www.highbeam.com/doc/1G1-54455033.html>.

79. Shicun Wu and Keyuan Zou, *Maritime Security in the South China Sea: Regional Implications and International Cooperation*, London: Ashgate Publishing, 2009, p. 232.

80. *Ibid.*

81. For example, China is the world's second-largest consumer of oil behind the United States, and the second-largest net importer of oil as of 2009. And, Korea is the second-largest importer of liquefied natural gas in the world behind Japan. See US Energy Information Administration, <http://www.eia.gov/countries/>.

82. *Supra* note 67.

83. Brian Morton and Graham Blackmore, "South China Sea", *Marine Pollution Bulletin*, Vol. 42, No. 12 (2001), p. 1246.

change. Many of them face competitive market pressures to produce at the lowest, short-term cost possible. As long as governments compete with each other for investment in an increasingly integrated world economy, they are reluctant to impose costly regulations to maintain environmental standards which might discourage investment and output. From the individual national, short-term view, pollution control programs may hinder economic performance and increase consumer prices. Nations that do impose charges on polluters are thought to give business enterprises an incentive to relocate in countries with more lenient standards. As a result, many environmental pollution problems are often overshadowed by concerns over economic growth.<sup>84</sup>

## B. Overfishing as an International Issue

The development of globalization has already become an important phenomenon in the modern international society. Such a phenomenon has been demonstrated by the economic elements of production flowing with an unprecedented speed and scale in the global scope. Although the process of globalization has been witnessed for several decades, it is still under a drastic debate whether globalization would cause the collapse of national boundaries. Furthermore, will states collapse in the future due to their functions being restricted?

Most discussions or debates on “globalization” are on international financial transaction, technology flows, transnational cooperations, capital flows, cross-border movements of people, and so forth. In other words, states, as members of the international community, are getting closer and sharing common interests. Therefore, more functional fields, and even disputes, are emerging.

It is a trend that national sovereignty has been challenged by the developments mentioned above. Not only do such phenomena appear in daily economic life, but they also appear in the development of an international legal system, especially in the fields of high seas fisheries and international environmental protection.

For the purposes of statistics concerning the fish catches, a list of major fishing areas is maintained by the Food and Agriculture Organization of the United Nations (FAO).<sup>85</sup> The South China Sea region is within Area 71, which is under the title of Western Central Pacific. In terms of global fishery production, it reached 82.6 million tonnes in 2011, and 79.7 million tonnes in 2012. Of the FAO statistical areas, the Northwest

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84. *Supra* note 89.

85. FAO, Map of FAO Major Fishing Areas for Statistical Purposes, <http://www.fao.org/3/a-az126e.pdf>.

Pacific had the highest production with 21.4 million tonnes (26 percent of the global marine catch) in 2011, followed by the Southeast Pacific with 12.3 million tonnes (15 percent), the Western Central Pacific with 11.5 million tonnes (14 percent), and the Northeast Atlantic with 8.0 million tonnes (9 percent).<sup>86</sup>

Total production in the Western Central Pacific grew continuously to a maximum of 11.7 million tonnes in 2010, and was 11.5 million tonnes in 2011. This area contributes about 14 percent of global marine production. However, there are reasons for concern as regards to the state of the resources, with most stocks being either fully fished or overfished, particularly in the western part of the South China Sea. The high reported catches have probably been maintained through the expansion of the fisheries to new areas and possible double counting in the transshipment of catches between fishing areas, which leads to bias in estimates of production, potentially masking negative trends in stock status.<sup>87</sup>

The resources of the South China Sea, living and non-living, are rapidly being exploited by the people of the region, who are heavily concentrated along the coastline.<sup>88</sup> Overfishing or a declining average annual fish catch now threatens the extensive fishing industry. Many fishermen are forced to apply more efficient and aggressive fishing techniques, and to venture further out to new fishing grounds. For the most extreme cases, some even apply illegal methods such as blast fishing and cyanide poisoning. Fish and coral habitats are also degraded by increased sedimentation, especially from land development. Coral reefs have been ravaged to provide for building materials, and plundered for ornamental commodities.<sup>89</sup> Furthermore, Chinese land reclamation projects on certain reefs in the Spratlys, such as Fiery Cross Reef, Subi Reef, and Mis-

86. FAO, *The State of World Fisheries and Aquaculture: Opportunities and Challenges*, Rome: FAO, 2014, p. 37.

87. *Ibid.*, p. 40.

88. In terms of the South China Sea Large Marine Ecosystem (LME) which is bordered by China, Indonesia, Malaysia, Philippines, Taiwan and Vietnam. It covers an area of 3.2 million square kilometers, of which 0.31% is protected, and contains 7.04% and 0.93% of the world's coral reefs and sea mounts, respectively. S. Heileman, "South China Sea: LME #36", in Sherman, K. and Hempel, G. (Editors), *The UNEP Large Marine Ecosystem Report: A Perspective on Changing Conditions in LMEs of the World's Regional Seas*. UNEP Regional Seas, Report and Studies No. 182 (2008). United Nations Environment Programme. Nairobi, Kenya.

89. <http://www.southchinasea.org/why.html>. Also Global International Waters Assessment (GIWA), Preliminary Results for the Scoping and Assessment of the South China Sea and Sulu-Celebes Seas. Draft discussion paper in the Regional GIWA Workshop, November 5-8, 2001, Bangkok, Thailand (2001), quoted from Porfirio M. Alino, "The South China Sea-Revisiting: The Large Marine Ecosystem Approach". See <http://innri.unuftp.is/pdf/South%20China%20Sea.pdf>.

chief Reef, have also raised concerns on marine environmental protection matters.

A further concern mentioned by Nina Hachigian, US Ambassador to ASEAN, is that illegal, unreported, and unregulated (IUU) fishing activities might cause serious damage on the fishery resources in the South China Sea. Common methods such as dynamite fishing, cyanide poisoning, and bottom trawling have wreaked havoc in regional ecosystems and threaten the future of the regional fishing market. Forty percent of the South China Sea's fish stocks have already disappeared and 70 percent of the South China Sea's coral reefs are rated to be in fair or poor condition.

Ms. Hachigian has listed some endangered species in the South China Sea which need an appropriate management mechanism to survive. For example, Green sea turtles and Hawksbill turtles are critically endangered. However, poaching turtles for their meat and shells remains common in the region. Millions of sharks are slaughtered every year solely for their fins. She has also mentioned that the increasing carbon in the atmosphere will take a slow, steady destructive toll on the oceans. Moreover, rising ocean temperatures threatens to reduce the availability of fish in traditional fishing areas as fish populations seek cooler waters.

Therefore, overfishing and IUU fishing are compounded by the sovereignty claims in the South China Sea. Fishing boats are travelling farther from their territorial waters because there are fewer fish to be found in traditional fishing grounds. Part of the reason the claimants are asserting sovereignty over islands, rocks, shoals and reefs is precisely because of the fish in the surrounding waters. Ambiguous claims, unilateral fishing restrictions, and unclear law enforcement jurisdictions among the claimants would surely worsen this problem.<sup>90</sup>

## V. SOLUTION: COOPERATION AS AN OBLIGATION

It is not the purpose of this paper to define the term “global governance” as there are a variety of definitions on this subject. Instead, the author would like to use the concept of cooperation to describe the ongoing processes of managing and conserving fishery resources. Such processes includes: international instruments, international organizations, and behavior of the states.

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90. Nina Hachigian, “The Other Problem in the South China Sea: Territorial disputes are not the only issue to trouble this vital maritime region”, *The Diplomat* (8 April 2015), <http://thediplomat.com/2015/04/the-other-problem-in-the-south-china-sea/>.

## A. International Instruments Framework

Basically, the 1982 UNCLOS<sup>91</sup> and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks<sup>92</sup> (hereinafter cited as “UNFSA”) provide certain possibilities on the regulation of cooperation among states in dealing with the issues of high seas fisheries.

One of the basic issues to be considered is the nature of the duty to co-operate. It is noteworthy that the duty to co-operate among the states, whether they are amicable or antagonistic, can be traced back to certain documents made more than three decades ago. In a declaration adopted by the General Assembly of the United Nations in 1970,<sup>93</sup> it states that “States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations. . .”

This duty can be characterized into one of the two forms: a duty to enter into negotiations; and a duty to negotiate and to reach an agreement. Obviously both duties of cooperation require that negotiations be entered into in good faith. Moreover, the parties concerned shall be obliged to work together in good faith to attempt to reach an agreement, and to carry that agreement through to a successful conclusion.<sup>94</sup> Under such considerations, certain provisions regulated in the UNCLOS and the UNFSA embrace the spirit of cooperation.

According to Article 118 of the UNCLOS, states fishing on the same living marine resources or in the same area of the high seas shall

91. The UNCLOS entered into force on 16 November 1994 and there are 167 states ratified this Convention as at 2 January 2015. See “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements”, [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea) .

92. The UNFAS entered into force on 11 December 2001 and there are 82 states ratified this Agreement. UN, Division for Ocean Affairs and the Law of the Sea, Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention, and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. See [http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf).

93. 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625(XXV), 24 October 1970.

94. L. Guruswamy, “The Promise of the United Nations Convention on the Law of the Sea: Justice and Environmental Disputes”, *Ecology Law Quarterly*, Vol. 25 (1998), p. 189. Cited from Stuart M. Kaye, *International Fisheries Management*, The Hague: Kluwer Law International, 2001, p. 111.

cooperate in the conservation of these resources. With respect to straddling fish stocks and highly migratory species on the high seas, the obligation is supplemented with the special obligations of the relevant coastal states and states fishing for these stocks in adjacent areas of the high seas to co-operate for the conservation of these stocks.<sup>95</sup> Taking into consideration of the practices in recent years from states and international organizations, these obligations have become part of international customary law.<sup>96</sup>

Part 3 of the UNFSA includes several provisions for mechanisms for cooperation on the conservation of straddling fish stocks and highly migratory species. Although the introductory paragraph of Article 8 seems to leave states a choice whether to co-operate directly or through regional or sub-regional fisheries management organizations or arrangements, the ensuing paragraphs emplace radical limitations on this freedom. Where there exists a fisheries management organization or arrangement competent enough to regulate the fishery for a specific straddling fish stock or highly migratory fish stocks, those states fishing for the stocks on the high seas and the relevant coastal states shall become members of the organization or participants of the arrangement.<sup>97</sup>

States fishing for the stock on the high seas may choose not to join or participate, but are then obligated to apply the management measures adopted by the organization or arrangement, in order to be entitled to fish on the stock.<sup>98</sup> If the straddling fish stock or highly migratory fish stocks is not subjected to the regulatory competence of any organization or arrangement, states fishing for the stock on the high seas and the relevant coastal states are obligated to establish either an organization or other appropriate arrangements.<sup>99</sup>

## **B. Regional Fisheries Management Organization as a Mechanism**

In the absence of an effective centralized authority in dealing with the matters of fishing issues, then probably the regional fisheries organization is an alternative to secure sustainable conservation and management of transboundary marine resources. Such regional fisheries cooperation involves efforts by states to overcome collective action problems

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95. UNCLOS, Articles 63(2) and 64(1).

96. Also see Tore Henriksen, Geir Honneland, and Are Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, The Netherlands: Martinus Nijhoff Publishers, 2006, p. 15.

97. UNFSA, Article 8(3).

98. UNFSA, Article 8(4).

99. UNFSA, Article 8(5).

related to the use of shared and common fisheries. This cooperation arises when two or more concerned states identify a shared problem or goal which requires a common and co-operative solution. Such cooperation is often formalized through bilateral or multilateral agreements establishing principles, rules, procedures and institutional organizations for the implementation of cooperation between the parties. In many cases these agreements are institutionalized by the formation of Regional Fishery Management Organizations (hereinafter cited as RFMOs).<sup>100</sup>

Most of the RFMOs operating in developing regions during the 1950s and 1960s were established at the initiative of the Food and Agriculture Organization of the United Nations (FAO). They were constituted with broad mandates to promote research, development and management, but without regulatory powers. Moreover, these organizations were established as development mechanisms, so their operations were dependent on funding from FAO and other donors. Thus, for their functions to be fulfilled, they heavily relied on the political will of members of the RFMOs to enforce regulations.<sup>101</sup>

Some scholars mention that the cooperative governance of marine resources management is meant to provide adequate means for meeting three major tasks: generation of adequate and reasonably consensual scientific knowledge to permit informed judgments about whether and how exploitation of resources shall be conducted; adoption of legitimate and appropriate regulatory measures to govern economic activities while taking heed of existing knowledge; and development of a system to promote compliance with such measures among those engaged in resource use in the area.<sup>102</sup> Therefore, the latter two tasks, i.e. regulatory measures and compliance of the members, will heavily rely upon members' positive practices.

Even so, some of the RFMOs have taken steps to improve their performance in managing and conserving marine living resources. The author shall use the Inter-American Tropical Tuna Commission (hereinafter cited as IATTC) to examine the progress. IATTC was established in

100. Are K. Sydnes, "Regional Fishery Organizations: How and Why Organizational Diversity Matters," *Ocean Development and International Law*, Vol. 32 (2001), pp. 350-351. Also, Are K. Sydnes, "Regional Fisheries Organizations and International Fisheries Governance", in Syma Ebbin, Alf Hoel, and Are K. Sydnes, eds., *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, The Netherlands: Springer, 2005, pp. 117-133.

101. Are. K. Sydnes, "Regional Fishery Organizaitons in Developing Regions: Adapting to Changes in International Fisheries Law," *Marine Policy*, Vol. 26 (2002), p. 374.

102. Olav Schram Stokke, "Governance of High Seas Fisheries: The Role of Regime Linkages," in Davor Vidas and Willy Ostreng, eds., *Order for the Oceans at the Turn of the Century*, The Hague: Kluwer Law International, 1999, pp. 159; 162-170.

1950 in accordance with the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission.<sup>103</sup> After almost fifty years of functioning, it was decided that the IATTC (Commission) and the 1949 IATTC (Convention) should be strengthened and modernized to take into account recently adopted international instruments, such as the 1982 UNCLOS, the 1992 Agenda 21 and Rio Declaration, the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the 1995 FAO Code of Conduct for Responsible Fisheries, and the 1995 UNFSA.<sup>104</sup> An ad hoc Working Group was formed to review the 1949 Convention.<sup>105</sup>

The revising work was done in June 2003 with the adoption of an amended convention.<sup>106</sup> According to Article 10 of the Antigua Convention, a Committee for the Review of Implementation of Measures Adopted by the Commission will be established: (a) to review and monitor compliance with conservation and management measures adopted by the Commission, as well as other cooperative measures; (b) to analyze information and any other information necessary to carry out its functions; (c) to provide the Commission with information, technical advice and recommendations relating to the implementation of, and compliance with, conservation and management measures; (d) to recommend to the Commission means of promoting compatibility; (e) recommend to the Commission means to promote the effective implementation of the Antigua Convention; (f) to recommend to the Commission, in consultation with the Scientific Advisory Committee, the priorities and objectives of the program for data collection and monitoring of this Convention and assess and evaluate the results of that program; and (g) to perform other functions.<sup>107</sup>

Furthermore, Article 18 provides that Parties shall take the measures necessary to ensure the implementation of and compliance with the Antigua Convention and any conservation and management measures adopted pursuant thereto, including the adoption of the necessary laws

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103. For 1949 IATTC Convention, see [http://www.iattc.org/PDFFiles/IATTC\\_convention\\_1949.pdf](http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf).

104. IATTC, Resolution on the Establishment of a Working Group to Review the IATTC Convention, June 1998.

105. *Ibid.*

106. Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (also known as "Antigua Convention"). For full text, see [http://www.iattc.org/PDFFiles2/Antigua\\_Convention\\_Jun\\_2003.pdf](http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf).

107. Annex 3. Committee for the Review of Implementation of Measures Adopted by the Commission, Antigua Convention.



and regulations. Also, Parties shall provide to the Commission all the information that may be required for the fulfillment of the objective of the Antigua Convention, including statistical and biological information and information concerning its fishing activities in the Convention Area, and information regarding actions taken to implement the measures adopted in accordance with the Antigua Convention.

Except for the actions made by the IATTC, other RFMOs took similar actions either by adopting resolutions or taking related measures so that the conservation and management measures could be achieved.<sup>108</sup>

From the aforementioned discussion, it might be safe to conclude that the RFMOs and arrangements have been given exclusive control to regulate the high seas fisheries of straddling fish stocks and highly migratory fish stocks.<sup>109</sup>

### C. Regional Cooperation in the Semi-Enclosed Sea: A Case on South China Sea<sup>110</sup>

In terms of the geographical location, the South China Sea could be categorized as a “semi-enclosed sea,” which is provided in Article 122 of the UNCLOS defining the term:

“[E]nclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Because the South China Sea is semi-enclosed, any change in the ecosystem of the semi-enclosed sea will have significant impact on the

108. For example, on 27 December 2000, the International Commission for the Conservation of Atlantic Tunas (ICCAT) adopted a resolution under the title of “Supplemental Resolution by ICCAT to Enhance the Effectiveness of the ICCAT Measures to Eliminate Illegal, Unregulated and Unreported Fishing Activities by Large-Scale Tuna Longline Vessels in the Convention Area and Other Areas”. Under this resolution, the ICCAT Commission urged Japan and Taiwan to take the necessary measures to complete the scrapping of IUU vessels built in Japan and Taiwan.

109. Tore Henriksen, Geir Honneland, and Are Sydnæs, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*, The Netherlands: Martinus Nijhoff Publishers, 2006, p. 16; Robin Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, p. 309; F. O. Vicuna, “The International Law to High Seas Fisheries: From Unrestricted Freedom of Fishing to Sustainable Use,” in O. S. Stokke, ed, *Governing High Seas Fisheries*, Oxford: Oxford University Press, 2001, pp. 40-42.

110. Unless specifically mentioned, this sub-section is basically quoted from Kuan-Hsiung WANG, “Bridges over Troubled Waters: Fisheries Cooperation as a Resolution to the South China Sea Conflicts,” *The Pacific Review*, Vol. 14, No. 4 (2001), pp. 541-543.

whole area. It is generally recognised that the living resources in the South China Sea area migrate from one EEZ to another or even to other marine areas, particularly those highly migratory species such as tuna and other shared stocks. Each country may already have its own assessment of its living resources in its EEZ, assuming that the definition and delineation of each EEZ is clear. The problem is that many of those EEZ boundaries are not well defined or mutually agreed upon by the relevant parties. Likewise, there are various conflicting claims to islands that complicate and defer the determination of the EEZ boundaries. For this reason, many experts and scholars are convinced of the need to cooperate on the assessment of the living resources in the South China Sea area without regard to jurisdictional boundaries. The basis for this endeavour would be Article 123 of the UNCLOS regarding enclosed and semi-enclosed seas.<sup>111</sup> The UNCLOS has foreseen this problem, since Article 123 provides that,

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

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

Therefore, all parties concerned should be aware that fish are migratory and fishery resources are exhaustible, so rational use of the South China Sea and the preservation of its marine environment should be important to all parties. Thus, cooperation among littoral states in the region is essential. In order to avoid overfishing or depletion of resources, con-

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111. Hasjim Djalal, "Issue Paper for Technical Working Group on the Resources Assessment of the South China Sea Informal Workshop," in the Second Working Group Meeting on Resources Assessment and Ways of Development in the South China Sea, Jakarta, Indonesia, 5-6 July 1993, pp. 1-2.

servations measures have to be taken. Such measures are not possible without regional cooperation and close co-ordination among the parties concerned, especially in a semi-enclosed sea.

Indeed, a semi-enclosed sea concept could conceivably provide the catalyst to promote cooperation and co-ordination of the management of resources in the South China Sea.<sup>112</sup> Under such circumstances, for all the littoral states to make the boundary delimitation issue the first priority seems unwise. Rather, concentrating upon their common interests can be an essential motivation to resolve conflicts rationally.

Fishery cooperation could be the most feasible course of action for the littoral states since through cooperation, fishery resources could be properly conserved and managed such that economic waste and over-exploitation may be avoided.

Cooperation in the utilization of fishery resources is a feasible and practical way to start a regional cooperation regime. It sidesteps the issue of sovereignty and focuses upon a common interest, namely the utilization of living resources. It also defers long-term negotiations with respect to delimitation of the continental shelf relating to the hydrocarbon resource issue. Thus, as co-operative relationships are forged with regard to fishery resources, mutual confidence will build among the various parties that may eventually contribute to successful cooperation with respect to hydrocarbon resources. Fishery resources management is crucial to preventing over-exploitation or overfishing, and may be a touchstone of the littoral states' sincerity.

Without affecting jurisdictional boundaries as laid down in the UNCLOS, it is certainly possible to have regional joint fishery management in the South China Sea as the starting point for further cooperation. If all states in this region treat cooperation as a key step toward achieving mutual benefit, then the future for such a regional cooperation mechanism is assured.

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112. Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea," *Ocean Development and International Law*, Vol. 25(1994), p. 71.

## VI. TAIWAN'S ROLE IN FISHERIES MANAGEMENT

### A. 2013 Taiwan-Japan Fisheries Agreement

As discussed earlier, Taiwan is one of the claimants to the islands sovereignty as well as maritime areas of the South China Sea. Although there are problems with its international recognition, Taiwan could play a constructive role in such a chaotic and urgent time.

In taking consideration of fostering regional peace and stability, economic prosperity and the sustainable development of the marine environment, as well as seeking to find a path to coexistence and mutual prosperity, President MA Ying-jeou declared the *East China Sea Peace Initiative* in August 2012 and called on all parties concerned to:<sup>113</sup>

1. Refrain from taking any antagonistic actions;
2. Shelve controversies and not abandon dialogue;
3. Observe international law and resolve disputes through peaceful means;
4. Seek consensus on a code of conduct in the East China Sea; and
5. Establish a mechanism for cooperation on exploring and developing resources in the East China Sea.

The main points of the Initiative are “shelving disputes, and working on joint development.” These ideas also conform to the “provisional arrangement” which is provided in the UNCLOS Article 74(3) on EEZ delimitation and 83(3) on continental shelf delimitation.<sup>114</sup> The text reads:

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

For the best result in resolving delimitation disputes, states in dispute should take the following actions:

113. The Republic of China (Taiwan), “East China Sea Peace Initiative,” *Ministry of Foreign Affairs, ROC*, (August 5, 2012), <http://www.mofa.gov.tw/EnOfficial/Topics/TopicsIndex/?opno=cc7f748f-f55f-4eeb-91b4-cf4a28bbb86f>.

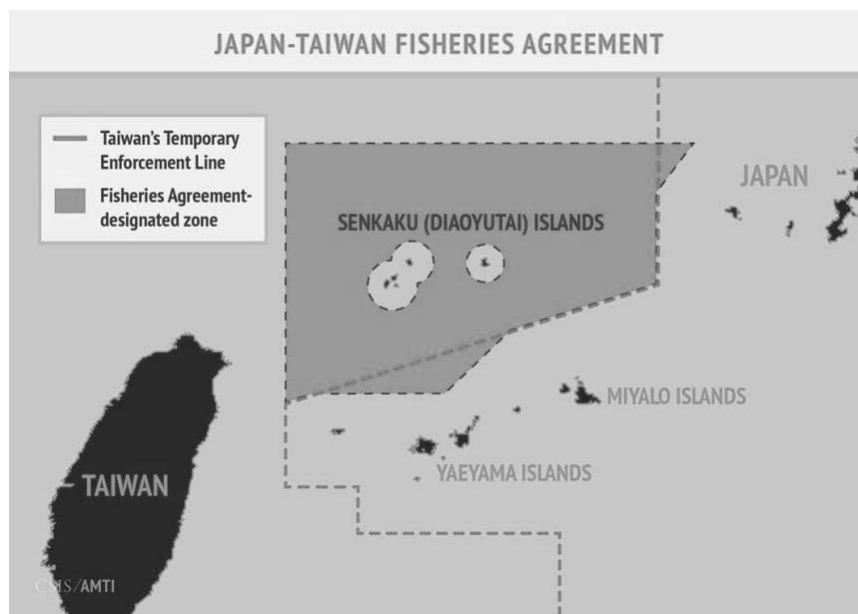
114. UNCLOS, Articles 74(3) and 83(3).

- A. Initiate negotiations in good faith. Under Articles 74(3) and 83(3), the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. The phrase, ‘in a spirit of understanding and cooperation,’ indicates that the parties concerned should negotiate in a spirit of good faith (or bona fide). The obligation to seek agreement in good faith has been defined in many well-established precedents of international law.
- B. Self-restraint. Even if the parties fail to reach a final agreement, they still have to restrain themselves from taking any action that would cause the dispute to deteriorate. That is to say, mutual restraint should be exercised pending final agreement or settlement in order not to impede the completion of the final delimitation. Only under such a presumption can the arrangement correspond to the spirit of the provision, ‘not to jeopardize or hamper the reaching of the final agreement.’

In addition, two aspects of the provisional arrangements should not be overlooked:

- A. Transitional nature: In the interests of international peace, the states concerned shall enter into provisional arrangements so as not to jeopardize or hamper the reaching of the final delimitation.
- B. Practical nature: Because the provisional arrangement is of a practical nature, it focuses on practical issues, i.e. utilization of resources, and puts the maritime boundary/jurisdiction delimitation and sovereignty issues aside.

The *East China Sea Peace Initiative* would be meaningful in the present tense situation because, on the one hand, “promoting joint development” might be a better way to ease the disputes, while on the other hand, it is also important to observe the role that Taiwan could and might play, since Taiwan is in a leverage position. The practice of the *Taiwan-Japan Fisheries Agreement* of April 10, 2013 would be a good example of the *East China Sea Peace Initiative*.



**Map 2: Designated Zone assigned in the 2013 *Taiwan-Japan Fisheries Agreement*<sup>115</sup>**

The background for finalizing the Agreement is mixed with political as well as legal considerations. On the one hand, Japan wants to protect its strategic interests in the East China Sea; it was trying to prevent Taiwan from cooperating with China while the conflict between Japan and China remained intense. On the other, the influence from the United States is also explicit. Both Japan and Taiwan are important to the United States in guarding its “rebalancing strategy.” The fisheries issue is minor compared to other security or strategic issues, so the United States is positive towards the conclusion of the Agreement. Furthermore, the *Taiwan-Japan Fisheries Agreement* also means a significant development of relations for both Japan and Taiwan.

Without considering political concerns, there are some legal points which are also noteworthy if the Agreement is to be reviewed thoroughly.

1. A wider “Agreement Application Zone” is designated for fishermen from both sides who may conduct fishing operations

115. Asia Maritime Transparency Initiative, CSIS (AMTI), *The Evolution of Asia’s Contested Waters*, available at <http://amti.csis.org/maritime-disputes>

without being disturbed by the other side. In other words, this Zone is a joint fishery zone which could accommodate fishery activities from both Taiwan and Japan.

2. Due to heavy fishery activities by Taiwanese and Japanese fishermen and for the purposes of regulating the operation of fisheries, a “Special Cooperation Zone,” located in the south-east corner of the aforementioned “Agreement Application Zone,” has been designated and is a matter for further discussion by the Taiwan-Japan Fishery Committee. This Committee was set up on May 7, 2013.
3. There is no accord in the Agreement regarding the area of the 12 nautical miles surrounding the Diaoyutai Islands. This is a result of shelving the sovereignty disputes and will be subject to future discussion. However, this might be the most controversial point, most likely causing a lot of discussion and discontent.

The Agreement is a good start for sustaining peace in the East China Sea. It focuses on the fisheries issue and puts aside the sovereignty or delimitation issues, which is a praiseworthy move made by both Taiwan and Japan. It is also putting into practice the “provisional arrangement” stipulated in the UNCLOS. Nonetheless, there are still a lot of matters to discuss and to be developed between the parties concerned. The Agreement relies upon the functioning of the Taiwan-Japan Fishery Committee and good practice from both sides.

## **B. The Inter-American Tropical Tuna Commission (IATTC) and Taiwan’s Participation**

Apart from the fact that Taiwan can, and would be willing to, enter into a bilateral fisheries agreement with another party, Taiwan is also capable of participating in a regional fisheries management organization. The Inter-American Tropical Tuna Commission (IATTC) is one of the precedents.

IATTC was established in accordance with the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission between the United States and Costa Rica. The 1949 IATTC Convention entered into force on March 3, 1950 with the Inter-American Tropical Tuna Commission (IATTC) being established. It is now the oldest of the regional fishery management organizations (RFMOs).

In 1998 it was decided that the IATTC and the 1949 IATTC Convention should be modernized to take into account recently adopted international instruments, such as the 1995 United Nations Straddling and

Highly Migratory Fish Stocks Agreement (UNFSA) and the 1982 UNCLOS. As a result of fishing performance in the east Pacific Ocean and for the purposes of enhancing conservation and management of tuna resources, Taiwan expressed its willingness to work with other IATTC members.

Through a 1998 resolution, the IATTC Commission welcomed Taiwan's commitment to participate actively in the work of the IATTC and recommended that the member governments of the Commission should find an appropriate mechanism to enable the active participation of Taiwan in the work of the IATTC. Later, Taiwan was invited to attend the meetings of the Working Group to Review the 1949 IATTC Convention as an equal negotiating partner along with the other IATTC Convention Parties.

On November 14, 2003, the Taiwanese delegate signed an Instrument for the Participation of Fishing Entities in Washington, D.C. along with other signatories. As a fishing entity, Taiwan is able to enjoy all the rights and have all the responsibilities stipulated in the amended 1949 IATTC Convention (also named the Antigua Convention) on an equal footing with other members of the Commission after the entry of the Antigua Convention. Because Taiwan's participation issue was solved, Taiwan will be able to participate in the IATTC in the capacity of a fishing entity and with an organizational status as a Member of the Commission under the designation of Chinese Taipei. Including Taiwan as a member is an ideal arrangement because it is one of the leading distant water fishing nations in the world. Thus, there is a necessity to incorporate Taiwan into the mechanism in order to more effectively accomplish conservation and management of marine living resources. Taiwan could contribute its knowledge and technology to the conservation and management mechanism.<sup>116</sup>

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116. For detailed development of the IATTC, its Convention amendments, and Taiwan's participation, see Dustin Kuan-Hsiung WANG, "Taiwan's Participation in Regional Fisheries Management Organizations and the Conceptual Revolution on Fishing Entity: The Case of the IATTC," *Ocean Development and International Law*, Vol. 37 (2006) pp. 209–219.



## VII. CONCLUSION

Fishing or fishery is a vital aspect of the world's diet, economy, and biodiversity. In recent years, fishing industry is recognized as one of the important elements which would have influence on the food security.<sup>117</sup> World population is expected to grow from the present 6.8 billion people to about 9 billion by 2050, and the Southeast Asia is one of the most populated regions. The growing need for nutritious and healthy food will increase the demand for fishery products from marine sources, whose productivity is already highly stressed by excessive fishing pressure, growing organic pollution, toxic contamination, coastal degradation and climate change. Looking towards 2050, the question that remains is how will fishery governance (and the national and international policy and legal frameworks within which it is nested) ensure a sustainable harvest, maintain biodiversity and ecosystem functions, and adapt to climate change?<sup>118</sup>

However, overwhelming evidence shows that these crucial uses of the marine world are in danger. Under such circumstances, the depletion of fishery resources is not a crisis for food, but also a crisis for environment.

The history of high-seas fisheries management over the last 150 years can be classified into three phases. The first phase, up until the early 1970s, saw a rapid increase in both the number of fishing vessels operating in the individual oceans and advances in technology which allowed greater catches. The phase was characterized by generally narrow coastal State maritime zones and large areas of high seas. Also, a considerable proportion of fisheries in the high seas fell under the jurisdiction of international or regional fishery commissions by the mid-1970s. The second phase, the period from the mid-1970s up until the early 1990s, reflected the developments and negotiations of the Third United Nations Conference on the Law of the Sea. Owing to the practices on claiming exclusive economic zone from countries, coastal states extended their jurisdiction out to 200 nautical miles so that many areas (and fisheries) that were previously classified as high seas came under national jurisdiction.

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117. United Nations Food and Agriculture Organization (FAO) recognizes the term "food security" as "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life. (World Food Summit, 1996)" From the wording, it is well accepted that food security does not mean "enough" food but also "good" food. See FAO, *Policy Brief*, Issue 2 (June 2006).

118. Serge M. Garcia and Andrew A. Rosenberg, "Food Security and Marine Capture Fisheries: Characteristics, Trends, Drivers and Future Perspectives," *Philosophical Transactions Royal Society B*, Vol. 365, No. 1554 (2010), pp. 2869–2880.

The area defined as high seas was thus considerably reduced and consequently so was the area under the jurisdiction of regional and international fisheries commissions. Since the mid-1990s, high-seas fisheries management has entered its third phase. This phase reflects the international community's concerns about overfishing in the high seas. Even greater emphasis has been placed on the international duties and responsibilities of all nations in the conservation of ocean resources, as well as the importance of cooperation between States, both adjacent to the fisheries and those exploiting them.<sup>119</sup>

For the purposes of conserving and managing marine living resources, traditional thought on *utilization* should be transformed to *sustainability*. In order to reach this objective, "sustainable development" is one of the main policy bases. Sustainable development is the idea that "meets the needs of the present generation without compromising the ability of future generations to meet their own needs."<sup>120</sup> Governments should take this position in making their fishery policy rather than concentrate on increasing fishing capacity or the amount of fishing, especially when the FAO reiterates the serious situation in the 1999 International Plan of Action for the Management of Fishing Capacity.<sup>121</sup>

Following on the concept of sustainable development of fisheries, another consideration that should be taken when making policy on fisheries is the "precautionary approach."

Since the mid-1980s, the concept of precautionary approach was developed through regional legal instruments for the protection of the terrestrial, and subsequently marine, environment, and was finally enshrined in Principle 15 of the 1992 Rio Declaration.<sup>122</sup> It states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

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119. Sevaly Sen, "The Evolution of High-Seas Fisheries Management in the North-East Atlantic," *Ocean & Coastal Management*, Vol. 35, Nos. 2-3 (1997), pp. 85-86.

120. World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987, p. 43.

121. Rosemary Rayfuse, "The Challenge of Sustainable High Seas Fisheries," in Nico Schrijver and Friedl Weiss, eds., *International Law and Sustainable Development: Principles and Practice*, Leiden and Boston: Martinus Nijhoff Publishers, 2004, pp. 469-477.

122. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I), 12 August 1996.

Based on the precautionary approach, the UNFSA not only includes this approach as a kind of duty to co-operate,<sup>123</sup> but also demands the application of the precautionary approach. This can be seen from Article 6 of the UNFSA:

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.
3. In implementing the precautionary approach, States shall:
  - (a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty; . . .

Such considerations even have to be applied when a natural phenomenon has a significant adverse impact on the status of straddling fishing stocks or highly migratory fish stocks. The exact language of Article 6 of UNSFA states that “States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact” and that “States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks.”<sup>124</sup>

Policy assessment is one of the most important parts in a policy-making circle. During the period of focusing on economic development and trading, exploring the marine living resources and increasing the production might be the right choice. However, under a globalized world, it is hard to distinguish the complicated web of influence between trade and environment. So is the fishery. Nonetheless, since we are in the phase of conserving and managing fishery resources, and international instruments and RFMOs have already embedded the concepts of sustainability and precautionary into the fishing activities, then it might be the right time and right choice to adjust fisheries policy to a more environmental deliberation. Moreover, States bordering semi-enclosed seas, such

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123. UNFSA, Article 5(c).

124. UNFSA, Article 6(7).

as the South China Sea, should have responsibilities to embed the consideration of regional cooperation into every party's national ocean policy. Moreover, the goal of sustainable fisheries management in the South China Sea region is currently impeded by ill-organized management which originated from the disputes of maritime delimitation and territorial sovereignty issues. This could be a good opportunity for all claimants to the South China Sea islands to take sustainable fisheries management into serious consideration.

**GLOSSARY OF SELECTED ABBREVIATED TERMS**

The Association of Southeast Asian Nations	(ASEAN)
Code of Conduct	(COC)
China's National Offshore Oil Corporation	(CNOOC)
Exclusive Economic Zone	(EEZ)
Food and Agriculture Organization of the United Nations	(FAO)
Inter-American Tropical Tuna Commission	(IATTC)
International Tribunal for the Law of the Sea	(ITLOS)
Illegal, Unreported, and Unregulated	(IUU)
Large Marine Ecosystem	(LME)
Regional Fishery Management Organizations	(RFMO)
United Nations Convention on the Law of the Sea	(UNCLOS)
United Nations Environment Programme	(UNEP)
United Nations Straddling and Highly Migratory Fish Stocks	(UNFSA)



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