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Managing Non-Traditional Security Concerns in the Context of Competing Maritime Claims: A Path to Peace or a Road to Nowhere?

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This is a preliminary paper at the very early stages of development. It seeks to map out the areas of law and policy, critical issues and core questions associated with the research topic. It is thus a conceptual outline rather than a paper per se.

1. Introduction

The South China Sea (SCS), which extends over 3.5 million kilometres with an average depth of 2000 metres[1] has become synonymous with intractable territorial and maritime delimitation disputes with the disagreement over the Spratly Archipelago (involving six nations - China, Taiwan, Vietnam, Malaysia, Brunei, Philippines) and the Paracel Archipelago (3 nations – Vietnam, China and Taiwan) being the most high profile of the disputes.[2]

The various disputes, which began to crystallise in the 1970s – with the discovery of oil – led to clashes between nations (particularly between China and Vietnam and China and the Philippines) in the late 1980s and early to mid-1990s.[3] Although relations appeared to improve in the late 1990s/ early 2000s between China and the other competing nations, tensions became apparent in

[1] Guifang (Julia) Xue, "Deep Danger: Intensified Competition in the South China Sea and Implications for China" 17 (2011 – 2012) *Ocean & Coastal LJ* 307 – 331 at 308.
[2] For an excellent overview of the origins of the various claims and disputes in the SCS see Nong Hong, *UNCLOS and Ocean Dispute Settlement. Law and Politics in the South China Sea* (Routledge 2012), chapter 2.
[3] Christopher C. Joyner, "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea" 13 (1998) *IJMCL* 193 – 236.

2009 as littoral states submitted information on their proposed continental shelf limits to the 1982 UNCLOS Continental Shelf Commission and responded to the submissions of rival claimants.[4] Unfortunately this tension has not been restricted to the exchange of terse diplomatic notes, and clashes between fishing vessels, oil exploration vessels and naval vessels belonging to both China and Vietnam occurred in 2011.[5] In November 2013 China declared an Air Defense Identification Zone (ADIZ) in the East China Sea drawing criticism from states outside of the region, notably the US, and is apparently contemplating an ADIZ in the South China Sea.[6] The year 2014 has been dominated by reports that China is artificially enhancing and occupying reefs in the Spratly archipelago. For example, the Johnson South Reef, until recently submerged is now occupied and, according to the Philippines, will provide the foundation for an airbase 800 miles from mainland China.[7] More generally, all of the states in the region are becoming increasingly militarised and more assertive in terms of their various claims.[8]

The SCS is of importance in terms of potential oil and gas resources, fish stocks (including yellow fin tuna) and has been described as a maritime super highway.[9] Of equal if not greater significance is its strategic importance (demonstrated by the fact that Japan occupied some of the Spratly Islands during WW2) to states within and beyond the region. Hence the interest of the US, Japan and other states in security and safety of shipping in the SCS more generally.

Given the intractability of the territorial and maritime disputes, the littoral and other interested states as well as academic commentators have increasingly

[4] See generally Ted L. McDorman, "The South China Sea after 2009: Clarity of Claims and Enhanced Prospects for Regional Cooperation" 24 (2010) *Ocean Yearbook* 507 – 535.
[5] See generally Ramses Amer, "China, Vietnam, and the South China Sea: Disputes and Dispute Management" 45 (2014) *Ocean Development and International Law* 17 – 40.
[6] See "China's Declaration of an Air Defense Identification Zone in the East China Sea: Implications for Public International Law" 18(17) 19 August 2014 *ASIL Insights* at http://www.asil.org/print/1611.
[7] See http://thebulletin.org/flashpoint-south-china-sea7736.
[8] Chris Rahman and Martin Tsamenyi, "A Strategic Perspective on Security and Naval Issues in the South China Sea" 41 (2010) *Ocean Development and International Law* 315 – 333 at 329.
[9] Guifang (Julia) Xue, "Deep Danger: Intensified Competition in the South China Sea and Implications for China" 17 (2011 – 2012) *Ocean & Coastal LJ* 307 – 331 at 308.

turned to a more indirect approach to improving cooperation between the disputant states: a focus on non-traditional security concerns.[10] Essentially, as a means of confidence building either to resolve the various disputes between the littoral nations or as a pathway to developing an alternative approach to territorial sovereignty. Commentators frequently invoke the examples of the Arctic and Antarctic in this respect.

What I would like to do in this paper, as part of this project, is to explore the extent to which a focus on non-traditional security concerns actually represents a viable pathway either to the resolution of the territorial and maritime delimitation disputes between the competing claimants or to the development of a long term interim solution whereby a framework is developed allowing states to manage the region without resolving those disputes.

In doing so, this paper has or at least will have the following components: a brief overview of the disputes in the SCS and an assessment of why they are particularly intractable; a brief overview of the global and regional regime which applies to the SCS within which a small number of key principles and concepts of particular relevance to the management of non-traditional security issues will be highlighted; a brief introduction to what non-traditional security interests mean in the region and an attempt to identify key areas of cooperation; a brief introduction to the institutional infrastructure present in the region and how these institutions might or might not support non-traditional security cooperative initiatives and finally, an assessment of whether, even if such cooperation were successful in relation to individual initiatives this actually gets us any further in relation to addressing the more fundamental sovereignty and territorial disputes. In this final section I also intend to briefly address whether the Arctic or Antarctic provide helpful precedents or lessons for the SCS region.

[10] See generally Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014).

2. Territorial and Maritime Disputes in the SCS

For the purposes of this paper today I intend to say very little about these disputes, which have been canvassed in a number of other presentations today. I will simply confine myself to a small number of remarks relating to why there is, I think, general consensus that this is a particularly problematic area and why therefore, it is sensible to consider a more indirect approach to dispute resolution in the SCS.

First, there are multiple disputes involving up to six nations and the disputes vary in nature. Some we would categorise as maritime delimitation, others are territorial disputes with obvious consequences for maritime zones.[11] There is consequently a significant level of complexity to these disputes.

Second, there is a substantial disparity between the political, economic and military might of the nations involved in the disputes with China on the on hand and states such as Vietnam, Philippines and Malaysia on the other. Given that China has indicated that it does not wish to engage in formal dispute resolution –

[11] See generally Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea" (2013) 107 *AJIL* 142 – 163; Wendy N. Duong, "Following the Path of Oil: The Law of the Sea or *Realpolitik* – What Good Does Law do in the South China Sea Territorial Conflicts?" 30 (2006 – 2007) *Fordham International Law Journal* 1098 – 1208; Christopher C. Joyner, "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea" 13 (1998) *IJMCL* 193 – 236; Ted L. McDorman, "The South China Sea Islands Dispute in the 1990s – A New Multilateral Process and continuing Friction" 8 (1993) IJMCL 263 – 285; Guifang (Julia) Xue, "Deep Danger: Intensified Competition in the South China Sea and Implications for China" 17 (2011 – 2012) *Ocean & Coastal LJ* 307 – 331. For a more detailed discussion on the disputes between China and Vietnam see: Ramses Amer, "China, Vietnam, and the South China Sea: Disputes and Dispute Management" 45 (2014) *Ocean Development and International Law* 17 – 40; John D Ciociari and Jessica Chen Weiss, "The Sino-Vietnamese Standoff in the South China Sea" 13 (2012) *Geo. J. Int'l Aff.* 61 – 69; Junwu Pan, "Territorial Dispute between China and Vietnam in the South China Sea: A Chinese Lawyer's Perspective" 5 (2012) *Journal of East Asia and International Law* 213 – 234; Raul (Pete) Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea* (A CNA Occasional Paper 2014). For a detailed discussion of the dispute between China and the Philippines see: Bing Bing Jia, "A Preliminary Study of the Title to Huangyan Island (Scarborough Reef/ Shoal" 45 (2014) *Ocean Development and International Law* 360 – 373; Mark E Rosen, *Philippine Claims in the South China Sea: A Legal Analysis* (A CNA Occasional Paper, 2014); Michael Sheng-ti Gau, "The Sino-Philippine Arbitration of the South China Sea Nine-Dash Line Dispute: Applying the Rule of Default Appearance" 28 (2014) *Ocean Yearbook* 81 – 133; Andreas Zimmermann and Jelena Baumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS" 12 (2013) *The Law and Practice of International Courts and Tribunals* 431 – 461.

a position made clear in its response to the initiation of proceedings by the Philippines[12] and that it wishes to resolve disputes or cooperate on a bilateral as opposed to multilateral basis [13] this makes achieving dispute resolution particularly challenging.

Third, Taiwan claims rights and is party to some of the disputes in the region – including the Spratly Islands but is not generally recognised as a state and consequently is limited both in its interaction with regional institutions and with other states in the region.[14]

Fourth, a number of the claims are in respect of geological features over which there is dispute as to whether they constitute rocks or islands for the purposes of Article 123 of UNCLOS and the parties in question have generally not made clear as to whether the maritime zones being claimed constitute merely a territorial sea or a continental shelf and EEZ.[15] Furthermore, most claimant states have yet to identify baselines from which the various boundaries are drawn.[16]

Finally, the Chinese claim in particular is controversial relying on the so-called nine-dash line and the concept of historic rights. It is thus far from certain that its basis of claim is therefore compatible with UNCLOS.[17]

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[12] See Yu Mincai, "China's Responses to the Compulsory Arbitration on the South China Sea Dispute: Legal Effects and Policy Options" 45 (2014) *Ocean Development and International Law* 1 – 16; Stefan Talmon and Bing Bing Jia, *The South China Sea Arbitration. A Chinese Perspective* (Hart, OUP, 2014);

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[14] For a discussion of Taiwan's limited participation within the various fora concerned with the SCS see Yann-Huei Song, "The South China Sea Workshop Process and Taiwan's Participation" 41 (2010) *Ocean Development and International Law* 253 – 269.

[15] See Robert C Beckman and Clive H Schofield, "Defining EEZ Claims from Islands: a Potential South China Sea Change" 29 (2014) *IJMCL* 193 – 243; Yann-huei Song, "The Application of Article 121(3) of the Law of the Sea Convention to the Five Selected Disputed Islands in the South China Sea" 27 (2009) *Chinese (Taiwan) Yearbook of International Law and Affairs* 43 – 66.

[16] Ibid and Jonathan I Charney, "Central East Asian Maritime Boundaries and the Law of the Sea" 89 (1995) *AJIL* 724 – 749; Tara Davenport, "Southeast Asian Approaches to Maritime Boundaries" 4 (2014) *Asian Journal of International Law* 309 – 357.

[17] See Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea" 107(2013) *AJIL* 124 – 141; Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications" 107 (2013) *AJIL* 98 – 124; Jianming Shen, "China's Sovereignty over the South China Sea Islands: A Historical Perspective" 1 (2002) *Chinese Journal of International Law* 94 – 157; Kuan-Hsiung Wang, "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea" 41 (2010) *Ocean Development and International Law* 237 – 252.

3. The Global and Regional Framework for Cooperation in the SCS

Turning to the global and regional framework for cooperation in the SCS. Again, I intend to say little about it for the purposes of this presentation and note that there has already been intensive discussion of various UNCLOS provisions today and of course much of this was set out in Don's excellent background paper.[18]

UNCLOS, which sets out the globally applicable principles applying to all maritime areas and activities has been ratified by all states in the region and has been endorsed by those states, through several ASEAN declarations.

Two provisions are worth briefly highlighting for the purposes of this presentation.

First, Article 123, which requires states bordering enclosed or semi-enclosed seas (of which the SCS is one) to cooperate directly or through an appropriate regional organisation in relation to environmental including living resources management and marine scientific research. One commentator has argued that Article 123 is in fact not limited to these areas and provides for a much more general level of cooperation, including in relation to the exploitation of non-living resources.[19] This is a key question in this research paper – what are the obligations on littoral states to address non-traditional security issues within enclosed or semi-enclosed seas.

The second article (in fact, articles) of particular relevance is Article 74(3) and 83 (3) of UNCLOS which requires states to make every effort pending maritime delimitation to enter into, without prejudice, provisional arrangements of a

[18] See more generally Nong Hong, *UNCLOS and Ocean Dispute Settlement. Law and Politics in the South China Sea* (Routledge 2012); Dong Manh Nguyen, "Settlement of Disputes under the 1982 United Nations Convention on the Law of the Sea: The Case of the South China Sea Dispute" 25 (2006) *University of Queensland Law Journal* 145 – 180; Yann-Huei Song and Stein Tonnesson, "The Impact of the Law of the Sea Convention on Conflict and Conflict Management in the South China Sea" 44 (2013) *Ocean Development and International Law* 235 – 269.

[19] See Nien-Tsu Alfred Hu, "Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea" 41 (2010) *Ocean Development and International Law* 281 – 314.

practical nature. This provision typically provides the basis for joint development arrangements for example, but is by no means restricted to exploitation agreements. In fact, if you apply Article 123 and Articles 74(3)/ 83(3) cumulatively you arguably have a clear and principled legal basis for cooperative action within the SCS, particularly in respect of environmental protection and resource management. These provisions are of course also supported by other sections of UNCLOS, notably, Part XII.

4. Regional Developments: ASEAN and the Law of the Sea

At the regional level there are several initiatives designed to support the implementation of UNCLOS and these initiatives are primarily soft law in nature and, in terms of substance, focused on environmental protection or enhancement of peaceful cooperation.

Probably the most important instrument for the purposes of this paper is the 2002 ASEAN/ China Declaration on the Code of Parties in the South China Sea. This builds on the Declaration on the South China Sea adopted in 1992 and sets out a number of broad principles in order to improve cooperation and relations within the region. Principles include: the need to resolve territorial and jurisdictional disputes without resorting to force and in accordance with UNCLOS and other principles of international law; the exercise of restraint in respect of activities that may complicate or exacerbate disputes; a reaffirmation of states' commitment to UNCLOS, in particular, the principle of freedom of navigation and overflight; and a commitment to cooperate in respect of issues including marine environmental protection, MSR, SAR and combatting transnational crime.[20] These issues might otherwise be described as non-traditional security issues and the Code of Conduct complements the broader Declaration of ASEAN and China on Cooperation in the Field of Non-traditional Security Issues also adopted in 2002 and which has an important maritime focus.

[20] See WU Shicun and REN Huaifeng, "More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea" 2 (2003) *Chinese Journal of International Law* 311 – 320.

Described as a "landmark in the history of Sino-ASEAN relations"[21] the DOC is a soft law instrument. The principles it endorses however, are arguably nevertheless binding under UNCLOS or international law more generally.

More recently, attempts have been made to develop a more substantial Code of Conduct. In 2011 Guidelines for the Implementation of the DOC were adopted, which set out a highly conservative set of principles designed to guide the development of cooperative projects. Principles include – the participation of cooperative arrangements on a voluntary basis, the importance of consensus and the need to develop confidence building measures in a step-by step incremental fashion. Attempts to adopt a full Code of Conduct have so far not been successful. The Philippines prepared a draft in 2012, which was subsequently revised by ASEAN but which failed to gain the support of China.[22] Nevertheless, progress has been made from time to time in respect of individual issues – such as the 2010 ASEAN Declaration on Cooperation in Search and Rescue of Persons and Vessels in Distress at Sea.

With respect to environmental protection, a quintessential non-traditional security issue, there are a plethora of initiatives which either focus on or encompass as part of a broader remit, the SCS. Examples include the UNEP East Asian Regional Seas Programme, comprising a non-binding action plan managed by the Coordinating Body on the Seas of East Asia (COBSEA), which is now also responsible for the continuation of the UNEP/ GEF South China Sea Project (which was concluded in 2009); the Partnership in Environmental Management for the Seas of East Asia (PEMSEA) supported by GEF, UNEP and the IMO – the SCS constitutes a sub-region in PEMSEA; and the South China Sea Large Marine Ecosystem Project.[23]

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[21] Ibid at 311.
[22] Carlyle A Thayer, "ASEAN's Code of Conduct in the South China Sea: A Litmus Test for Community Building?" 10 (issue 34, number 4) (2012) *The Asia Pacific Journal*.
[23] Shih-Ming Kao, Nathaniel Sifford Pearre and Jeremy Firestone, "Regional Cooperation in the South China Sea: Analysis of Existing Practices and Prospects" 43 (2012) *Ocean Development and International Law* 283 – 295 at 286 – 288.

These initiatives, like those developed within ASEAN are non-binding and this preference for soft over hard instruments is quite dominant within the region. For example, two specific agreements to conserve wildlife in the region – sea turtles[24] and dugongs[25] adopted pursuant to the Migratory Species Convention[26] are non-binding. Soft law can of course provide a pathway to binding obligations and it is worth noting in this context the Memorandum of agreement between the Philippines and Malaysia on the establishment of the turtle island heritage protected area, which, notwithstanding the use of the appellation MOA is clearly a binding a agreement setting out quite detailed obligations to protect the nesting area of the green and hawksbill turtles.[27]

5. Non-traditional Security Interests in the SCS

The very brief overview of the regional framework of obligations and initiatives in the South China Sea demonstrates that the littoral states are already developing a strong focus on what, since 9/11, are typically described as non-traditional security interests. What constitutes security – traditional or otherwise is undoubtedly contested[28] and I was interested that Don in his background paper referred to piracy as a traditional security interest,[29] which, in the context of the history of the law of the sea, is an appropriate description, although today piracy is commonly included by commentators in the list of non-traditional security interests.[30] Accepting the demarcation between traditional and non-traditional security interests is porous, the latter term is commonly

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27 Memorandum of agreement between the government of the republic of the Philippines and the government of Malaysia on the establishment of the turtle island heritage protected area reproduced in 5 (2002) *Journal of International Wildlife Law and Policy* 157 – 161.

28 See Arnold Wolfers, "'National Security' as an Ambiguous Symbol" 67 (1952) *Political Science Quarterly* 481 – 502; David A Baldwin, "The concept of security" 23 (1997) *Review of International Studies* 5 – 26; Jessica Tuchman Mathews, "Redefining Security" 68 (1988 – 1990) *Foreign Affairs* 162 – 177; and Hitoshi Nasu, "Law and policy for Antarctic Security. An Analytical Framework" in Alan D Hemmings, Donald R Rothwell and Karen N. Scott, *Antarctic Security in the Twenty-First Century. Legal and Policy Perspectives* (Routledge 2012) 18 – 32.

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30 For example, in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) three of the chapters focus on maritime piracy.

used to refer to issues that are not military in the traditional sense and which are not normally considered integral to a state's identity such as territory or political independence. Issues which are commonly fall into this category include – but are by no means limited to – environmental pollution, climate change, piracy, illicit trade in people, drugs, arms and wildlife and terrorism.[31] The latter, depending on the scale and nature of the threat can equally be classified as a traditional security threat.

Because these issues are not necessarily integral to a state's identity and because they typically affect several if not all states in a region or area they can be used as a basis to develop cooperative, confidence building arrangements. In the Arctic for example, concerted attempts were made to improve relations between states – in particular, the Cold War rivals, the US and the USSR, through cooperation in relation to environmental matters in the region.[32] The Antarctic provides an archetypal example of a cooperative arrangement within which states with competing territorial claims and states which do not recognise any territorial claims are quite successfully managing issues such as scientific research, exploitation of living resources and environmental protection.[33] So, does this represent a viable pathway towards managing or even resolving the territorial or what might otherwise be described as hard security issues in the South China Sea?

Timo Kivimaki argues in support of this proposition. He states "[t]he focus on non-traditional security threats as a way to focus on something that unites rather than on something that divides is, in general, in line with the East Asian way of dealing with conflicts. The fact that this discursive approach diverts attention from conflicts and frames interaction in a cooperative manner is at the core of the East Asian way."[34] Similarly, Nong Hong in her book titled *UNCLOS*

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34 Timo Kivimaki, "Regional Cooperation and Joint Development in the South China Sea: Speech that Acts and Action that Speaks" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 17 – 31 at 25 – 26.

and Ocean Dispute Settlement. Law and Politics in the South China Sea concludes her study with a focus on non-traditional security threats and provides a relatively positive assessment of the opportunities they present for the region.[35] A survey of recent literature on the South China Sea reveals as much on the prospects of cooperation in relation to joint development of resources or marine protected areas as on the traditional areas of territorial disputes and maritime delimitation.[36] Moreover, the various declarations, statements and initiatives adopted under the auspices of ASEAN and other regional organisations also appear to endorse cooperation on non-traditional security threats as a pathway to peace and the resolution of disputes in the region.

On the other hand, these statements have taken on a somewhat rhetorical tone. Relatively few initiatives in the South China Sea have been adopted at the multilateral or regional level – there are a greater number of bilateral initiatives – and, as noted in the introduction to this paper, tensions over territory and other maritime disputes has in fact increased in the recent past. Chris Rahman and Martin Tsamenyi conclude rather more pessimistically "[s]upposedly common regional interests in SLOC security, marine environmental protection and conservation of fish stocks, energy security, combatting transnational crime, and even mitigating the potential negative effects of climate change all require cooperative approaches if they are to be satisfactorily addressed. However, the region still lacks effective mechanisms by which to achieve practical cooperation, and the reality of regional political life means that those challenges are as likely to divide states as to unite them… Any thoughts that the South China Sea can become a zone of peace and cooperation may have to be placed on hold for some time."[37] Nien-Tsu Alfred Hu is similarly sceptical, describing the prospects for cooperation in the SCS as "not very promising."[38]

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[35] Nong Hong, *UNCLOS and Ocean Dispute Settlement. Law and Politics in the South China Sea* (Routledge 2012) chapter ?

[36] See the references noted in Part 6, infra.

[37] Chris Rahman and Martin Tsamenyi, "A Strategic Perspective on Security and Naval Issues in the South China Sea" 41 (2010) *Ocean Development and International Law* 315 – 333 at 329.

[38] Nien-Tsu Alfred Hu, "Semi-enclosed Troubled Waters: A New Thinking on the Application of the 1982 UNCLOS Article 123 to the South China Sea" 41 (2010) *Ocean Development and International Law* 281 – 314 at 304.

Before coming to a conclusion myself over whether this represents a viable pathway to peace and reconciliation in the region it is I think important to try to identify which non-traditional security issues have the potential to make a contribution to this process and whether there are institutional supporting mechanisms in this respect. It is also I think important to bear in mind that cooperation in relation to many if not all of these non-traditional security issues is likely to benefit the region if not the international community even if they don't actually lead to the reconciliation of the various disputes. So a pessimistic conclusion in this paper does not actually mean that we shouldn't support these various initiatives.

6. Non-Traditional Security Interests in the SCS

Given that we do not have an exhausted list of non-traditional security interests, which interests provide a potential platform for cooperation? Well, we could start with the ASEAN declarations on the South China Sea which identify, as I noted earlier, interests including environmental protection, MSR, safety of navigation, SAR and combatting transnational crime including drugs, piracy and trade in illegal arms. Commentators have added others to the list including the management of submarine cables,[39] fisheries management[40] and climate change.[41]

Three issues have received the most attention from states and academic commentators to date and for the purposes of this paper I am going to highlight very briefly each of those.

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41 Robin Warner, "The Portents of Changing Climate: Maritime Security Implications for the South China Sea" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 241 – 256.

(a) Piracy and Robbery

The first of those non-traditional security threats is piracy and robbery. In their volume on *Non-traditional Security Issues and the South China Sea*, which argues that a focus on these issues provides a pathway to resolving disputes within the regin, Shicun Wu and Keyuan Zou devote three chapters to piracy. Within the region piracy is regularly discussed within multiple fora and a regional initiative: the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against Ships in Asia (ReCAPP) has been established.[42] Logically, cooperating in relation to piracy and armed robbery provides an excellent means to build trust and confidence between the competing claimant states and in of itself clearly makes a contribution to the security of the region, of significance to the international community more generally, but it is not obvious that this is an issue which provides a pathway towards the resolution of the territorial and maritime disputes in the region.

(b) Joint Development

The second issue, which has probably garnered the most attention from both commentators and states is joint development of transboundary resources or of resources in areas under dispute. [43] In contrast to piracy, joint development in contested areas has "increasingly been recognized by the international community as a peaceful and pragmatic alternative to settle the economic and emotional battles of competing sovereign claims…"[44] Although China has consistently refused to adjudicate disputes it has indicated willingness to enter into joint development agreements.[45] More generally, half of the delimitation agreements in the Southeast Asian region contain provisions dealing with

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[43] See generally Robert Beckman, Ian Townsend-Gault, Clive Schofield and Tara Davenport (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar 2013).

[44] Wendy N. Duong, "Following the Path of Oil: The Law of the Sea or *Realpolitik* – What Good Does Law do in the South China Sea Territorial Conflicts?" 30 (2006 – 2007) *Fordham International Law Journal* 1098 – 1208 at 1143.

[45] Ibid at 1155.

transboundary resources[46] and Tara Davenport has noted that "the relatively high number of Provisional Arrangements entered into by Southeast Asian states in lieu of boundaries reflects a preference for solutions which aim to maintain peace and good relations between parties rather than resolve the underlying cause of the dispute."[47] The creation of joint development zones is clearly compatible with UNCLOS and can be supported under Articles 74(3) and 83(3) of the Convention, which calls upon parties to enter into practical agreements of a provisional nature pending final delimitation – which could of course be an Antarctic Treaty like agreement to disagree rather than the actual resolution of boundaries between competing states.

However, there are some significant issues within the region, which arguably serve as a caution to undue optimism. First, as I briefly noted earlier in some areas, notably the Spratlys, it has yet to be determined whether some of the geological features are rocks – in which case any maritime zone is confined to a territorial sea (for resource exploitation purposes) or islands – which generate a continental shelf and EEZ. Without such a determination it is difficult to see how joint development agreements can be entered into. A decision by two or more states to treat a feature as an island and enter into an agreement to jointly develop a significant area of the continental shelf clearly risks prejudicing the interests of other states, not part of the agreement and, the international community more generally – to the extent that the agreement prejudices other states' high sea and Area rights.[48] Similar issues arise in relation to baseline disputes.[49]

Second, the practice so far in the South China Sea[50] has relied on bilateral as opposed to multilateral agreements. In other words, China prefers to deal with competing claimant states on an individual basis and is reluctant to enter into

[46] Tara Davenport, "Southeast Asian Approaches to Maritime Boundaries" 4 (2014) *Asian Journal of International Law* 309 – 357 at 329.
[47] Ibid, at 343.
[48] See generally Robert C Beckman and Clive H Schofield, "Defining EEZ Claims from Islands: a Potential South China Sea Change" 29 (2014) *IJMCL* 193 – 243.
[49] Ibid.
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multilateral negotiations. In entering into an agreement with Vietnam and the Philippines in 2005 to undertake joint seismic research China was accused of "slicing up the unity of ASEAN".[51] More generally, the absence of a regional framework for joint development has, according to one author, "resulted in a *de facto* carving up of the South China Sea's basins."[52]

Christopher Linebaugh has argued convincingly that the obligations imposed by Article 123 of UNCLOS to cooperate in the exercise of their rights within semi-enclosed seas, in particular, in the area of environmental protection, require a multilateral approach to joint development negotiations.[53] Discussion of ASEAN and China.

(c) Marine Protected Areas

The third issue for the purposes of this paper is the designation of marine protected areas. This issue provides some support for those that argue for an Antarctic Treaty style solution for the South China Sea in that it emphasises environmental protection rather than resource extraction. Without the emphasis on resource extraction, it may be easier to persuade states to enter into cooperative arrangements. The idea of establishing marine protected areas – or accurately in the context of this region – peace parks is by no means new. John McManus advocated a Spratly Island marine park in 1992.[54] Today, marine protected areas are considered to be a core mechanism for effective ocean environmental management[55] and their legal basis within areas beyond national

[51] Wendy N. Duong, supra, note 44 at 1179.
[52] Thomas Grieder, "Bridge Over Troubled Waters: Energy Cooperation in the South China Sea and the Gulf of Thailand" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 225 – 240 at 240.
[53] Christopher Linebaugh, "Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea" 52 (2013 – 2014) *Columbia Journal of Transnational Law* 542 – 568.
[54] J W McManus, "The Spratly Islands: A Marine Park Alternative" (1992) *Naga: The ICLARM Quarterly* 4 – 8. See also Noel Ludwig, "Swords into Timeshares: An International Marine Park in the Spratly Islands?" 15 (2001) *Ocean Yearbook* 7 – 37; John W McManus, Kwang Tsao Shao and Szu-Yin Lin, "Towards Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan" 41 (2010) *Ocean Development and International Law* 270 – 280.
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jurisdiction is under active consideration.[56] Unsurprisingly there has been significant academic discussion on the prospects of designating MPAs in the SCS within and beyond the Spratlys for a range of purposes including the protection of vulnerable ecosystems,[57] fishing[58] and the management of shipping.[59] There would be little difficulty in justifying such measures under UNCLOS – Article 123 and Part XII of the Convention providing a sound legal basis and of course there are now numerous instruments which support the designation of MPAs – including the Biodiversity Convention, Ramsar and the Migratory Species Convention.[60]

Like joint development, the establishment of MPAs provides a mechanism for putting in place principles and processes for managing areas under dispute without actually resolving that dispute. In contrast to joint development, the emphasis on environmental protection rather than exploitation may assist in defusing tensions. A key to the current success of the Antarctic Treaty is the moratorium on commercial minerals exploitation and some commentators – such as Keyuan Zou have argued for a similar moratorium for the South China Sea.[61] Whether the littoral states would agree to a moratorium is highly questionable however, given all those states' – and particularly China's growing demand for energy resources.

In contrast to joint development there appears to be little state practice with respect to transboundary MPA designation – with the exception of the turtle island heritage area established by Malaysia and the Philippines, which I

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57 See Hai Dang Vu, "Towards a Regional MPA Network in the South China Sea: General Perspectives and Specific Challenges" 26 (2012) *Ocean Yearbook* 291 – 316; Hai Dang Vu, "Towards a Network of Marine Protected Areas in the South China Sea: Options to Move Forward" 28 (2014) *Ocean Yearbook* 207 – 244. See also the references ibid.

58 Hai Dang Vu, "A Bilateral Network of Marine Protected Areas Between Vietnam and China: An Alternative to the Chinese Unilateral Fishing Ban in the South China Sea" 44 (2013) *Ocean Development and International Law* 145 – 169.

59 Aldo Chircop, "Regional Cooperation in Marine Environmental Protection in the South China Sea: A Reflection on New Directions for Marine Conservation" 41 (2010) *Ocean Development and International Law* 334 – 356.

60 See more generally, Hai Dang Vu (2014) note 57, supra.

61 Keyuan Zou, "Realizing Sustainability in the South China Sea" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 207 – 224 at 218 – 220.

mentioned earlier. Moreover, it is also worth noting that constituting a territorial tool, the problems I noted in the context of joint development with respect to the status of rocks/ islands and the uncertainty of baselines are equally – although not perhaps as fundamentally – applicable here. Finally, even where MPAs have laudable and legitimate environmental objectives it is not always possible to avoid issues of sovereignty, jurisdiction and control. This is illustrated by the current debate over the proposed Ross Sea MPA in the Antarctic and concerns expressed by Russia and China that it – and the proposed Eastern Antarctic MPA - somehow serve the interest of the claimant states: New Zealand and Australia.[62] It has also been illustrated in a rather different context by the dispute between the UK and Mauritius over the Chagos Islands MPA.[63]

7. Institutions and Processes for Cooperation

Of arguably equal importance to the need to identify areas of cooperation is the need to identify institutions or processes to facilitate that cooperation. There are in fact numerous organisations that cover the SCS in terms of their mandate and this multiplicity is in fact not necessarily an advantage. One feature of diplomacy in the region is 1.5 diplomatic track negotiations or fora within which individuals participate in a personal capacity. The most well known of these is the SCS workshop process which was an Indonesian/ Canadian initiative in response to the conflict between China and Vietnam in the late 1980s and which constitutes a series of annual meetings – held from the early 1990s to date – designed to promote mutual understanding and the development of confidence building measures.[64] Notably Taiwan participates in these meetings although its participation is constrained owing to China's maintenance of the one-China policy.[65] Whether these track 2 negotiations can lead to political compromise is however, uncertain.

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64 Yann-huei Song, "A Marine Biodiversity Project in the South China Sea: Joint Efforts Made in the SCS Workshop Process" 26 (2011) *IJMCL* 119 – 149 at 123 – 124.

65 Yann-Huei Song, "The South China Sea Workshop Process and Taiwan's Participation" 41 (2010) *Ocean Development and International Law* 253 – 269.

A more promising option is ASEAN, which has, since the 1990s taken an increasing interest in the SCS disputes and is developing an ever closer relationship with China.[66] All the SCS claimant states with the exception of China and Taiwan are ASEAN members. Within ASEAN there are nine fora currently dealing with maritime issues including the ASEAN Maritime Forum and the ASEAN Expanded Maritime Forum. The latter organisation is of particular interest as it includes partner states including Australia, China, India, Japan, New Zealand, Russia and the US. It is also a 1.5 track process with academic participation. Given the significance of the SCS to the international community and the interests that these partner states have in getting a resolution to the disputes there is I think merit in exploring as to whether this might provide an appropriate forum to take the lead in facilitating cooperative arrangements. Whether China, in particular, would be open to this arrangement is far from certain as China has regularly opposed any attempt to "internationalise" the disputes, preferring bilateral negotiation.[67]

8. Concluding Remarks: A Pathway to Peace?

So, in conclusion, assuming states are prepared to cooperate on these and other non-security issues, where does this lead us: to a path to peace or a road to nowhere?

Well, at the very least such initiatives have the potential to build trust and confidence between the competing claimants and may assist in creating a diplomatic space where fruitful negotiations can take place. The Arctic represents a pertinent example here demonstrating that cooperative initiatives in areas such as the environment can make a significant contribution to improving relations between states in the management of the region. From the

[66] See Rameses Amer, "The Dispute Management Approach of the Association of Southeast Asian Nations (ASEAN): What Relevance for the South China Sea Situation?" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 47 – 72; Arif Havas Oegroseno, "ASEAN as the Most Feasible Forum to Address the South China Sea Challenges" 107 (2013) *Am. Soc'y Int'l L Proc* 290 – 293.
[67] Shih-Ming Kao, Nathaniel Sifford Pearre and Jeremy Firestone, "Regional Cooperation in the South China Sea: Analysis of Existing Practices and Prospects" 43 (2012) *Ocean Development and International Law* 283 – 295 at 284.

beginnings of cooperation in the late 1980s it was only a relatively short period before the Arctic Council was established in 1996. The Arctic also provides an interesting parallel to the SCS in that over the last 20 years or so it has transformed from essentially a regional issue to an international issue[68] with many non-littoral states having an interest in its future management and indeed even becoming formal observers within the Arctic Council. It is ironic that China, determined to resist the internationalisation of the SCS, has been a strong advocate of the internationalisation of the Arctic and its own participation and advocacy of Arctic interests. However, the Arctic also represents the fragility of soft cooperative arrangements and the limitation of confidence building measures – particularly in the face of traditional security concerns and this of course is being currently demonstrated by the deterioration of relations between the Arctic states owing to Russia's activities in the Ukraine.

At the other end of the spectrum the Antarctic provides an example of a regime where claimant (and non-claimant) states have agreed to disagree over the status of the continent[69] and, over 50 years, have developed a sophisticated and essentially successful cooperative regime based on the principles of peace, scientific research and environmental protection. The Antarctic Treaty does provide a possible model for at least part of the SCS – perhaps the Spratly Archipelago area and a number of the claimant states, including China and Malaysia are familiar with the model, being Antarctic Treaty parties. However, in contrast to the SCS, mineral resources in the Antarctic are not currently accessible and of course are currently subject to the moratorium. The parties have agreed to treat the waters surrounding Antarctica as high seas for fisheries purposes and there is no arrangement in place to deal with access to and sharing of genetic biological resources. Unless the littoral states in the SCS agree to a moratorium on oil and gas exploration – which is unlikely – the Antarctic Treaty is probably not an apposite model for the region.

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[68] Nong Hong, "Arctic vs. South China Sea: How Coastal States and User States View the Navigation Regime and Security?" in Shicun Wu and Keyuan Zou (eds), *Non-traditional Security Issues and the South China Sea. Shaping a Framework for Cooperation* (Ashgate 2014) 108 – 129 at 114 – 115.

[69] 1959 Antarctic Treaty, Article IV.

The middle ground – between the Arctic and the Antarctic – is using cooperation in non-traditional security issues as a pathway to build trust and confidence in order to try to resolve the maritime disputes in favour of one or other of the claimant states. This need not be a zero sum game. The 1920 Svalbard Treaty, which applies to the Spitzbergen Archipelago in the Arctic,[70] provides yet another model to manage contested territory. Under the Treaty, Norway exercises sovereignty over the archipelago but does not exercise exclusive sovereign rights over the resources of Svalbard. Other Treaty parties have rights of exploitation or extraction. In light of the fact that the SCS states have generally indicated that they are in favour of joint development the Svalbard Treaty provides a potential model of how this might be implemented on a multilateral basis. Agreeing the details of any such regime is however, likely to prove challenging. It is notable that after many years of obscurity the Svalbard Treaty has generated much discussion in recent years owing to disagreements among its parties as to whether its principles apply to the EEZ or continental shelf – maritime zones not in existence at the time of its adoption in 1920.[71]

In conclusion, I remain unconvinced that cooperation in relation to non-traditional security issues represents a path to peace. But I would not suggest that such cooperation leads us down a road to nowhere. Irrespective of whether the claimant states manage to resolve their differences, improving cooperation in relation to issues such as environmental protection, resource management and transnational crime – including piracy – is likely to have clear benefits for the region and for the international community more generally. In theory, they should also help build long term trust and confidence between states within the region. As Nien-Tsu Alfred Hu says "[t]he bordering States should have the collective wisdom to solve their common problems within the region, but this is based on political will."[72]

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72 Nien-Tsu Alfred Hu, "South China Sea: Troubled Waters or a Sea of Opportunity" 41 (2010) *Ocean Development and International Law* 203 – 213 at 211.