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NATURE KNOWS NO BORDERS: INTERNATIONAL LAW AND ENVIRONMENTAL MEASURES IN RESOLVING MARITIME BOUNDARY DISPUTES

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Abstract

Maritime boundary delimitation has always been a challenging issue at least for three reasons. Firstly, it has to take into account the expansion of territorial sovereignty and sovereign rights at sea, notably since the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Secondly, it does not only involve legal aspects but also technical ones, and not every state has adequate resources to deal with technical matters. Thirdly, it is politically sensitive at times given the strategic role of oceans in national defense and security. Thus, it is not surprising that many maritime boundary disputes have taken a very long time to resolve or even remain unresolved until present, such as the overlapping claims in the South China Sea (SCS). This article argues that maritime boundary disputes should not jeopardize the marine environment in disputed areas, especially where environmental protection and preservation are critically needed. Furthermore, environmental measures could play a significant role in resolving maritime boundary disputes, since they could encourage the states involved to cooperate in managing the marine environment, a field that is less politically sensitive compared to the question of sovereignty. As far as the SCS is concerned, experts have warned that this area has been severely degrading, especially the coral reefs, and may lead to ecocide. In this context, this article will discuss international instruments related to environmental measures that should be considered in the SCS disputes and the role that the Association of Southeast Asian Nations (ASEAN) could play.

Keywords*: maritime boundary, environment, marine biodiversity, South China Sea, ASEAN.*

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I. INTRODUCTION

Maritime boundary delimitation has always been a challenging issue for states at least for three reasons. Firstly, it has to take into account the expansion of territorial sovereignty and sovereign rights at sea, notably since the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[1] Secondly, it does not only involve legal aspects

[1] United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('UNCLOS').

but also technical ones, and not every state has adequate resources to deal with technical matters. Thirdly, it is politically sensitive at times given the strategic role of oceans in national defense and security. Thus, it is not surprising that many maritime boundary disputes have taken a very long time to resolve or even remain unresolved until present, such as the overlapping claims in the South China Sea (SCS).

The SCS is a part of the western Pacific Ocean that borders the Southeast Asian mainland.[2] It covers an area of about 3,685,000 square kilometers with a mean depth of 1,212 meters.[3] There are seven countries that surround the SCS, namely China, Taiwan, the Philippines, Brunei Darussalam, Indonesia, Malaysia, and Vietnam.[4] The area of SCS forms part of the vital international route of maritime trade and transport, which has long been used by the East and Southeast Asian states to trade with their partners in other parts of the region and the rest of the world.[5]

The SCS disputes have been incredibly complex, politically sensitive, and extremely long-winded. One scholar even argued that such disputes had become an obstacle to realizing a positive security relationship in the region.[6] The SCS disputes basically concern the overlapping territorial sovereignty claims over the islands and maritime features in the SCS.[7] China, Taiwan, Vietnam, the Philippines, Malaysia,

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[2] Encyclopaedia Britannica, "South China Sea", available at: https://www.britannica.com/place/South-China-Sea , accessed on 29 August 2017.

[3] *Ibid*.

[4] Some writers also include other countries, including Singapore, Thailand, and Cambodia. See e.g., Nguyen Chu Hoi and Vu Hai Dang, "Building a Regional Network and Management Regime of Marine Protected Areas in the South China Sea for Sustainable Development", *Journal of International Wildlife Law and Policy*, vol. 18, no. 2, 2015; Christopher Linebaugh, "Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing Natural Resources of the South China Sea", *Columbia Journal of Transnational Law* vol. 52, 2014; and Mark J. Valencia, "The South China Sea: Prospects for Marine Regionalism", *Marine Policy*, vol. 2, no. 2, 1978.

[5] Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, vol. 107, no. 1, 2013, p. 99.

[6] Mark J. Valencia, "Troubled Waters: Disputes in the South China Sea", *Harvard International Review*, vol. 16, no. 2, 1994, p. 12.

[7] Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime

and Brunei Darussalam all have competing claims over these islands.[8] In particular, the dispute over the Spratly Islands is perhaps the most complex one. All the Spratly Islands are claimed by China, Taiwan, and Vietnam, but many of the features of the Spratly Islands also fall within the Kalayaan Island Group, claimed by the Philippines, and several features are claimed by Malaysia with one reef lies within 200 nautical miles of Brunei Darussalam.[9] In addition, it has been reported that more than sixty of the geographic features in the Spratly Islands are occupied by the claimants.[10]

The SCS disputes reached its culmination in the international arbitration between the Philippines and China regarding the unilateral claim by China on its sovereignty over the SCS. The Chinese claim constituted imaginary lines—known as the "nine dash line"—that enclosed the islands and maritime features in the SCS, making them parts of China's maritime territory. To challenge the legality of this claim, the Philippines initiated arbitral proceedings against China on 22 January 2013 pursuant to Articles 286 and 287 of UNCLOS, and in accordance with Article 1 of UNCLOS.[11] Specifically, the Philippines requested the arbitral tribunal to:

1) "declare that the Parties' respective rights and obligations in regard to the waters, seabed and maritime features of the South China Sea are governed by UNCLOS, and that China's claims based on its "nine dash line" are inconsistent with the Convention and therefore invalid;
2) determine whether, under Article 121 of UNCLOS, certain of the maritime features claimed by both China and the Philippines are islands, low tide elevations or submerged banks, and whether they are capable of generating entitlement to maritime zones greater than 12 M; and

Disputes in the South China Sea", *American Journal of International Law*, vol. 107, no. 1, 2013, pp. 143–145; Gao and Jia, see note 6.

[8] Linebaugh, see note 5, p. 542.

[9] Beckman, see note 8, p. 142.

[10] *Ibid*.

[11] Permanent Court of Arbitration, "PCA Case No.2013-19 in the matter of the South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China", Award of 12 July 2016, paragraph 28.

3) enable the Philippines to exercise and enjoy the rights within and beyond its exclusive economic zone and continental shelf that are established in the Convention".[12]

On 12 July 2016, the Permanent Court of Arbitration delivered its award that principally rejected China's claim regarding the "nine dash line" as well as declared that it is contrary to UNCLOS.[13] In addition, the tribunal found that China has breached its obligation with respect to the protection and preservation of the marine environment in the SCS.[14] In this regard, the tribunal clearly stated that the fishing activities conducted by the fishers from Chinese flagged vessels have caused severe destruction of the coral reef ecosystem.[15]

Despite the award, the Chinese Government still contended that it did not recognize the competence of the tribunal, and accordingly refused to observe and acknowledge the tribunal's decision.[16] Therefore, the SCS disputes still linger and this situation has raised a number of concerns, particularly with regard to the marine environment surrounding the region. As one scholar has noted:

> *"Rich resources usually trigger international disputes as it has also happened in the South China Sea. The complicated political landscape of the South China Sea contains potential of conflicts with various different national interests. ... No doubt, it is the responsibility of the coastal states to conserve and protect the rich biological resources in the South China Sea in accordance with the principle of sustainable development, but the disputes over territorial sovereignty and maritime claims may affect adversely any effective conservation measures."*[17]

This clearly illustrates that the complex maritime boundary disputes in the SCS could somehow pose a significant threat to the marine

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[12] *Ibid*.

[13] *Ibid*, paragraph 1203.

[14] *Ibid*.

[15] *Ibid*.

[16] See e.g., The Guardian, "Beijing Rejects Tribunal's Ruling in South China Sea Case", available at: https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china, accessed on 12 July 2016.

[17] Keyuan Zou, "Managing Biodiversity Conservation in the Disputed Maritime Areas: The Case of the South China Sea", *Journal of International Wildlife Law and Policy*, vol. 18, no. 2, 2015, p. 98.

environment in the region.

The SCS region itself is conveniently located at one of the world's marine biodiversity hotspots. It has been recognized as a global center of marine shallow-water, tropical biodiversity and a home to special marine environment consisting of submerged coral reefs.[18] In addition, a significant number of species of mangrove, sea grass, and giant clam have been identified in the near-shore areas of the SCS.[19] Furthermore, it has been reported that the SCS supports a significant world fishery important to the food security and the economy, especially of the bordering countries.[20]

As indicated in the ruling of the Permanent Court of Arbitration, human activities in the SCS, particularly fishing practices[21] and reclamation activities,[22] have become a major threat to the marine environment in the region. Many writers have also suggested other threats, such as overexploitation of fishery resources,[23] lack of research attention,[24] climate change,[25] and lack of coordinated regional efforts.[26]

This article argues that maritime boundary disputes should not jeopardize the marine environment in disputed areas, especially where

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[18] Hoi and Dang, see note 5, p. 129.

[19] Yann-huei Song, "A Marine Biodiversity Project in the South China Sea: Joint Efforts Made in the SCS Workshop Process", *International Journal of Marine and Coastal Law*, vol. 26, 2011, p. 121, quoted UNEP/GEF Project, *Reversing Degradation Trends in the South China Sea and Gulf of Thailand*, available at: http://www.unepscs.org/repository/startdown/381.html.

[20] *Ibid*.

[21] National Geographic, "Giant Clam Poaching Wipes Out Reefs in South China Sea", available at: http://news.nationalgeographic.com/2016/06/south-china-sea-coral-reef-destruction/, accessed on 12 July 2016.

[22] Abhijit Singh, "Why the South China Sea is on the Verge of an Environmental Disaster", available at: http://nationalinterest.org/blog/the-buzz/why-the-south-china-sea-the-verge-environmental-disaster-17348, accessed on 13 August 2016.

[23] J. Y. Liu, "Status of Marine Biodiversity of the China Seas", *PLOS One*, vol. 8, no. 1, 2013, p. 20.

[24] Danwei Huang, *et.al.*, "Conservation of Reef Corals in the South China Sea Based on Species and Evolutionary Diversity", *Biodiversity Conservation*, vol. 25, 2016, p. 332.

[25] Hoi and Dang, see note 5, p. 132.

[26] P.K.L. Ng and K.S. Tan, "The State of Marine Biodiversity in the South China Sea", *The Raffles Bulletin of Zoology*, vol. 8, 2000.

environmental protection and preservation are critically needed, such as in the SCS. Environmental measures could play a significant role in resolving maritime boundary disputes, since they could encourage the states involved to cooperate in managing the marine environment, a field that is less politically sensitive compared to the question of sovereignty. In this regard, coordinated regional efforts are essential to address the current challenges to the SCS marine environment. As most environmental problems are transboundary in nature, countries need to consider the importance of cooperative mechanism in handling such problems.

Against this background, this article will discuss international instruments related to environmental measures that should be considered in the SCS disputes, especially with regard to the conservation of marine biodiversity in the SCS. In this context, this article will analyze relevant instruments of international law, particularly UNCLOS and the 1992 United Nations Convention on Biological Diversity (CBD).[27] Then, it will examine the current initiatives and processes related to marine environmental measures in the SCS region. Subsequently, it will analyze the role that the Association of Southeast Asian Nations (ASEAN) could play with respect the formulation and implementation of environmental measures in resolving the SCS dispute. This article concludes that ASEAN holds a significant role in adopting necessary environmental measures and environmental cooperation in the SCS region. Accordingly, further measures still need to be taken especially within the Framework for the Code of Conduct for the South China Sea.

II. RELEVANT INSTRUMENTS OF INTERNATIONAL LAW

A. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

UNCLOS is the major international treaty that regulates the marine space and all activities conducted therein. It has been widely acknowledged as "a constitution for the oceans"[28] and many of its

[27] Convention on Biological Diversity (CBD), opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('CBD').

[28] Tommy Koh, "A Constitution for the Oceans", available at: http://www.un.org/

provisions reflect customary international law. The Preamble recognizes the essential objectives of UNCLOS, namely to facilitate international communication and to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment.[29]

As far as the marine environmental issues in the SCS are concerned, at least two parts under UNCLOS are of relevance, namely Part XII regarding Protection and Preservation of the Marine Environment, and Part IX regarding Enclosed or Semi-Enclosed Seas. Under Part XII, UNCLOS provides that all States have the obligation to protect and preserve the marine environment.[30] It also considers the importance of cooperation between States in this context. Article 197 stipulates:

> *"States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".*[31]

This provision therefore confirms the necessity of global and regional measures in implementing rules or measures for the protection and preservation of the marine environment.

Being surrounded by a number of countries, the SCS has a particular characteristic as an enclosed or semi-enclosed sea.[32] Thus, Part IX of UNCLOS is also applicable in this regard. There are two provisions concerning enclosed or semi-enclosed seas, namely Article 122 and 123. Article 122 provides:

> *"For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected*

depts/los/convention_agreements/texts/koh_english.pdf , accessed on 3 September 2017.

[29] UNCLOS, Preamble.

[30] UNCLOS, Article 192.

[31] UNCLOS, Article 197.

[32] For detailed discussions on the SCS as an enclosed or semi-enclosed sea, see e.g., Christopher Linebaugh, see note 5.

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".[33]

Furthermore, Article 123 states that:

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

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article".[34]

Article 123 thus lays down key provisions that could serve as a legal basis to encourage and to promote cooperation between States concerned in formulating and adopting necessary marine environmental measures in the SCS.

B. CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

The CBD was adopted in 1992 as a part of the United Nations Conference on Environment and Development (also known as the "Earth Summit") held in Rio de Janeiro, and entered into force on 29 December 1993.[35] It has been regarded as "a landmark in the environment and developmental field, as it takes for the first time a comprehensive rather than a sectoral approach"[36] to conservation and

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[33] UNCLOS, Article 122.

[34] UNCLOS, Article 123.

[35] Convention on Biological Diversity, "History of the Convention", available at: https://www.cbd.int/history/default.shtml, accessed on 29 August 2017.

[36] Lyle Glowka, *et.al.*, *A Guide to the Convention on Biological Diversity*, IUCN-The

sustainable use of the Earth's biological diversity. The objectives of the CBD are threefold: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[37]

The principle of CBD is embodied in Article 3, which provides:

> *"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".*[38]

As to the marine environment, the CBD confirms that Contracting Parties shall implement the Convention consistently with States' rights and obligations under the law of the sea.[39] Therefore, the law of the sea prevails should the implementation of the CBD conflicts with it.[40]

The CBD does not contain any particular provision with respect to semi enclosed or enclosed seas. However, there are a number of provisions under the CBD that could be of relevance. For instance, Article 5 obliges each Contracting Party to cooperate with other Contracting Parties in respect of areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity.[41]

III. THE CURRENT INITIATIVES ON THE SCS MARINE ENVIRONMENT

It is interesting to note that environmental cooperation among relevant countries in the SCS is arguably more promising compared to the settlement of maritime boundary disputes. As suggested by Chen, there has been a growing trend towards environmental cooperation in the

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World Conservation Union Gland and Cambridge, 1994, p. 1.

[37] CBD, Article 1.

[38] CBD, Article 3.

[39] CBD, Article 22.

[40] Glowka, *et.al.*, see note 37, p. 109.

[41] CBD, Article 5.

SCS region at both the policy and operational levels since the 1990s.[42] The environmental measures involving the SCS bordering countries however have been in place since 1970s. These measures are discussed below, which include the United Nations Environment Programme (UNEP) initiative; the Philippines-Viet Nam Joint Research; and the Coral Triangle Initiative. The current development regarding the proposal to establish a network of marine protected areas and a marine peace park in the SCS region will also be discussed.

A. UNEP INITIATIVE

Marine environmental cooperation in the SCS region was initiated in the late 1970s through the development of the East Asian Seas Action Plan under the UNEP's Regional Seas Programme.[43] However, the Action Plan generally sponsored small national research projects that are rather sporadic and temporary, thus did not contribute significantly to regional marine environmental cooperation in the SCS.[44] This situation changed substantially in the 1990s, when countries in the SCS region were integrated through the UNEP/ Global Environmental Facility (GEF) Project entitled "Reversing Environmental Degradation Trends in the South China Sea and Gulf of Thailand".[45] It was the first and only project to be approved inter-governmentally by seven countries bordering the SCS (Cambodia, China, Indonesia, Malaysia, the Philippines, Thailand, and Viet Nam), including China.[46]

B. PHILIPPINES-VIETNAM JOINT RESEARCH

Another environmental initiative that has been taken in the SCS region is the Philippines-Vietnam Joint Research, conducted from 1996 to 2007.[47] This program, entitled "Joint Oceanographic and Marine

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[42] Sulan Chen, "Environmental Cooperation in the South China Sea: Factors, Actors and Mechanisms", *Ocean and Coastal Management*, vol. 85, 2013, p. 132.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*.
[47] John W. McManus, Kwang-Tsao Shao, and Szu-Yin Lin, "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Imprtance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan", *Ocean Development and International Law*, vol . 41, 2010, 274.

Scientific Research Expedition in the South China Sea", included some findings on the status of marine biodiversity around the SCS region and presented some evidence regarding heavy exploitation of fisheries in the SCS.[48] The project has been praised as a forum that successfully demonstrated a cooperative governance mechanism for larger-scale research, safety navigation, and conservation.[49]

C. CORAL TRIANGLE INITIATIVE

The Coral Triangle Initiative (CTI) is another example of regional marine biodiversity cooperation that is relevant to the SCS region. The CTI covers the region along the equator at the confluence of the Western Pacific and Indian Oceans, with the total area of 18,000 square kilometers in approximate.[50] It is a multilateral partnership of six countries—Indonesia, Malaysia, Papua New Guinea, Philippines, Solomon Islands and Timor Leste—established in 2009 and dedicated to sustaining marine and coastal resources by addressing environmental issues such as food security, climate change and marine biodiversity.[51] The Spratly Islands is located at the border of the CTI area, however the current territorial disputes in the SCS have been preventing the islands from being included in the CTI programme.[52]

D. MARINE PROTECTED AREAS NETWORK

According to the CBD, a "protected area" is defined as "a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives".[53] This definition has been further elaborated by the Ad hoc Technical Expert Group on Marine and Coastal Protected Areas, which defined a marine protected area (MPA) as:

[48] *Ibid*.

[49] *Ibid*, quoted A. C. Alcala, "The Philippines-Vietnam Joint Research in the South China Sea, 1996–2007", *Manila Bulletin*, 27 April 2008, available at: www.articlearchives.com/environmentnatural-resources/ecology-environmental/173704-1.html.

[50] McManus, Shao, and Lin, see note 48, p. 274.

[51] Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security, "History of CTI-CFF", available at: http://www.coraltriangleinitiative.org/history-cti-cff, accessed on 3 September 2017.

[52] McManus, Shao, and Lin, see note 48, p. 275.

[53] CBD, Article 2.

> *"any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/ or coastal biodiversity enjoys a higher level of protection than its surroundings."*[54]

Countries bordering the SCS have individually set up and declared parts of their territories as MPAs. Nevertheless, it has been reported that these MPAs have only demonstrated a modest contribution to the conservation of marine biodiversity in the region.[55] In fact, some of the MPAs have failed or only partially achieved their objectives.[56] In this context, a proposal regarding the establishment of a regional network of MPAs has been put forward and discussed for some time. As Dang has argued:

> *"The practice of networking MPAs is even more critical because of the characteristics of the marine ecosystem. Compared to the terrestrial environment, the sea is relatively open with more organisms dispersing and migrating at various life stages. Changes in marine ecosystems also occur in a shorter scale of time as they are subject to the surrounding medium and respond to forces such as tides or circulation patterns. Marine ecosystems and species are more closely connected in a number of ways such as by the actions of waves, winds, freshwater inflows or tidal currents"*[57]

The network of MPAs is expected to assist countries bordering the SCS region to gain the objectives of marine biodiversity conservation in more effectively. The challenges however remain as it requires regional cooperation in the SCS that is still at a very "under-developed" stage.[58] In addition, the complexity of the SCS disputes would also substantially

[54] Convention on Biological Diversity, "Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work", *Report of Ad hoc Technical Expert Group on Marine and Coastal Protected Areas*, 8th Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, Montreal, Canada, March 10–14, 2003.

[55] Vu Hai Dang, *Marine Protected Areas Network in the South China Sea: Charting a Course for Future Cooperation*, Martinus Nijhoff Publishers Leiden and Boston, 2014, pp 1–2.

[56] *Ibid*.

[57] *Ibid*, p. 16.

[58] *Ibid*, p. 258.

limit the territorial scope of a potential regional regime on MPAs in this region.[59]

E. MARINE PEACE PARK PROPOSAL

Recently, there have been some discussions regarding the possibility of designating the SCS, especially the Spratly Islands, as an international marine peace park.[60] This initiative is based on the works of the International Union for Conservation of Nature (IUCN), which has defined "Parks for Peace" as "transboundary protected areas that are formally dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and to the promotion of peace and cooperation".[61] Furthermore, the IUCN has also proposed specific objectives of peace parks, which include as follow:

i) "Supporting long-term cooperative conservation of biodiversity, ecosystem services, and natural and cultural values across boundaries;
ii) Promoting landscape-level ecosystem management through integrated bio-regional land-use planning and management;
iii) Building trust, understanding, reconciliation and cooperation between and among countries, communities, agencies and other stakeholders;
iv) Preventing and/ or resolving tension, including over access to natural resources;
v) Promoting the resolution of armed conflict and/ or reconciliation following armed conflict;
vi) Sharing biodiversity and cultural resource management skills and experience, including cooperative research and information management;
vii) Promoting more efficient and effective cooperative management programmes;
viii) Promoting access to, and equitable and sustainable use of natural resources, consistent with national sovereignty; and

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[59] *Ibid*.

[60] See e.g., David Cyranoski, "South China Sea Ruling Sparks Conservation Fears", *Nature*, vol. 535, 21 July 2016.

[61] Trevor Sandwith, *et.al.*, *Transboundary Protected Areas for Peace and Cooperation*, IUCN-The World Conservation Union Gland and Cambridge, 2001, p. 3.

ix) Enhancing the benefits of conservation and promoting benefit-sharing across boundaries among stakeholders".[62]

The current marine peace park initiatives include the Red Sea Marine Peace Park (RSMPP) and the Korea Marine Peace Park.[63] The RSMPP was initiated as part of the peace treaty between Israel and Jordan in 1994, and was managed by the United States National Oceanic and Atmospheric Administration (NOAA).[64] The project focused on the sustainable use and conservation of the shared coral reefs in the region.[65] The Korea Marine Peace Park was the result of the extension of the Korean Peace Parks and established in 2007 through a Joint Declaration of Intent between North Korea and South Korea.[66] Unfortunately, tense relations that still continue between the two countries have obstructed further development of this initiative.[67]

The discussion regarding the establishment of a marine peace park in the SCS region started in the 1990s, however it was only in 2009 that this proposal gained substantial credibility.[68] Recently, the proposal gained a significant support especially from marine scientists as well as environmentalists as a motion on this subject has been filed with the IUCN.[69]

IV. WHAT ASEAN CAN DO

ASEAN was established on 8 August 1967 with the signing of the ASEAN Declaration[70] by its five founding countries: Indonesia,

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[62] *Ibid*, p. 5.

[63] Peter Mackelworth, "Peace Parks and Transboundary Initiatives: Implications for Marine Conservation and Spatial Planning", *Conservation Letters*, vol. 5, 2012, p. 92.

[64] *Ibid*.

[65] *Ibid*.

[66] *Ibid*, pp. 92–93.

[67] *Ibid*, p. 92.

[68] McManus, Shao, and Lin, see note 48, p. 276.

[69] University of Hawaii, "South China Motion Press Release", available at: http://blog.hawaii.edu/elp/files/2016/08/South-China-Sea-Motion-Press-Release-5Sept2016.pdf, accessed on 3 September 2017.

[70] Declaration Constituting an Agreement Establishing the Association of South East Asian Nations (ASEAN), signed 8 August 1967, 1331 UNTS 235 (entered into force 8 August 1967).

Malaysia, Philippines, Singapore and Thailand.[71] Currently, ASEAN has ten Member States which include the five founding countries and Brunei Darussalam (joined on 7 January 1984), Viet Nam (28 July 1995), Lao PDR (23 July 1997), Myanmar (23 July 1997) and Cambodia (30 April 1999).[72] The philosophy of cooperation within ASEAN is based on the "ASEAN Way" which incorporates three essential pillars.[73] Firstly, non-interference or non-intervention in each other's domestic affairs in accordance with article 2 paragraph 7 of the Charter of the United Nations.[74] Secondly, preference towards consensus planning and co-operative programs in lieu of legally binding treaties. Thirdly, putting more reliance on national implementation instead of common and formal region-wide bureaucracy.[75]

Initially, the ASEAN framework did not embrace environmental concerns.[76] The environmental dimension of ASEAN began to take shape after the then ASEAN members attended the 1972 United Nations Conference on the Human Environment in Stockholm.[77] Since then, the ASEAN Member States began to include environmental management and cooperation in its organizational framework. For instance, every three years ASEAN holds its Ministerial Meeting on the Environment and the actual work for the ministerial meetings is coordinated through the ASEAN Senior Officials on the Environment.[78] Particular concerns on biodiversity matters have been reflected through the establishment of an ASEAN Regional Centre for Biodiversity Conservation which

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[71] Association of Southeast Asian Nations, "Overview", available at: http://asean.org/asean/about-asean/overview/, accessed on 4 September 2017.

[72] *Ibid*.

[73] See Koh Kheng-Lian and Nicholas A Robinson, "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the 'ASEAN Way'", *Singapore Journal of International and Comparative Law*, vol. 6, 2002, pp. 642–643.

[74] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[75] See also Koh Kheng-Lian and Nicholas A. Robinson, "Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model" in Daniel C. Esty and Maria H. Ivanova, eds., *Global Environmental Governance: Options and Opportunities*, Yale School of Forestry and Environmental Studies, 2002, pp. 101–120.

[76] Koh and Robinson, see note 74, p. 643.

[77] *Ibid*.

[78] *Ibid*, pp. 645–646.

has been strongly linked to the objectives of the CBD.[79]

In 2005, the ASEAN leaders declared their intention to create a charter for the association, and in November 2007 they signed the ASEAN Charter.[80] The Charter,[81] which entered into force on 15 December 2008, serves as a firm foundation for ASEAN by providing legal status and institutional framework.[82] The Charter provides fifteen purposes of ASEAN. Among these, the purpose that is closely related to environmental issues is "to promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples".[83]

Since the SCS disputes involve some ASEAN Member States—particularly Brunei, Malaysia, the Philippines, and Viet Nam as claimant states—the involvement of ASEAN in the SCS disputes is inevitable. Many scholars have also argued that ASEAN is the most proper and feasible forum to resolve the SCS disputes.[84] Nevertheless, the SCS disputes have posed tremendous challenges for ASEAN as it has to strike a delicate balance between maintaining the "ASEAN Way "on one hand and ensuring regional security on the other. As Thayer put it:

> "Since ASEAN was founded in 1967, it has sought to preserve Southeast Asia's autonomy from interference by outside powers. At the same time, ASEAN has sought to assert its centrality in regional

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[79] *Ibid*, pp. 647–648.

[80] David Martin Jones, "Security and Democracy: The ASEAN Charter and the Dilemmas of Regionalism in South-East Asia", *International Affairs*, vol. 84, no. 4, 2008, p. 736.

[81] Charter of the Association of Southeast Asian Nations, opened for signature 20 November 2007 (entered into force 15 December 2008) ('ASEAN Charter'), available at: http://www.asean.org/storage/images/archive/21069.pdf, accessed on 3 September 2017.

[82] Association of Southeast Asian Nations, "ASEAN Charter", available at: http://asean.org/asean/asean-charter/, accessed on 4 September 2017.

[83] ASEAN Charter, Article 1.9.

[84] See e.g., Stephen Wakefield Smith, "ASEAN, China, and the South China Sea: Between A Rock and A Low-Tide Elevation", *University of San Francisco Maritime Law Journal*, vol. 29, 2016 and Arif Havas Oegroseno, "ASEAN as the Most Feasible Forum to Address the South China Sea Challenges", *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 107, 2013.

security affairs. South China Sea disputes have proven to be a particularly vexing obstacle to the attainment of these objectives. ASEAN has had difficulty reaching consensus among its diverse members on a unified South China Sea policy. ASEAN also has had difficulty asserting its centrality in dealing with China".[85]

To address this challenging situation, ASEAN and China have conducted numerous meetings and consultations. In November 2002, they finally agreed to adopt a non-binding instrument known as the Declaration on the Conduct of Parties in the South China Sea (DOC).

The DOC contains four trust and confidence building measures and five voluntary cooperative activities. In particular, it states that:

"Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

a. holding dialogues and exchange of views as appropriate between their defense and military officials;
b. ensuring just and humane treatment of all persons who are either in danger or in distress;
c. notifying, on a voluntary basis, other Parties concerned of any impending joint/ combined military exercise; and
d. exchanging, on a voluntary basis, relevant information".[86]

As to the cooperative activities, the DOC provides that:

"Pending a comprehensive and durable settlement of the disputes, the Parties concerned may explore or undertake cooperative activities. These may include the following:

a. marine environmental protection;
b. marine scientific research;
c. safety of navigation and communication at sea;
d. search and rescue operation; and
e. combating transnational crime, including but not limited to traf-

[85] Carlyle A. Thayer, "ASEAN, China and the Code of Conduct in the South China Sea", *SAIS Review of International Affairs*, vol. 33, no. 2, 2013.

[86] Declaration on the Conduct of Parties in the South China Sea, available at: https://cil.nus.edu.sg/rp/pdf/2002%20Declaration%20on%20the%20Conduct%20of%20Parties%20in%20the%20South%20China%20Sea-pdf.pdf, accessed on 3 September 2017, Paragraph 5.

ficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms".[87]

Despite the fact that the DOC contains essential provisions that would promote amicable settlement of the SCS disputes, ASEAN and China still have to implement the DOC through the adoption of a code of conduct in line with Paragraph 10 of the DOC, which stipulates that:

"The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective".[88]

This is the critical part that would determine whether the DOC will be a success or a failure. The process to implement the DOC has been almost as complex as the SCS disputes themselves. Since the adoption of the DOC in November 2002, it was only on 6 August 2017—almost fifteen years later—that ASEAN and China finally reached an agreement to endorse the Framework for the Code of Conduct for the South China Sea (COC).[89]

Regarding this recently adopted COC Framework, one scholar has commented as follows:

"While the framework is a step forward in the conflict management process for the South China Sea, it is short on details and contains many of the same principles and provisions contained in the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea (DOC) which has yet to be even partially implemented. ... The framework will form basis for further negotiations on the COC. Those discussions are likely to be lengthy and frustrating for those ASEAN members who had hoped to see a legally binding, comprehensive and effective COC".[90]

The COC Framework consists of three parts: preambular provisions, general provisions, and final clauses. As far as environmental issues

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[87] *Ibid*, Paragraph 6.
[88] *Ibid,* Paragraph 10.
[89] Ian Storey, "Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea", available at: https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_62.pdf, accessed on 4 September 2017.
[90] *Ibid*, p.1.

are concerned, the general provisions include a section titled "Basic Undertakings", which consists of six parts: Duty to Cooperate; Promotion of Practical Maritime Cooperation; Self-Restraint/ Promotion of Trust and Confidence; Prevention of Incidents; Management of Incidents; and Other Undertakings in Accordance with International Law.[91] Although it is not explicitly elaborated under the Framework, the "Promotion of Practical Maritime Cooperation" has been assumed to include environmental protection.[92]

The perfunctory nature of the COC Framework may seem counterproductive to marine environmental cooperation in the SCS region. However, it could also provide opportunities for both ASEAN and China to further elaborate the scope of "maritime cooperation" by thoroughly discussing environmental measures that are acceptable to both parties. Considering the complexity of the SCS disputes and China's hesitancy to accept anything that involves the allocation of maritime boundaries in the SCS, the environmental measures adopted should be designed as cautiously as ASEAN Member States could.

In this regard, it is advisable for ASEAN to consider the following measures in promoting environmental cooperation in the SCS region. Firstly, ASEAN should keep being objective by relying on relevant international instruments, especially UNCLOS and the CBD. All countries bordering the SCS are parties to these important treaties, except Cambodia that is not yet a party to UNCLOS. Promoting an environmental cooperation to support marine biodiversity conservation in the SCS region is therefore an almost universal obligation for all States concerned.

Secondly, ASEAN and China should bring together the scientific findings and environmental assessments of marine biodiversity in the SCS region in all decision making process in light of the COC Framework. These would again serve as objective criteria under which environmental measures in the SCS will be proposed. The alarming rate of marine biodiversity decline in the SCS should be sufficient as a wake-up call to all countries bordering the SCS.

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[91] *Ibid*, p. 5.
[92] *Ibid*.

Thirdly, ASEAN should take this opportunity of elaborating the COC Framework to develop a regional approach in the protection and preservation of the marine environment, as well as marine biodiversity conservation. Currently, ASEAN initiatives on this particular field is still lacking and under developed. It has been suggested that regional and cooperative approaches in oceans management have appeared to win more favor among countries in the world. Regional cooperation to solve environmental problems has also been regarded as successful as it leads to enhanced confidence and dialogue among concerned States and stakeholders.[93] In this regard, there has also been wide support towards regionalism in biodiversity conservation as it has been considered the most appropriate measure to deal with numerous problems that may arise from conservation efforts. As Karkkainen has observed:

> *"...global policy-makers might consider whether some seemingly global environmental problems might better lend themselves to regional solutions, on the theory that effective inter-sovereign and state/non-state problem-solving collaborations ... might be more readily obtained at eco-regional scales. For example, the conservation of biodiversity might better be understood not as a single overarching global problem requiring global rules and approaches, but rather as a series of thematically linked local and regional ecosystem-scale problems, ultimately requiring local and regional solutions and replicable regional governance models."*[94]

In this context, ASEAN has a pivotal role in designing a specific regional approach in marine environmental protection that still needs to be developed in the Southeast Asian region, including the SCS. Through this particular approach, ASEAN could enhance its participation in global efforts to conserve marine biodiversity.

V. CONCLUSION

The SCS disputes are probably the most complex maritime boundary disputes that ever take place in the Asian region. A myriad number of

[93] Gunnar Kullenberg, "Regional Co-Development and Security: A Comprehensive Approach", *Ocean and Coastal Management*, vol. 45, 2002, p. 762.

[94] Bradley Karkkainen, "Marine Ecosystem Management & a "Post-Sovereign" Transboundary Governance", *San Diego International Law Journal*, vol. 6, 2004, p. 141.

studies and research regarding the SCS have been conducted to find feasible solutions for countries involved in the disputes. The progress to implement these solutions however remains slow and at the same time, the SCS region continues suffering from deterioration of the marine environment and rapid decline of marine biodiversity.

It is therefore a high time for ASEAN to enhance its active involvement in resolving the SCS disputes through the adoption of environmental measures and environmental cooperation in the region. The lingering boundary disputes and overlapping territorial claims in the SCS should not hinder the countries involved from adopting measures or reaching an agreement on how to deal with environmental threats in the SCS region. Further efforts to elaborate the COC Framework with respect to marine environmental protection will also provide an excellent opportunity for ASEAN to develop a specific regional approach to the protection and preservation of the marine environment, especially marine biodiversity.

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