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South China Sea

Everlasting Antagonisms

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The Southeast Asia Research Program (SEARP) within the Institute, as a part of its activities, undertake research and organise events under "Inside Southeast Asia," aimed at exploring issues and challenges in contemporary Southeast Asia covering economic issues, inter-State relations, political developments and emerging social tensions and fault lines. This essay was a part of the first annual conference held in December 2011.

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Protracted tensions between nation-states over disputed territories are a universally occurring and indeed expected phenomenon of politics. Since time immemorial, the acquisition of territories has translated into greater political and economic control. Be that control over new markets, cheaper labor or natural resources; expansion has been understood historically as a way of sustaining power. Yet, apart from the 'slicing of the Chinese melon' during the colonial era, rarely has the modern or the post-modern world witnessed a dispute involving 5 countries and that too over island groups and boundaries in the sea.

The South China Sea (SCS) has acquired that distinction particularly in the past 3 decades with the 1982 convention on the United Nations Law of the Sea (UNCLOS) which introduced clear demarcations on what constitutes as the territorial sea, exclusive economic zone (EEZ), continental shelf, contiguous zone and alas the free for all high seas. Consequently, the dispute has involved Philippines, Malaysia and Brunei Darussalam all of who seek to possess their newly realized pounds of flesh. China and Vietnam have apart from economic motivations, the pride of a lost heritage driving their claims. Finally, all the claimants are in varying degrees, smitten with the lure of purported large reserves of crude oil and natural-gas under the seabed of the SCS. Additionally, the Spratlys & Paracel archipelagoes comprise not only as disputed oceanic territory but are also contested 'land' territory, delineating the SCS dispute as not only maritime-jurisdictional between all the claimants but

also a political-sovereignty dispute between Vietnam and China in particular. This paper explores the geopolitical constraints and motivations of the claimants and that of the crucial external stakeholder, USA. It seeks to analyze also the role of ASEAN and the utility of international maritime law in the mitigation of the dispute, offering a prognosis cognizant of recent developments in the region.

I UNCLOS AND THE SCS DISPUTE

The 1982 UNCLOS convention established after much deliberation with 160 participating countries, what constitutes the political oceanic periphery of a country, extending from its coastline. It fixed the territorial sea (UNCLOS, p.26) at 12 nautical miles (nm), a contiguous zone (UNCLOS, p.31) of 24nm and the EEZ (UNCLOS, p.40) up to 200nm. Furthermore the continental shelf (UNCLOS, p.49) could extend beyond the 200 nm limitation under certain topographical considerations and be claimable up to 350nm. The Philippine's claims to the Spratlys and that of Malaysia and Brunei Darussalam's to territories in the SCS stems from this modernization of UNCLOS and in particular the demarcation of the EEZ. The convention for all intents and purposes was drafted to provide clarity and straightforward quantitative resolution of maritime territorial disputes. However, in the case of the SCS dispute, it has resulted in the emergence of overlapping legal claims based on geographical proximity in addition to the existent political-historical contestations.

Additionally, UNCLOS has classified navigational regimes into the 3 broad categories of innocent, transit and archipelagic sea lanes (ASL) passage. Transit passage is expeditious and through the straits, which have traditionally been used for international navigation and may not be impeded unduly. On the other hand innocent passage, since it involves access through territorial waters includes prohibitions on the military operations including flying of aircrafts, use of weapons systems and other activities considered prejudicial to the coastal state. Given the tense climate created due to SCS dispute, the coast guard and navies of the claimant states have a heavy presence and high vigil in their respective EEZs.

Arguably, the operative word in the acronym EEZ is not 'exclusive' but economic. While a coastal state may exercise sovereign rights over the fishing, drilling and other commercial resources of their EEZ; UNCLOS makes it perfectly legal for foreign military vessels to conduct marine scientific research (MSR) in the EEZs of another state. Such provisions have facilitated ambiguities between alleged benign MSR activities on the one hand and geo-strategically motivated power projection on the other. Specifically, this has served to make the SCS a volatile region by particularly exacerbating Chinese fears of an encirclement and suffocation of its vital strategic space by USA. While USA's presence in China's EEZ is perfectly legal, it highlights the arguably confused understanding of EEZ in the Asia-Pacific wherein there is a tendency to safeguard them as restricted national frontiers, when legally an EEZ allows for an international air space and passage for foreign military vessels. The other confusion regarding EEZ in the Asia-Pacific, pertaining to the SCS dispute specifically concerns the Paracel and Spratlys archipelagoes which are often understood as homogenous land territories by the claimants. Article 121(3) of UNCLOS states that: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf" (UNCLOS, p.66). Nonetheless, according to Thao and Amer

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(2009, p.340); "The position of China is that the features in the Paracel and Spratlys archipelagos can generate full maritime zones".

The more land territory that a country has the political sovereign rights over, the more opportunities there exist for utilizing both living and non-living natural resources of the sea. It is noteworthy that under UNCLOS, archipelagic states unlike regular coastal states are allowed straight baselines from the outermost points that can extend up 100 nautical miles (UNCLOS, p.40); thus providing even larger areas of territorial sea. Hence, given the conviction amongst the SCS claimants on the natural resource wealth of the Spratlys and Paracel archipelagoes; it is only natural that they would want to ensure that they are acknowledged entirely as 'land territories' so that sovereign rights over them provide a larger territorial sea in addition to an EEZ.

Despite the fact that the number of claimants to the SCS dispute have increased due to the parameters of the 1982 UNCLOS; it is unlikely that the dispute's resolution and mitigation shall be guided purely by international maritime law. The fact that the SCS dispute has endured for nearly 3 decades and been shaped through military confrontations indicates that it is undoubtedly larger than a maritime legal difference of opinion. It is a contestation for strategic space and of

political sovereignty for which there are no guidelines in UNCLOS. This is because the island groups of Spratlys and Paracels may be understood as not only disputed oceanic territory and thus subject to international law of the sea (LOS) but as disputed 'land' territories, qualifying them as a political sovereignty dispute i.e. beyond the scope of UNCLOS.

Nonetheless, if UNCLOS was given paramount importance by all the SCS claimants then perhaps, Philippines would have emerged as the victor against China in its claims over the Spratlys, a long time ago. It is also noteworthy that while the more recent claimants have based their sovereign rights upon geographical proximity and the specific measurements laid down by UNCLOS, yet attempts to involve the international court of justice (ICJ)'s international tribunal on law of the sea (ITLOS), have not been entertained. To be fair, amongst the Southeast Asian states, Malaysia experienced the unexpected setback of losing the Ligitan and Sipadan islands to Indonesia by a December 2002 judgment of the ICJ (Sovereignty over Pulau Ligitan and Pulau Sipadan, 2002). Clearly, a regional consensus is required amongst the claimants to employ the services of the ICJ on the SCS dispute. That has not happened because some of the claimants such as Malaysia have lost territory while other's claims and aspirations in the SCS extend beyond what the ICJ is likely to grant them. Given that the ICJ's decisions are binding, the

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claimant's probably prefer to partake in the unstable, complex yet potentially beneficial game of diplomatic courtships to compete for concessions and access amongst and against each other.

II ASEAN'S ROLE

ASEAN has played an assuaging role in the mitigation the SCS dispute. The treaty of Amity and Cooperation of 1976 has been the blueprint for a conscious effort towards conflict avoidance. Article 10 of this treaty discourages participation in any activity perceived as a threat to the political or economic sovereignty of a member state whilst Article 17 emphasizes the resolution of disputes through friendly negotiations before resorting to other means. However, it must be borne in mind that while this treaty may be regionally acknowledged, it is ultimately a non-binding code of conduct (COC). The 2002 declaration on the COC of parties in the SCS dispute, hopes to fructify a more binding official agreement, while managing tensions through a support of the tenets of 1982 UNCLOS such as freedom of navigation, over-flight and MSR. More prominently, the declaration also urges states to give due notification on any impending joint military exercise albeit on a voluntary basis.

Ultimately it must be borne in mind that neither ASEAN nor any of the treaties till date have been engineered to act as a compelling source of authority but as a facilitator of multilateral conflict avoidance and confidence building. Despite being the regional body to reckon with, ASEAN functions on a modus operandi of non-interference in the territorial disputes and other political upheavals involving member states. Arguably, this does not necessarily translate to ASEAN being an ineffectual body but one mindful of the enduring and thorny nature of political antagonisms in the Asia-Pacific particularly since the Second World and Cold War period. Engaging in resolution of the contentious SCS dispute may be perceived as taking sides and would digress

from ASEAN's campaign of amity promotion in the region; a role which it has doggedly stuck to by remaining neutral on the dispute. As a dove of regional peace, ASEAN is nevertheless highly responsive to the meanderings of the SCS dispute. The ASEAN Secretary General Surin Pitsuwan has commented that, "ASEAN's role in facilitating a resolution process should not conflict with China's demand that this issue be resolved at the bilateral level". (Padden, 2011)

The inability of the ASEAN to draft a joint statement at its July 2012 conference in Cambodia is unprecedented but also indicative of not only the risk and complexity of the dispute itself but the political fissures and high stakes contestations in SCS, which make compromise difficult for the maritime-dependant nations of Asia-Pacific. Regionally, it has also highlighted the indispensability and clout of China. According to a Xinhua news report: "China is willing to talk to ASEAN countries about legalizing a COC in the SCS, provided that the issue be discussed and resolved peacefully through bilateral talks" (Xinhua Insight, 2012).

III RECENT REGIONAL DEVELOPMENTS

According to a July 2011 BBC Q&A report, "Vietnamese naval exercises in the potentially resource rich South China Sea have raised tensions between Hanoi and Beijing" (BBC News Q&A, 2009). This has been in the midst of a generalized trend amongst the countries of Southeast Asia and China, of naval modernization and military advancement. Globally, military advancements have played a definite role in making the ASEAN nations, a hub in the international political economy; regionally the contribution to confidence building has manifested through joint military exercises. Interestingly, the SCS dispute translates even normal military modernization, into an expression of mutual regional insecurities and what is purported as an Asian arms race. The geopolitical & natural resource appeal of contested SCS territories takes on an urgent and renewed importance, given the military takeover of the

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Paracel islands by China from Vietnam in 1974 and the increase in oil prices since the 2008 global financial crisis. In fact it is naïve not to make contributory linkages between military advancements in Southeast Asia and the SCS dispute, given how it has shaped it thus far. Thao and Amer highlight the military chronology of the SCS dispute as under: "In 1974 China seized control of the Paracels from Vietnam. In the Spratlys, the early 1970s saw Vietnam sustain its claim by occupying some features-the control of which was transferred to Vietnam after 1975. The Philippines moved into the Spratlys in the 1970s while Malaysia took control of a feature for the first time in 1983. China got a foothold in the Spratlys in early 1988 following a naval battle with Vietnam. Most widely publicized has been the Chinese seizure of Mischeif Reef from Philippines in 1995". (Thao & Amer, 2009)

While the Southeast Asian countries are seeking off the shelf modernizations of their militaries and navies from the West, the Chinese dragon is putting indigenous muscle behind its military advancement through its patronage of defense industrial clusters. Defense Economist Ron Mathews comments that: "They (China) are a remarkable defense-industrial success story. The Yangtze based around Shanghai, the Bohai centered on Dalian, south China focused around Guangzhou produce over 20% of the world's shipping". (Mathews, 2011)

Additionally, Lloyd's list has declared Shanghai as the busiest container port,

“taking the crown from Singapore during the course of 2010” (Marle Van, 2011). The other crown that China has acquired recently has been from Japan by becoming the “world’s second-biggest economy”. (BBC News, 2011) Arguably, it is this hard earned and regionally admired economic prowess that has given China the confidence and clout recently to assert for bilateral negotiations, in the mitigation of the SCS dispute. Given, the size of China whether it is militarily, economically or otherwise relative to the other SCS claimants; there is a compelling advantage for China in being able to steer the dispute on its terms at the bilateral level. Under the multilateral forum of the ASEAN, the other SCS claimants are better able to amalgamate their concerns and motivations. Moreover, the inclusion of the SCS as a “core national interest” by the CCP has attracted much media attention recently with the regional contenders and external stakeholders finding it congruent with the escalation of China’s aggressive pursuit of the SCS dispute. Da Wei writes that, “By declaring a specific issue as a core national interest, the country sends a clear signal to other countries that there is no possibility and tendency to compromise on the issue” (Wei, 2010).

Interestingly, the SCS dispute claimants cite the ASEAN declaration on the code of conduct, whenever they find themselves disadvantaged in the political maneuverings of the other claimants. This has particularly

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been the case when any claimant has attempted to internationalize the SCS dispute or unilaterally conduct exploration in the region, in which case the particular state’s activities are derided as not being in spirit of the DOC. Recently, the most noteworthy maneuverings in the military choreography of the Asia-Pacific have true to form, come from USA and China. USA’s Defense Secretary Leon Panetta declared at the June 2012 Shangri-La Dialogue conference in Singapore: “Pentagon will shift more Navy warships to the Asia-Pacific region over the next several years and by 2020, about 60% of the fleet will be assigned there” (USA Today, 2012).

Never the passive observer, China by the end of June 2012, has approved the deployment of a military garrison in the newly established city of Sansha in the West Philippines Sea. According to a news report by GMA news which quotes the mayor of Kalayaan town in the nearby Philippine Palawan Island: “Filipinos have been settled in the islands (Spratlys) since 1978 whereas China is forming the government of its Sansha city there only now”. (Calonzo, 2012).

Notably, this development has been accompanied by a stronger physical presence i.e. more frequent patrolling and surveillance by Chinese military vessels of the disputed SCS territories.

China’s Position

China’s contestation for the whole of the SCS and its land territories as part of their sovereign rights has been propagated upon a 2000 year old history, with the Chinese believing that it was their ancestors (Ming and Han dynasties) who first discovered and occupied the territories of SCS. The first public promulgation of this claim was done by China in 1947 through the production of a location map of the SCS. Li Jingming and Li Dexia (2003, p.287) comment: “A dotted line encloses the main island features of the South China Sea: the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands. The dotted line also captures James Shoal which is as far south as 4 degrees

north latitude”.

Author Dong Manh Nguyen (2005, p.15), skeptical of Chinese historical claims, states: “Although an archeological object may feature Chinese style or was originally made in China, it cannot be assumed that the object was brought to the island by someone who represented China as a state”.

Additionally, apart from ambitious claims, China has also the most inflated estimates amongst the claimant and extra-regional stakeholders on the resource wealth of the SCS. According to the US energy information administration: “One Chinese estimate suggests potential oil resources as high as 213 billion barrels of oil (bbl). A 1993/1994 estimate by the U.S. Geological Survey estimated the sum total of discovered reserves and undiscovered resources in the offshore basins of the SCS at 28 billion bbl” (U.S. Energy Information Administration, 2008).

With regards to this, the Chinese government has issued strong condemnation on attempts by any of the other SCS claimants to engage in mineral exploration which is unilateral, involving international parties or amongst the other claimants, i.e. excluding China. Accompanying this strong stance has been the People’s Liberation Army Navy (PLAN) demonstrations of its capabilities in the SCS. Furthermore, China’s enhancement its military bases in Hainan as well as the Paracel islands has been in line with the SCS dispute becoming a core interest.

Nevertheless, Beijing is ultimately mindful of the possibility of the other SCS claimants deepening military ties and strategically aligning with USA to the detriment of China should it continue to intensify its military power projection. While China’s support for ASEAN during the financial crisis of 1997-98 had bolstered confidence in its relations with the member states; the recent economic and military growth of China has also created uneasiness, stemming specifically from the competition over the SCS. To this end, China has utilized ASEAN’s multilateral forums to

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assuage any fears and ensure its neighbors that its rise is peaceful while at the same time condemning use of ASEAN as a forum for discussion of the SCS dispute. On the whole there is an active involvement in the dual play, on the multilateral forum of ASEAN on the one hand and military shows of deterrence in the SCS on the other. This is done by both China and the other SCS claimants. China has attempted to encourage bilateral and tripartite agreements on the SCS dispute; however it has not always worked or sustained a spirit of cooperation and mutual compromise. Arguably, China’s vehement opposition of external stakeholders’ involvement in the SCS dispute may also stem from its Cold war memory of USA’s rallying its allies to the detriment and demise of the Erstwhile Soviet Union.

Vietnam & Philippines:

Vietnam is the SCS dispute claimant which opposes China’s historical claims with its own, stating that: “It has actively ruled over both the Paracel and Spratlys since the 17th century and has the documents to prove it” (Q&A: BBC News, 2011). Vietnam has clashed militarily with China over the Paracel and Spratlys and suffered losses on both accounts and had to retreat from the territories that it considers its sovereign right. The SCS dispute escalates frequently between the two due to skirmishes at sea

involving Chinese coast guards giving chase to Vietnamese fishing trawlers as well as unmarked ships from both sides harassing one another. This has manifested in a worsening of relations and protest marches in capitals cities of Hanoi and Beijing. A significant step forward in this regard has been the signing of a bilateral agreement between the two countries to un-ruffle feathers. According to an October 2011 report by Reuters, “The deal builds on Beijing's efforts to cool tensions over rival territorial claims in the South China Sea. The two sides have agreed to open a hotline to deal with potential maritime flare-ups and hold border negotiation talks twice a year” (Reuters, 2011).

The Philippine is the other claimant that has experienced losses 'vis-à-vis' China, over the Mischief Reef in 1995. The reef despite being inside the Philippines EEZ and claimed as its sovereign territory, was taken over by the Chinese after they covertly built a military presence upon it. This created unease in not only the Philippines and the other SCS claimants but was worrisome to the entire ASEAN collective. The response from the Chinese foreign ministry was: "Structures had been built on the Reef by China to ensure the safety and lives as well as the production operations of the fishermen who work in the waters of the Nansha (Spratly) Islands" (Raman, 1999).

Herein, it should be duly noted that this action of China was illegal as per UNCLOS

USA justifies its military presence in Asia-Pacific as promoting its freedom of navigation and legal as per the provisions of UNCLOS. Ironically, while USA honors the provisions of UNCLOS as customary international law, it has itself not yet ratified the convention.

Article 60 (1) which categorically bestows the right of construction of installations and structures as the exclusive right of the coastal state (UNCLOS,p.45). Contrasting the ambience of mistrust created as a result of this incidence, a decade later on 14 March 2005, the national oil companies of China along with Vietnam and Philippines entered into a tripartite agreement for a period of 3 years for 'Joint Seismic Undertaking in the Agreement Area' in the SCS (Nguyen, 2005). However, once this agreement expired in 2008 both Philippines and Vietnam proceeded to involve western international parties, specifically oil companies in the resource exploration and exploitation of particularly the Nansha or Spratly sea area, much to the dismay of China. Yingying & Feng (2011) echo the Chinese sentiment as under: “They (Vietnam and Philippines) have solicited foreign oil companies to get involved in exploration of disputed areas and elevated the Nansha dispute to be more complicated and more international. It also shows that resource gain is much more important to the perpetrators than island acquisition”.

USA's presence:

USA justifies its military presence in Asia-Pacific as promoting its freedom of navigation and legal as per the provisions of UNCLOS. Ironically, while USA honors the provisions of UNCLOS as customary international law, it has itself not yet ratified the convention. However, 2012 has seen a departure from USA's traditionally suspicious distancing from UNCLOS. As it gets more deeply committed in the Asia -Pacific, the liberals in particular view ratifying of the convention as a means to augmenting its credibility in maritime affairs, in various parts of the globe. According to a May 2012 AFP report:

“Clinton has said the arguments against the treaty are based in ideology and myth and that oil and mining companies, as well as environmental groups had all endorsed it”. (Washington AFP, 2012)

USA's presence in Asia-Pacific has been and

continues to be understood as counter-balancing the rise of China, whose intentions especially with regards to the SCS are regionally, habitually feared as being expansionist and seeking to intimidate if not exclude both regional and extra-regional stakeholders.

Additionally, all the SCS claimants are cognizant of the strategic significance of this centrally located sea which when controlled by Japan during World War II, worked to its advantage and the detriment of rest of East Asia.

Presently as China lays claim to the entire SCS and engages in military power projection; it is constantly rankled by the other SCS claimants and USA who along with its allies wants the SCS to continue to have an international and multilateral presence. Given that USA remains the world biggest military power and whose defense budget in 2011 has been 25% of its total federal budget (US Government Spending: Federal Budget Spending Estimates, 2011); it has the capability to be the game changer should it decide to get involved in a military confrontation in the SCS on behalf of its allies or freedom of navigation. Nevertheless it remains plausible that, none of the players including USA should find actual conflict in SCS helpful, politically. This is especially given the far reaching economic interdependencies which indeed work both ways. For e.g. the end of June 2011 saw China purchase an additional \$5.7 billion of US treasuries, taking its total holdings to \$1.7 trillion (Xinhua, 2011). While this is understood as an economic trump card for China, author Rosemary Foot highlights the symbiotic nature of the dependency: "Beijing understands that if it cuts back too swiftly or steeply on its purchase of US bonds or diversifies too quickly out of US dollars, the value of its assets will plummet. It retains an interest in getting US back on its economic feet" (Foot, 2010).

Despite this firm interdependence there also abound simultaneously and perpetually feelings of mutual distrust. USA perceives

increased Chinese militarization and assertiveness in the SCS in the wake of the 2008 global financial crisis, as an attempt to usurp from USA the influence that it has enjoyed previously in the Asia-Pacific. Similarly, China finds the presence of USA's military vessels in the SCS and specifically in its EEZ driven by political motivations and part of a strategy of neo-containment for checking China's rise. Despite the misgivings and the escalating military presence of both USA and China; actual conflict remains highly undesirable due to the extent to which it could damage political good will and also take an economic toll on the two world powers. Interestingly, apart from communicating the USA's re-balancing in the Pacific, at the 2012 Singapore Shangri-la dialogue, Leon Panetta also balanced his message to East Asia when he stated that: "Asian nations must find a way to resolve their own conflicts because the US cannot always come charging in to help". (Dawn, 2012)

To that end, USA has urged for the finalizing of a legally binding COC that will aid conflict avoidance as well as an ASEAN forum for SCS dispute resolution. Arguably, USA's declaration of the trajectory and amount of its military presence in East Asia was perhaps also aimed to encourage greater transparency from China on the specifics of its own military doctrine and modernization plans. Collaboration on issues such as terrorism, piracy, cyber security etc should help facilitate a comfort level between the two states. still, USA's regular insistence on freedom of navigation which has an undeniable trickle down implications for the dynamics and course of the SCS dispute; i.e. assuaging for all the SCS claimants except, China for whom it is irksome.

IV CONCLUSION

The international political economy of the world and the Asia-Pacific in particular are experiencing a crucial transition with the continuing rise of China and other East Asian countries as economic and military powers to reckon with in a region of global significance.

The prospects for crude oil, natural gas and rich fishing grounds renders the SCS much more than a mere maritime territorial dispute but indeed the trump card for significant power and economic ascendancy in the coming decades. The control of the SCS which lies upon crucial international maritime trade routes, translates to regional hegemony with an upshot for various international stakeholders, particularly the purportedly declining world hegemonic power, USA.

Future prospects in the mitigation of the SCS dispute indicate an increase in bilateral negotiations in the short term, as well as a focus on exploration of non-living natural resources. In the longer term trajectory of the SCS dispute, the multilateral forum of ASEAN shall play a pivotal stabilizing role through its campaign for and insistence on peaceful means. The ASEAN Defense Minister's meeting (ADMM) and the ASEAN regional forum (ARF) shall lend some transparency by being a multilateral platform for the expression of political concerns and convictions regarding the dispute. Additionally, it is quite likely that any bilateral and or tripartite negotiation regarding SCS will not be limited to or be through China. This is especially in light of the readiness with which the Philippines and Vietnam have engaged unilaterally in exploratory ventures with western oil companies in recent years. The USA shall continue with the blessings of other SCS claimants and ASEAN, to exert its military presence in the Asia-Pacific. This will also have the upshot of making the Chinese reciprocally dig in their heels more adamantly in the SCS. The dispute being one of political-sovereignty foremost shall remain unresolved for the foreseeable future. However, along with more assertive military power projections from all parties, the competitive search for natural resource wealth shall become a habitual practice in the SCS. The region shall remain tense, busy, heavily militarized with both conflict and collaboration prevailing and hard and soft talks influencing the climate. Philippine and Vietnam shall remain the most vehement

regional opponents of China's maneuverings in SCS and their engagement with external stakeholders shall shape the dispute significantly

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