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ABSTRACT

ASEAN is notable for the 'long peace' in the region that has existed since the 1980s. Most analysts have attributed this success to the norms enshrined in the 1976 ASEAN Treaty of Amity and Cooperation (TAC), and which the members have accepted as an intrinsic part of their intra-ASEAN and international relations. However, this paper argues that the 'long peace' applied only to interactions and developments on land. In contrast, a 'conflict-threat' process, including militarization of disputes, has marked ASEAN relations in contested maritime zones, especially in the South China Sea and the Celebes Sea. This is in complete variance with the norms of the 'ASEAN way, which endorses non-use of threat or force in addressing conflicts. This is because two different realms exist within ASEAN – the terrestrial and the maritime – where different norms apply. This paper argues that a 'state of nature' exists in contested maritime zones, with ASEAN members engaged in boundary making. This explains why cooperation at sea has been highly problematic, in contrast to the terrestrial realm where territorial boundaries/sovereignties have been clearly established. Fundamentally, the 'ASEAN way' still does not apply to the maritime realm, and cooperation at sea will thus be difficult to achieve. Successful joint development and cooperation in the Gulf of Thailand in fact confirms the argument.

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JN Mak is an independent analyst specialising in maritime security issues in Southeast Asia. His research goes beyond conventional security frameworks to cover non-traditional security issues, focusing in particular on how the interplay between external and domestic political and economic variables affects the security of both states and societies, including local and marginalized communities. He has just completed a study on illegal migration in Malaysia, with the focus on Sabah and the Sulu and Celebes seas. This study reveals how the federal government differently constructs the 'problem' of illegal migration in Peninsular Malaysia and Sabah, which consequently shapes policy responses across the two regions and their impact on local communities especially in Sabah. Ongoing studies include those on naval developments in the Asia-Pacific, and securitization dynamics and the ASEAN Regional Forum.

SOVEREIGNTY IN ASEAN AND THE PROBLEM OF MARITIME COOPERATION IN THE SOUTH CHINA SEA

INTRODUCTION

Many scholars of ASEAN have showcased ASEAN as an example of a regional body that has not only succeeded in mitigating intra-regional tensions in Southeast Asia, but has brought about a 'long peace' in the region.[1] In spite of potential conflict over a number of territorial and other inter-state disputes, Kivimaki and other scholars writing in the constructivist tradition, including Amitav Acharya and Nikolas Busse, have argued that the development of the key ASEAN norms of non-intervention in the internal affairs of another state and the emphasis on respecting the independence and sovereignty of each member as fundamental to the Association's success in establishing peace, security and stability in Southeast Asia.[2] These norms are embodied in ASEAN's 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC). Besides the emphasis on sovereignty and non-intervention, the TAC in Article 2 also calls on states to peacefully settle disputes. Not only does the TAC emphasise the non-use of force to settle disputes, it also calls on the ASEAN members to renounce the *threat* to use force. Although Nischalke sees ASEAN more as a "rule-based community rather than a community based on the existence of a collective identity" as Acharya, Kivimaki and Busse suggest, Nischalke, nevertheless, also regards the TAC as the central pillar of ASEAN and the source of the norms and principles that have guided its behaviour since its establishment.[3] These scholars also regard the 'ASEAN way' approach to intra-regional interactions based on non-confrontational dialogue and consensus building as key to ASEAN's success in maintaining peace, stability and order in Southeast Asia.[4] While the 'ASEAN way' and TAC have certainly kept the 'long peace', I argue that they seem to have done so

[1] Timo Kivimäki, "The Long Peace of ASEAN," Journal of Peace Research, vol. 38, no. 1, 2001, pp. 5–25.

[2] Amitav Acharya, "Ideas, identity, and institution-building: from the 'ASEAN way' to the 'Asia-Pacific way'?" The Pacific Review, Vol. 10 No. 3, 1997, pp. 319-46; Nikolas Busse, 'Constructivism and Southeast Asian Security', *The Pacific Review*, Vol. 12, No. 1, pp. 39-60.

[3] Tobias Nischalke, "Does ASEAN measure up? Post-Cold War diplomacy and the idea of regional community," The Pacific Review, Vol. 15 No. 1 2002, p. 110.

[4] Shaun Narine, "The English School and ASEAN," The Pacific Review, Vol. 19 No. 2 June 2006, pp. 203-204.

on land rather than in the maritime realm. The ASEAN norms do not seem to have contributed as much to a working regional order at sea.

The Key Puzzle

As Kivimäki observed, ASEAN was still full of 'conflict potential,' in particular maritime conflicts, during the 'long peace.'

> All through the long peace there were several unsettled territorial disputes between Malaysia and Singapore (Pedra Branca), Indonesia and Malaysia (Sipadan and Ligitan), Indonesia and the Philippines (Miatan Islands), Malaysia and the Philippines (Sabah), and Malaysia, Vietnam, and the Philippines (Spratly Islands).[5]

Kivimaki also notes that these maritime disputes became militarized. Nevertheless, despite their militarization, Kivimaki argued that these disputes did not lead to open war or casualties, thereby reinforcing his constructivist reading of ASEAN's role in ensuring regional peace and stability. However, while these maritime disputes did not lead to war or open confrontation, the very fact that they were militarized, which I define as involving the threat to use force, military posturing, deployment and military 'incidents' or skirmishes short of open confrontation or warfare, are significant and cannot be glossed over. These actions contravene the ASEAN norms, which constructivists and even some of their realist sceptics concede have helped to maintain peace, stability and even a modicum of regional order in ASEAN. Significantly, similar military posturing and threats were rarely encountered with respect to intra-ASEAN disputes outside the maritime realm over a sustained period of time.

The question therefore is why ASEAN has managed to maintain a 'long peace' on land, in addition to developing significant economic and other forms of functional cooperation, while disputes in the South China Sea and elsewhere have invited aggressive conduct on the part of some ASEAN states against their fellow members.

[5] Kivimäki,, op cit, pp. 11-12.

Many analysts have attributed the regional maritime disputes to the race for valuable ocean resources, control of strategic sea lines of communication (SLOCs), attempts to control a sea area of considerable strategic importance, and the rising tide of nationalist sentiments, especially in China. It is generally agreed that one of the most important drivers of the disputes is the race for economic resources, especially gas and oil and fish. Thus, efforts at inducing cooperation have focused on ensuring that states are made aware of the potential collective gains to be had from cooperating at sea. However, what most of the literature on enhancing cooperation in the South China Sea or establishing cooperative norms and institutions fail to explain is why such efforts at driving cooperation at sea has, for the most part, failed except for the joint development and exploitation ventures in the Gulf of Thailand. More than that, these 'explanations' fail to account for why the ASEAN states, despite adhering fairly closely to the key TAC principles, have failed to behave in accordance with these norms with respect to their maritime disputes and conflicts.

In the rest of this paper, I explain this paradox by arguing that we need to distinguish between two distinct realms in ASEAN – the maritime and the terrestrial – where different norms apply because of the distinct notions of sovereignty that prevail in these two realms. In other words, ASEAN norms that operate in the security realm on land are different from the norms operating in the South China Sea. An evidence of this is that despite the 1976 TAC, ASEAN nevertheless spent considerable time and effort from the 1990s, to develop a separate code of conduct for the South China Sea, implying therefore that an 'explicit instrument' to deal with conflicts and potential conflicts in the maritime sphere was necessary.[6] My argument unfolds in Sections 2 to 4. In Section 2, the paper shows how intra-ASEAN maritime conflicts became militarized, especially during the 1990s. It then discusses in Section 3 the reasons why security norms are different in the maritime and terrestrial realms in ASEAN. This is because land boundaries are considered sacrosanct because of ASEAN adopting the principle of *uti possidetis juris,* whereas a 'state of nature' still exists at sea (with the exception of the Gulf of Thailand), where clearly delimited or accepted maritime boundaries have yet to be established, and boundary making is still the preoccupation of all claimant states, including ASEAN.

In this respect, the paper therefore argues that two different forms of sovereignty – one pertaining to the land and the other to the sea – coexist in ASEAN. Because of this feature, the ASEAN norms of conflict-avoidance and non-use of force or threat to use force do not apply to the sea. The fact that the sea is regarded as a frontier where boundary making is still taking place is discussed in Section 4. In Section 5, the paper uses these insights to explain why functional maritime cooperation has been very difficult to achieve in the South China Sea and will continue to remain difficult to attain, in contrast with the Gulf of Thailand. In the Gulf, major sovereignty issues had already been settled, and the extension of maritime zones was therefore more a technical than a political-sovereignty issue.

THE MILITARIZATION OF MARITIME CONFLICTS IN ASEAN

Intra-ASEAN conflicts on land tend to focus on 'soft' security issues such as economics, human rights, good governance and sanctions against recalcitrant member states such as Myanmar. It is in this sense that the term 'conflict' is used, since it refers to a state of disharmony between the incompatible interests of nation states. On the other hand, intra-ASEAN cooperation on functional 'soft' security issues such as trans-national crime, drugs, people smuggling and international terrorism has steadily developed over the years. Moreover, ASEAN 'hard' security (or military) cooperation along its land boundaries, especially with regard to the non-interference norm, has continually improved. Although Thailand fought a short border skirmish with Myanmar in the northwest in 2001 over the issue of separatist rebels using Thailand as a base, the problem was sorted out rapidly.[7] Indeed, ties between Myanmar and Thailand have become so strong because of vested economic interests that the land boundary issue is no longer a problem, with an agreement for Thai businesses to "cultivate millions of acres of land tax-free in Myanmar's border areas."[8] In addition, Thailand and Myanmar have also embarked on a joint hydropower project along the

[6] Christopher Chung, op cit, p. 310. The evolution of the Declaration on the South China Sea is detailed in pp. 310-348.

[7] Thai Burma border talks positive, BBC News, April 4, 2001. http://news.bbc.co.uk/2/hi/asia-pacific/1255640.stm, accessed April 12, 2003.

Thai-Myanmar border.[9] Similarly, the Thai-Cambodian border dispute on land has not resulted in the militarization of their common border. Instead, both Thailand and Cambodia agreed to jointly press for UN World Heritage Status for the Preah Vihear temple, the central symbol of the Thai-Cambodia border dispute.[10]

Malaysia also established General Border Committees (GBCs) with all its neighbours to solve trans-border problems. As an illustration, Malaysian Defence Minister Mohamed Najib made it very clear that the separatist problem in southern Thailand is purely "an internal problem of Thailand and that Malaysia respects the cardinal principle of non-interference in the internal affairs of our neighbours."[11] Kuala Lumpur in the same vein, refused to recognise as refugees the Acehnese who fled to Malaysia to avoid the fighting between Indonesia and the Gerakan Aceh Merdeka (Free Aceh Movement) separatist movement since it did not want to interfere in the internal affairs of Indonesia.[12] In contrast to confrontation at sea, Malaysia and Indonesia are currently involved in jointly demarcating their international land boundaries in Sabah and East Kalimantan, and between Sarawak and West Kalimantan.[13] Indeed, after the overthrow of President Sukarno and the end of *Konfrontasi*, Malaysia and Indonesian troops jointly patrolled the Sarawak-Kalimantan border and carried out joint operations against communist sanctuaries.[14] We see therefore that ASEAN members usually comply with the ASEAN norms of

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[8] Clifford McCoy, "Capitalizing the Thai-Myanmar border," Asia Times Online, June 21, 2007. http://www.atimes.com/atimes/Southeast_Asia/IF21Ae02.html, accessed January 12, 2008.

[9] "Salween Hydropower Project (Thai–Burma border) Briefing Paper," Foundation for Ecological Recovery, June 2003. http://www.terraper.org/articles/BriefingSalweenThai-BurmaJune03.pdf, accessed May 7, 2005.

[10] Frances Harrison, "Heritage bid unites border rivals," BBC News, March 4, 2008. http://news.bbc.co.uk/2/hi/in_depth/7277928.stm, accessed March 19, 2008

[11] Opening Address By The Honourable Dato' Sri Mohd Najib Bin Tun Hj Abdul Razak, Deputy Prime Minister And Minister Of Defence, Malaysian Joint Chairman At The 47th GBC Meeting Between Malaysia-Thailand, Kuala Lumpur, 21st June 2007 http://www.mod.gov.my/index.php?option=com_content&task=view&id=468&Itemid=203, accessed March 19, 2008.

[12] Jonathan Kent, "Malaysia Aceh Policy Criticised: Malaysia does not recognize international treaties on refugees," BBC Kuala Lumpur, BBC News, April 2, 2004.

[13] Speech by Malaysian Prime Minister Abdullah Ahmad Badawi at the Annual Consultations between the Republic of Indonesia and Malaysia, Putra Jaya, Jan. 11, 2008. http://www.kln.gov.my/?m_id=25&vid=594, accessed March 18, 2008.

[14] Lee Yong Leng, "The Razor's Edge: Boundaries and Boundary Disputes in Southeast Asia," Research Notes and Discussions [sic] paper No. 15, Institute of Southeast Asian Studies, Singapore, 1980, p. 6.

peaceful resolution of conflicts, the non-use of force and non-interference in the internal affairs of another member state with regard to security issues on land.

In contrast, maritime boundary tensions continue to bedevil cooperation at sea. While these tensions have not broken out into actual shooting wars between the ASEAN members, a great deal of aggressive military posturing, veiled military threats, confrontations and the occupation of islets and cays in the South China Sea have taken place. This military posturing is a 'conflict-threat process' which runs contrary to Article 2 of the TAC that explicitly renounces "the threat or use of force."

Vietnamese and Filipino occupation of the Spratly islands mainly took place in the 1960s and 1970s, before the TAC was signed. However, in December 1979, a Malaysian naval task force occupied Swallow Reef, which is also claimed by China, Taiwan, and Vietnam. The most controversial move probably was the Malaysian occupation of Investigator Shoal and Erica Reef in 1999. As one scholar noted, this was the first time that an ASEAN member had "moved against the claims of co-members the Philippines and Vietnam in the South China Sea."[15] The occupation of Investigator Shoal was a "major military operation" involving six frigates and Malaysia's most modern combat aircraft.[16] Manila became even more upset when it discovered that Malaysia had occupied and built a two-storey structure on another feature, Erica Reef, in July 1999. Tension further increased in 1999 when two Malaysian air force fighter jets intercepted and drove off two Filipino military aircraft near Investigator Shoal.[17]

In addition, there were very aggressive encounters between the Malaysian and Indonesian armed forces during the course of sovereignty patrols around the contested islands of Sipadan and Ligitan in the Celebes Sea, off the eastern Sabah coast, in the 1990s. Recognising that the aggressive encounters could easily turn into open conflict, the Malaysian and Indonesian navies, with intellectual support from the Maritime Institute of Malaysia, worked out and signed the *Malaysia-Indonesia*

[15] Christopher Chung,, op cit, p. 116.
[16] Michael Richardson, "On Eve of Annual Talks, ASEAN Members Are Split Over Spratlys Dispute," International Herald Tribune, July 23, 1999.
[17] For a full description of the Malaysian occupation of two new Spratly islands features in 1999, see Christopher Chung, op cit, pp. 122-145.

Prevention of Incidents at Sea Agreement (*MALINDO INCSEA*) in January 2001. It is extremely significant that a Prevention of Incidents at Sea Agreement (INCSEA) was concluded between two so-called 'friendly' navies despite the norms of the TAC.

Another illustration of the high level of intra-ASEAN maritime tension was when an Indonesian warship and a Malaysian naval vessel bumped each other during another "robust, confrontational approach" in the disputed Ambalat area off the south-eastern coast of Sabah in April 2005.[18] This resulted in some Indonesian officials and the Indonesian public calling for the "use of military force" and the revival of *'konfrontasi'* against Malaysia[19] As a consequence of the dispute, both countries increased the deployment of military units to the area. The Indonesian national news agency *Antara*, also reported incidents of Indonesian ships intercepting and successfully driving away Malaysian navy craft that had 'violated' Indonesian territory in Ambalat on three occasions in 2007.[20] This was a very clear case of military posturing and the indirect threat of the use of force to reinforce the sovereignty claims of each country. While the Ambalat case was not strictly a sovereignty issue, sovereignty was at the heart of the conflict because first, Indonesia felt cheated of its sovereignty over Sipadan and Ligitan after the International Court of Justice (ICJ) awarded the two islands to Malaysia in 2002.[21] Second, the anti-Malaysia feelings were also linked to perceptions of Malaysian arrogance over the brutal and unfair treatment of 'sovereign' Indonesian migrant labour in Malaysia.[22]

Besides Ambalat, Malaysia and Indonesia are also involved in maritime disputes off the west coast of Sarawak-Kalimantan in the Gosong Niger zone. Malaysian navy ships were accused by Indonesia of regularly patrolling the area, which the latter

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[18] Clive Schofield and Ian Storey, "Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes," Harvard Asia Quarterly, Fall 2006. http://www.asiaquarterly.com/index.php?option=com_content&task=view&id=160&Itemid=1, accessed March 12, 2007. The authors also provide a detailed chronology of the Malaysia-Indonesia spat over Ambalat.

[19] "Govt urged to get tough in territory dispute," The Jakarta Post, March 7, 2005.

[20] Malaysian warships trespass RI waters in Ambalat," Antara, Feb. 27, 2007.

[21] Richel Langit, "Indonesia: Islands in the storm," Asia Times Online, Dec. 21, 2002. http://www.atimes.com/atimes/Southeast_Asia/DL21Ae01.html, accessed Jan. 12, 2003.

[22] "Malaysia: Human rights at risk in mass deportation of undocumented migrants," Amnesty International, December 2004. www.amnestyusa.org/news/document.do?id=a41fbb92a536608380256e7c0062b8af, Accessed March 3, 2006.

claims is its sovereign territory.[23] Additionally, tensions continued to rise over the Spratlys between the ASEAN members. Vietnamese troops on Pigeon Reef for instance, apparently fired on a Philippines air force reconnaissance aircraft in October 1999.[24]

Significantly, there is a move by Malaysia over the next five years to persuade its ASEAN neighbours to adopt bilateral INCSEA agreements in light of the modernisation of all the ASEAN navies. A Malaysian government official noted that the ongoing modernisation and expansion of ASEAN navies, coupled with maritime conflicts especially in areas such as the Ambalat, makes future INCSEA agreements essential.[25] Given this background, why are some ASEAN member states prepared to push the envelope of conflict and risk at sea in spite of the TAC? Is there a difference between ASEAN norms at sea and their observance on land? In this paper, I argue that separate and distinct notions of sovereignty apply to ASEAN land territory and its maritime zones. This accounts for the different conflict behaviour seen at sea in contrast with that on land, with implications for the prospect of maritime cooperation.

TWO DIFFERENT REALMS: THE MARITIME AND TERRESTRIAL

It is clear that ASEAN norms take a back seat to national interests in the maritime realm. One illustration of the primacy of national interests as sea is contained in the introduction to the *MALINDO Prevention of Sea Incidents Cooperative Guidelines, 2001* that states:

> …both parties [the Indonesian and Malaysian navies] also recognise that despite the sharing of common ideals, the orientations of their respective national interests may at times run at odds against one another… *Of particular concern are those that could develop from an action reaction process*

[23] I Made Andi Arsana, "Gosong Niger: Is it Another Ambalat?" Geopolitical Boundaries, March 3, 2006. http://geo-boundaries.blogspot.com/2006/03/gosong-niger-is-it-another-ambalat.html, accessed April 07, 2006.
[24] Celeste Lopez and James Conachy, "Spratlys continue to loom as Asian flashpoint," Dec. 13, 1999. http://www.wsws.org/articles/1999/dec1999/spra-d13.shtml, accessed April 16, 2001.
[25] Personal interview, March 10, 2008.

involving naval forces from both countries during operations to safeguard their respective national sovereignties.[26]

The argument that two separate sets of norms exist within ASEAN is in contrast to the contructivist approach that considers ASEAN norms as applicable across all realms. Realists too, fail to recognise the existence of these two separate security realms. From the realist perspective, China is the most recalcitrant actor in the South China Sea because it is the biggest power in the region. However, Malaysia, Vietnam and Indonesia are all equally adamant in asserting their maritime sovereignty claims in the South China Sea. In one sense therefore, the maritime realm is still in a state of nature. Because the norms operating in the maritime realm are distinct from the cooperative norms that operate on land, the many attempts to promote maritime cooperation invariably failed in the past.

There are several reasons why I consider the two realms as distinct security entities. The first is the legacy of *uti possidetis juris*, by which the newly independent ASEAN states inherited and incorporated colonial boundaries as their own borders. Second, while land boundaries were clearly demarcated with the acceptance of the principle of *uti possidetis juris*, maritime boundaries were not clearly delimited, much less demarcated by Britain, the Netherlands and France. Consequently, ASEAN is still involved in basic maritime boundary making today. In turn, this has implications for ASEAN sovereignty. A sovereign state is defined by specific territorial boundaries. However, since maritime boundaries have yet to be established (demarcated) in large areas of the Southeast Asian seas, maritime sovereignty remains tenuous and therefore highly contested. Finally, there is also the related ASEAN norm of non-interference in the internal affairs of another member state. To my mind, the non-interference concept referred not merely to a bounded territory, but more important, had the people within that territory as its focus. Since the South China Sea has almost no permanent constituency, i.e. population, nor properly demarcated boundaries, the ASEAN norm of non-interference and respect for state sovereignty does not apply to most of the Southeast Asian maritime sphere.

[26] "MALINDO Prevention of Sea Incidents Cooperative Guidelines", Introduction 1a, 1b. Kuala

Uti Possidetis Juris

Apart from the 1963-1966 *Konfrontasi* by Indonesia against Malaysia, there has never been any serious conflict over land boundaries in the ASEAN region. While the Philippines claim to Sabah had the potential to become very serious, Manila never really pressed its claims. Indeed, one can argue that there was little attempt by post-colonial states in Southeast Asia to change by force the boundaries that they inherited. In this sense, Southeast Asia's political boundaries are based on inherited colonial borders, principally the land borders and their immediate territorial seas.[27] Although the legal concept of *uti possidetis juris (title to territory – 'as you possess so shall you possess')* was not formally adopted by ASEAN, unlike in Latin America and Africa, its tacit acceptance by Southeast Asia was never challenged by any state within the region. Thus the principle of *uti possidetis juris* is fundamental to sovereignty and regional peace in ASEAN. As the ICJ stressed in a 1986 ruling, the aim of *uti possidetis juris* is "to secure respect for the territorial boundaries which existed at the time when independence was achieved," thus freezing title over territory and producing a "photograph of the territory".[28] *Uti possidetis juris* therefore is a principle that transforms colonial borders into international frontiers with the key objective of ensuring stability among newly decolonised states.

The significance of u*ti possidetis juris* is that it combines the concepts of non-interference and self-determination *based on territoriality* (in the ASEAN case, colonial territorial boundaries) "rather than ethnic claims".[29] Under the concept of *uti possidetis juris,* the right to self-determination and sovereignty is based on the acceptance of the pre-eminence of colonial boundaries over ethnicity, culture, religion or even pre-colonial boundaries. Thus, title to colonial territory has constituted the legal basis for the ASEAN norm of sovereignty and non-intervention. So far, no ASEAN country has seriously challenged the legality of existing post-colonial

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Lumpur, 2001. Emphasis added.

[27] Michael Leifer, I*nternational traits of the World Volume Two: Malacca, Singapore, and Indonesia*, (Alphen aan den Rijn, the Netherlands: Sijthoff and Noordhoff, 1978), pp. 10-11.

[28] Burkina Faso vs. Republic of Mali, 1986 ICJ Reports 565, cited in Enver Hasani, "Uti Possidetis Juris: From Rome to Kosovo", International Law Under Fire, Fletcher Forum of World Affairs, Summer/Fall, 2003, http://operation_Kosovo.kentlaw.edu/symposium/resources/hasani-fletcher.htm (accessed Nov. 25, 2004).

Southeast Asian boundaries, with the possible exception of the 1962 Philippines claim to North Borneo (now Sabah), in which Manila argued that title to the East Malaysian state is still held by the Sultan of Sulu, in Mindanao. Ironically, however, the presumed claimed area is still based on colonial British boundaries. Indonesia also laid claim to Dutch Papua New Guinea because it was part of the Netherlands East Indies Administrative territory in addition to being part of the Sultanate of Tidore before Dutch rule.[30]

The evidence that ASEAN members have accepted *uti possidetis juris* as a key principle is reflected in the various legal tussles over maritime claims in the region. For instance, in the Sipadan-Ligitan dispute between Malaysia and Indonesia, both countries cited the 1891 Convention between Britain and the Netherlands which delimited the Dutch and British boundary in Borneo, as the legal basis for their claims before the ICJ in 2001.[31] Similarly, the basis of the claims and counter-claims made by Malaysia and Singapore over the ownership of Pulau Batu Putih or Pedra Branca before the ICJ in 2007 was again based on British colonial administrative boundaries. Arguments to resolve the Cambodia-Thai border dispute, symbolised by the ancient temple of Preah Vihear, which the ICJ decided in favour of Cambodia in 1962, similarly rested on whether the French map showing the boundary or the text of the 1904 Convention delineating the boundary, should take precedence.[32]

ASEAN Sovereignty: Periphery and Core

Just as ASEAN norms operated mainly on land, the ASEAN (or Westphalian) notion of sovereignty also applied largely to land territories and the adjacent strip of territorial seas.

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[29] Enver Hasani, *op cit.*

[30] Anthony L. Smith and Angie Ng, "Papua: Moving Beyond Internal Colonialism?" New Zealand Journal of Asian Studies, December, 2002, pp. 92, 97.

[31] Opening statement by Agent for Malaysia, *op cit*; Opening Speech of the Agent of the Republic of Indonesia**,** Dr. N. Hassan Wirajuda, Minister for Foreign Affairs of the Republic of Indonesia, The Hague, 3 June, 2002, http://www.indonesia.nl/statements.php?rank=6&art_cat_id=10.

[32] Lee Yong Leng, op cit, p. 17.

Indeed, the ASEAN emphasis on non-intervention in the domestic affairs of another member state did not merely focus on territorial incursions, which have been rare within ASEAN. Instead, ASEAN members are more wary of 'soft' intervention, such as criticising the standards of governance of other states, accusing states of human rights abuses; subverting peoples, ethnic groups, or supporting local insurgencies and fomenting domestic dissatisfaction so that a population, or parts of a population, will rise up against the ruling political elites. Non-intervention therefore extends to not providing political, moral and material support for dissidents in neighbouring countries; and helping neighbouring states to fight subversive groups.[33]

Thus, the ASEAN norm of non-intervention is not merely about respecting borders, but has the population or people living within a defined territory as a key focal point. As McCorquodale and Pangalangan noted, boundaries do not merely delimit the area of a state and "state sovereignty but *also define the inhabitants*."[34] In this sense, the actual physical space or geographic boundaries on land is arguably not the key target of the ASEAN non-intervention norm. The focus on people was because many ASEAN states were colonial constructs, with the newly independent states left with populations comprising diverse ethnic groups and speaking different languages. These ethnic groups often were separated by colonial boundaries, and shared blood and religious ties with their kinfolk in neighbouring countries. Thus the primary objective of non-intervention was to prevent external actors from exploiting current or potential domestic unrest, such as the issue of human rights, and to ensure that established governments are not overthrown through the use of force.[35]

The unilateral extensions of maritime zones by the ASEAN members therefore did not challenge traditional national sovereignty for a number of reasons. Firstly, because of the implicit ASEAN acceptance of *uti possidetis juris,* the unilateral maritime claims of the 1960s and 1970s did not affect established land borders, which can be regarded as the 'sovereign' or 'territorial core' of ASEAN. Secondly, these

[33] Amitav Acharya, "Sovereignty, Non-Intervention, and Regionalism", CANCAPS Paper Number 15, October 1997, p. 3.
[34] Robert McCorquodale & Raul Pangalangan, "Pushing back the Limitations of Territorial Boundaries," European Journal of International Law, Volume 12, Number 5, 1 December 2001, p. 874.
[35] Amitav Acharya, "Sovereignty, Non-Intervention, and Regionalism", CANCAPS Paper Number 15, October 1997, p. 9.

contested maritime zones did not include large permanent population centres. This is important because the unilateral extensions of maritime zones therefore did not challenge the ASEAN norm of non-intervention and its strictures against creating domestic dissension and overthrowing neighbouring governments. The ASEAN notion of sovereignty and non-intervention in this sense only applies to the grouping's territorial core, i.e. the borders inherited from France, Britain and the Netherlands that are held to be inviolate.

4. Maritime Sovereignty and Boundary Making

In contrast to territorial boundaries, colonial boundaries were not delimited and demarcated in huge areas of the South China Sea and the Celebes Sea. The 19th and early 20th centuries were the era of British supremacy at sea with its emphasis on free trade and the freedom of navigation. The open seas regime had existed for nearly 300 years because the world's maritime powers found that freedom of navigation worked to their mutual benefit. The open seas regime meant that no one owned the ocean, except for a very narrow coastal belt, usually confined to a three-nautical-mile wide territorial sea. As such, colonial maritime boundaries seldom extended beyond three nautical miles from the coastline. However, all these changed with innovations in seabed mining technology and the growth in the number of newly independent coastal states after decolonisation. These new states saw the adjacent seas as important sources of wealth. The desire to exploit the sea directly demanded not only access to the desired resources, but the ability to exclude others from exploiting it, i.e. the ability to establish sovereignty or property rights.[36] Consequently, coastal states, including those in Southeast Asia, were all for extending their territorial sea claims from the traditional three-nautical-mile limit up to six, 12 and even 200 nautical miles. This explains the rush to unilaterally 'fence off' the oceans in the 1960s, and the need to establish a new ocean regime to restore order in the maritime sphere, which ultimately culminated in the 1982 UNCLOS.

However, UNCLOS was not able to and did not establish ownership of the ocean. It provided instead, provisions on how maritime zones could be extended and claimed

[36] Daniel Moran, "The International Law of the Sea in a Globalized World", in Sam J. Tangredi (ed) *Globalization and Maritime Power*, (Washington: Institute for National Strategic Studies, National Defense University, 2002).

after sovereignty over territory had been established. Consequently, maritime boundaries and borders do not really exist in the South China Sea. As such, it is important to distinguish between maritime borders/boundaries and maritime frontiers in the maritime realm. Boundaries or borders are where political limits are demarcated, whereas frontiers tend to be rather flexible, since they are geographic zones where states have yet to establish complete political control, or are in the process of doing so. Thus, a significant portion of the various claimed maritime zones in Southeast Asia may be considered maritime frontiers.

There are five basic steps involved in boundary making. The first is for a state to define the extent of its claims, i.e. boundary *definition*. If the boundary definition is not contested and is subsequently marked out on a map, then it is considered to be *delimited*. Following this, the boundary is considered *demarcated* if boundary markers are emplaced on land and turning points which are not contested plotted out for sea areas. Importantly, disputes can arise even over a delimited boundary because of "differing interpretations of its verbal or cartographic definition."[37] The last step in establishing authority over a demarcated boundary is to administer the territory. In this respect, most claimants have merely defined their boundaries in the South China Sea. Indeed, the "significance of international law for solving the dispute seems limited" while UNCLOS itself assumes that the issue of sovereignty had already been resolved.[38] Thus, instead of boundaries, the South China Sea is characterised by frontiers, which can be defined as a zone or "tract of territory separating the centres of two sovereignties."[39]

Following this line of argument of a 'sovereign core' and a 'sovereign periphery,' threats to ASEAN sovereignty may also be divided into threats to national sovereignty (threats to the core or heartland), and threats to the maritime periphery or maritime frontier. For instance, in a study contrasting ASEAN solidarity with respect to the Vietnamese invasion of Cambodia with the Chinese occupation of Mischief Reef, Sharpe noted that in the latter case, the Chinese "violation was not as clear-cut

[37] Alastair Lamb, Asian Frontiers: Studies in a Continuing Problem (New York: Frederick A. Prager, 1968), p. 5.
[38] Leni Stenseth, op cit.
[39] Alastair Lamb, op cit, p. 6.

[because] Mischief Reef was not uncontested Filipino territory".[40] In contrast, ASEAN had regarded the Vietnamese invasion of Cambodia in 1978 as a clear violation of two key TAC norms that proscribed the use of force and interfering in the internal affairs of another state. In 1995, when the Philippines discovered that China had established a military outpost on Mischief Reef, Manila merely managed to evince a rather bland statement from the ASEAN foreign ministers' meeting, which did not even imply that China had done something wrong.[41] This of course could be due to the fact that ASEAN members did not wish to alienate a rising power such as China over a relatively inconsequential maritime squabble.[42] Nevertheless, it was also highly likely that the Mischief Reef incident did not resonate with ASEAN because it did not violate the sovereign core of an ASEAN member.

Despite the protests of the Philippines, China continued to expand and develop its military facilities on Mischief Reef. ASEAN remained significantly silent over China's occupation of Mischief Reef, unlike the vociferous and united stand it took over the Vietnamese invasion of Cambodia that involved two non-ASEAN states. In other words, the Vietnamese invasion of Cambodia was a violation of the 'sovereign core' of a Southeast Asian state, whereas Mischief Reef can be regarded merely as a challenge to the maritime frontier, or 'periphery', of an ASEAN member. Moreover, the Spratly islands disputes do not constitute a 'regime-threatening' issue for the ASEAN members.[43] The tacit ASEAN recognition that its maritime boundaries are in reality frontiers is illustrated by Indonesia's attempts to properly demarcate and administer its outlying islands following the ICJ award of Sipadan and Ligitan to Malaysia. Although most sources listed Indonesia as possessing 15,000 islands in 2001, after the loss of Sipadan and Ligitan, the Indonesian government claimed that it had more than 17,000 islands. This was followed by a move to name and register

[40] Samuel Sharpe, "An ASEAN way to security cooperation in Southeast Asia?" *The Pacific Review*, Vol. 16 No. 2 2003, p. 239.
[41] "Recent Developments in the South China Sea (1995)," March 18, 1995. http://www.aseansec.org/5232.htm, accessed Jan. 12, 2001.
[42] Leszek Buszynski, ""Realism, Institutionalism, and Philippine Security," Asian Survey, Vol. 42, No. 2, May/June 2002, p. 491.
[43] This is in direct contrast with China where one scholar has argued that the Spratly islands had become part of the Chinese national identity, and therefore "considered an inseparable part of the motherland, and occupation by others is interpreted as encroachments on Chinese territory." Leni Stenseth , "The Imagined China Threat in the South China Sea," Centre for Development and the Environment, University of Oslo. (Undated), p. 40.

9,000 islands with the United Nations.[44] In addition, Jakarta encouraged Indonesians to migrate and settle down in the outer islands since the "further losses of islands threatens to *redraw Indonesia's archipelagic territorial borders*."[45] Furthermore, a senior Indonesian politician described the collision between a Malaysian and an Indonesian warship off Ambalat in 2005 as indicative of the "legal weakness regarding Indonesia's outer borders" and stressed that "this is a matter of Indonesia's sovereignty. *We have to secure this sovereignty*."[46]

The fact that two sets of sovereignty norms – one applicable to the land and the second to the maritime frontier – co-exist in ASEAN explains why ASEAN states had been able to push the envelope at sea and violate the accepted norms of the TAC. Malaysia is perhaps the one ASEAN member that has pushed the envelope the most. The Philippines in particular felt cheated by the 1999 Malaysian occupation of Investigator Shoal and Erica Reef, which it considered to be against the 1992 ASEAN Declaration on the South China Sea, which had reiterated the call for the peaceful resolution of all conflicts.[47]

Equally significant, the ASEAN norms of consultation and consensus also appeared to fail with regard to defusing tensions in the South China Sea. Since the Philippines was militarily very weak to stand up to China, and later Malaysia, it resorted to intra-regional and international diplomacy to handle incursions against Filipino 'sovereignty'. Although it managed to evince from the ASEAN foreign ministers' meeting in 1995 a vague statement to resolve the Mischief Reef incident amicably, by 1999 however, ASEAN unity over Spratlys issue had become "fragile."[48] Malaysia thwarted attempts by the Philippines to discuss developments in the Spratly islands at the 1999 ASEAN foreign ministers' meeting and insisted on bilateral discussions only. Malaysia also took the side of China in the ARF by arguing that it was not an

[44] Indonesia to Registers Small Islands' Names to UN on August 18 Tempointeraktif, July 23, 2007. http://www.tempointeraktif.com/hg/nasional/2007/07/23/brk,20070723-104181,uk.html. Accessed July 25, 2007.

[45] Meidyatama Suryodiningrat, "RI must make presence felt on islands", The Jakarta Post, March 13, 2006.

[46] "MPR Speaker: Indonesia's Outer Borders Are Weak," Tempointeractive, April 13, 2005. (Emphasis added). http://www.tempointeraktif.com/hg/nasional/2005/04/13/brk,20050413-04,uk.html, accessed April 16, 2005. (Emphasis added).

[47] "ASEAN Declaration On The South China Sea", Manila, Philippines, 22 July 1992. http://www.aseansec.org/1196.htm, accessed May 11, 2001.

"appropriate venue" to discuss the South China Sea disputes.[49] If anything, this was an example of ASEAN breaking ranks over an issue involving sovereignty on its periphery.

THE FAILURE OF MARITIME COOPERATION

Despite sustained efforts to promote maritime cooperation, it has produced little result so far except in the closed and restricted waters of the Gulf of Thailand. This is despite the fact that ASEAN officially touted maritime cooperation as a key pillar of its attempt to establish an ASEAN Security Community (ASC). First enunciated in 2003, Paragraph 5, Section A of the Declaration of ASEAN Concord II (Bali Concord II) specifically mentioned that "maritime cooperation between and among ASEAN member countries shall contribute to the evolution of the ASEAN Security Community."[50] The stress on ASEAN maritime cooperation was re-emphasised at the ASEAN Foreign Ministers' meeting in Jakarta in June 2004. The meeting reiterated that maritime cooperation is "vital to the evolution of the ASEAN Security Community" and agreed to look into setting up a maritime forum.[51] There was also the assumption that since maritime problems are invariably trans-boundary in nature, there would be shared interests inherent in the maritime sphere, which theoretically ought to make the institutionalisation of Southeast Asian maritime cooperation easier and more achievable.[52] Yet regional efforts to foster maritime cooperation and reduce interstate tensions have at best, met with limited success except in the Gulf of Thailand.

The most notable of these regional efforts to foster maritime cooperation was the Indonesian South China Sea Workshop series on *Managing Potential Conflicts in the*

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[48] Christopher Chung,, op cit, p. 145.
[49] Christopher Chung,, op cit, p. 145
[50] Declaration of ASEAN Concord II (Bali Concord II), http://www.aseansec.org/15159.htm, accessed Nov. 15, 2004.
[51] "Indonesian presses ASEAN to pursue security bloc", Reuters report, International Herald Tribune, June 30, 2004.
[52] For an institutionalist argument, see Mark J. Valencia, "Prospects for Multilateral Regime Building in Asia", in Sam Bateman (ed), *Maritime Cooperation in the Asia-Pacific Region: Current Situation*

South China Sea, the first of which was held in 1990.[53] The aim of the South China Sea workshops was to defuse tensions between claimants to the Spratlys by fostering functional cooperation and leaving aside the thorny issue of sovereignty. However, despite a great deal of effort, the Indonesian-organised and Canadian-sponsored South China Sea workshops failed to get the claimant countries to work together meaningfully. Very briefly, obstacles to cooperation included the fact that countries such as Malaysia were more or less happy with the *status quo* in the South China Sea, while other countries were not prepared to put cooperation before sovereignty claims. Thus, Canada decided in 2001 to stop funding the South China Sea workshop series because of "the lack of concrete results"[54] while Hashim Djalal, the initiator of the workshops, was reported to have been "not optimistic" by 1998.[55] Significantly, the issue of sovereignty proved to be a key factor in the inability of the claimant countries to cooperate.

Maritime cooperation will be very difficult to achieve in the South China Sea because of the belief that the wealth of the sea could enrich the economies of the countries that happen to own the 'right' maritime zones. In short, ownership of potentially rich maritime zones is still seen in zero-sum terms. Although initial attempts by China, Vietnam and the Philippines to cooperate on seismic exploration in the South China seemed to vindicate the belief that functional cooperation in the South China Sea is feasible, subsequent events proved otherwise. The Philippines and China entered into a bilateral agreement in 2004 for a joint seismic exploration for oil in the South China Sea. In 2005, Vietnam decided to join forces with China and the Philippines in the survey, turning it into a tripartite agreement.[56] The Joint Marine Seismic Undertaking

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and Prospects, Canberra papers on Strategy and Defence No. 132, (Canberra: Australian National University, 1999).

[53] See Liselotte Odgaard, "Conflict Control and Crisis Management between China and Southeast Asia: an Analysis of the Workshops on Managing Potential Conflicts in the South China Sea," http://www.southchinasea.org/docs/Odgaard.pdf, accessed March 04, 2001.

[54] Yann-Huei Song, "The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks," Ocean Development & International Law, 34, p. 249.

[55] Leni Stenseth, "Nationalism and Foreign Policy – the Case of China`s Nansha Rhetoric," Unpublished PhD Dissertation, Department of Political Science, University of Oslo, 1998. Footnote 29.

[56] "A Tripartite Agreement for Joint Marine Scientific Research in Certain Areas in the South China Sea By and Among China National Offshore Oil Corporation and Vietnam Oil and Gas Corporation and Philippine National Oil Company, 2005." http://www.newsbreak.com.ph/index.php?option=com_remository&Itemid=88889273&func=startdown&id=219, accessed March 18, 2008.

(JMSU) was initially hailed as a breakthrough and watershed for diplomacy and indicative of "the growing level of trust and confidence among [South China Sea] claimants and their commitment to pursue peaceful options."[57] Subsequently, however, the agreement was criticised as another sign of ASEAN members breaking ranks instead of taking a unified stand against China.[58]

But the most opposition to the agreement came from within the Philippines itself. While this opposition probably has a great deal to do with domestic politics, most opponents to the JMSU criticise it as a sell-out of Filipino sovereignty. Opposition Senator Antonio Trillanes IV even accused President Arroyo of "treason for entering into such an agreement with China and Vietnam."[59] Other critics observed that since the JMSU site covered about 80 per cent of the Philippines' exclusive economic zone, the agreement implied that the Philippines "acknowledged the area [involved] as disputed."[60] This would therefore weaken its sovereignty claims in the South China Sea. The fact that this attempt at functional cooperation between three countries in the South China Sea has been so highly contested shows that the problem of sovereignty remains problematical. Although supporters of functional cooperation may argue that the controversy has more to do with domestic opposition to the Arroyo administration, the accusation of selling out Filipino sovereignty cannot be ignored.

Why the Gulf of Thailand is an Exception

Proponents of functional cooperation usually cite the Gulf of Thailand as an example of how 'political will' can overcome the problems of conflicting maritime claims in Southeast Asia.[61] My own interpretation of the positive developments in the Gulf is

[57] Secretary Romulo Heralds RP-China-Vietnam Agreement on Joint Seismic Survey of the South China Sea, Official Website of the Government of the Philippines, March 14, 2005. http://www.gov.ph/news/default.asp?i=7301, accessed March 18, 2008.

[58] Christopher Roberts, 'China and the South China Sea: What Happened to ASEAN's Solidarity?" IDSS Commentaries, 26 April 2005.

[59] Michaela P. del Callar, "No Gloria order to suspend JMSU: Chinese ships to continue exploration—diplomat," The Daily Tribune, March 19, 2008. http://www.tribune.net.ph/headlines/20080319hed1.html, accessed March 19, 2008.

[60] Miriam Grace A. Go, "A Policy of Betrayal (First of three parts)," ABS-CBN NEWS.com/Newsbreak, http://www.abs-cbnnews.com/storypage.aspx?StoryId=112137, accessed March 18, 2008.

[61] Clive Schofield, "Unlocking the Seabed Resources of the Gulf Of Thailand," Contemporary Southeast Asia: A Journal of International and Strategic Affairs, Volume 29, Number 2, August 2007, p.298.

that while political will was important, the fact that major sovereignty issues had already been settled in the Gulf because littoral states had accepted the principle of *uti possidetis juris* was critical. Colonial France and Britain allowed Thailand to continue to exist as an independent state because they needed a buffer state between their spheres of interests in Southeast Asia.[62] The Anglo-French Agreement of 1904 clearly "decided the British and French spheres of influence at the Kra Isthmus and Malaysia peninsula."[63] The subsequent Anglo-Siamese Treaty of 1909 not only ceded four southern Thai states to the British, but also drew up on paper, the limits of the boundaries between Thailand and colonial Malaya.[64] Very significantly, the Boundary Protocol annexed to the 1909 Treaty also included delimiting, or fixing the boundary line, of the territorial seas between Thailand and British Malaya.[65] The French and British also set the boundary limits for Thailand and Cambodia and Cochin China. Although the colonial delimitation was grossly unfair, Thailand, Malaysia, Vietnam and Cambodia nevertheless accepted these boundaries as their own after the withdrawal of the French and British.

For instance, the Cambodia-Vietnam Historic Waters Agreement of 1982 again resolved the sovereignty dispute between the two countries over the ownership of various islands off their coasts by referring back to colonial administrative boundaries. Under the agreement, both countries accepted the so-called 1939 Brevie Line of the French colonial administration, which had determined then that a "number of small islands" came under the jurisdiction of Cambodia while the island of Phu Quoc belonged to Cochin China, today's Vietnam.[66] Although Thailand lodged a diplomatic protest, the agreement nevertheless resolved a crucial sovereignty conflict between Vietnam and Cambodia.[67]

Fundamentally, the Gulf of Thailand states had moved a step beyond the South China Sea claimants in that the ownership or sovereignty over land territory, including

[62] Lee Yong Leng, op cit. p. 7.
[63] Lee Yong Leng, op cit. p. 8.
[64] Lee Yong Leng, op cit. pp. 19-20.
[65] R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective*, International Boundary Studies Series, Kluwer International Law Limited, London, 1998, p. 68.
[66] Clive Schofield, op cit, p. 295.
[67] Clive Schofield, op cit, p.295.

islands, were generally not disputed because of *uti possidetis juris.* Clive Schofield had suggested that one reason why functional agreements on resource sharing in the Gulf succeeded, despite the presence of maritime conflicts, was the proven reserves of hydrocarbon resources in the Gulf. Joint agreements not only facilitated access to the proven resources, but negated the possibility that a state could end up owning a zone with no resources at all.[68] In other words, absolute gains prevailed.

However, many of the 'conflicts' in the Gulf that Schofield refers to were technical rather than sovereignty conflicts. They involved technical debates over which turning points or baselines to use as the basis of a country's maritime claims. For example, the Malaysia-Thai conflict in the Gulf revolved round the issue of whether Thailand's Ko Losin was a rock or an island, which would directly affect how large a maritime zone Thailand could claim.[69] If Ko Losin is a rock, as Malaysia claimed, then it would only generate 12 nautical miles of territorial seas. However, Thailand argued that Ko Losin is an island, which would additionally generate an EEZ as well as a continental shelf for Thailand. Similarly, the overlapping claims between Malaysia and Vietnam in the Gulf resulted from the two countries using different islands as basepoints to extend their continental shelf claims. Malaysia, for instance, used its offshore islands to generate full maritime suites while ignoring the Vietnamese island of Hon Da as a legitimate basepoint.[70] The Malaysia-Vietnam dispute was not over who owned what islands, but which islands should be used as the technical basis to extend the continental shelf of each country, which would then impact on how large a continental shelf area each side can claim.

Overall, therefore, I argue that functional cooperation and the delimitation of maritime boundaries were easier to achieve in the Gulf of Thailand because it did not involve critical sovereignty issues, unlike in the South China Sea. Maritime conflicts arose not from sovereignty disputes over land and islands, but over how large a maritime zone these already claimed and delimited land territories can generate under UNCLOS. The squabbles were therefore mainly legal and technical in nature. However, UNCLOS does not provide precise guidelines for dealing with overlapping

[68] Clive Schofield, op cit, p. 288.
[69] Clive Schofield, op cit, p. 290.
[70] Clive Schofield, op cit, p. 297.

maritime boundary claims. Instead, UNCLOS only enjoins all contending parties to use international law to "achieve an equitable solution." However, because there was little conflict over the foundational issue of sovereignty over land territory, the conflicting maritime claims were not militarized in the Gulf.

CONCLUSION

What makes the maritime realm so different from the terrestrial realm is that the issue of sovereignty is still highly contested. Hand in hand with the contestation, ASEAN members are also involved in a 'conflict process' that involves militarizing conflicting claims in the South China Sea. This process includes overt deployments of military units, confrontation between navies in contested zones, and the implicit use of threats. Contructivists will argue that the fact that this 'conflict process' has not broken out into open warfare shows that the ASEAN way and the TAC norms are alive and well. However, the fact remains that military confrontations are still taking place at sea, in contrast to attempts to resolve issues cooperatively and peacefully on land. Because of this threat potential, Malaysia is attempting to put in place a comprehensive suite of INCSEA agreements with all its maritime neighbours. The implication of the conflict-process taking place at sea in the ASEAN region is that attempts to establish cooperation at sea, even functional cooperation that puts aside sovereignty issues, will very likely fail. As the JMSU case illustrates, agreements on functional cooperation can be seen as weakening a state's sovereignty claims. Although national leaders can agree to functional cooperation, critics in the more democratic ASEAN member states can criticise any agreement as a 'sell-out.' More than that, countries that are already exploiting proven reserves of oil and gas in contested maritime zones will be unlikely to consider functional cooperation. After all, why should they share their proven and 'sovereign' resources for the sake of promoting multilateral cooperation in the South China Sea region or other disputed maritime zones?

Proponents of functional cooperation are essentially proposing a technical solution that follows the ASEAN approach to conflict management, which is to shelf contentious political issues whilst concentrating on technical cooperation. However, this ignores the fact that the crucial problem of the South China Sea is a *foundational*

political problem about state sovereignty. The exception is the Gulf of Thailand where the foundational issue of sovereignty was resolved, leaving only comparatively minor cases to be settled. As the Gulf of Thailand illustrates, the political question of state sovereignty must be settled first before meaningful cooperation can take place, such as the joint exploration and exploitation of resources, or the joint development of areas with proven gas and oil deposits. Thus, prospects for functional and meaningful cooperation in the South China Sea do not look promising given that the foundational political problem – maritime sovereignty – has yet to be solved.

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