

THE JOURNAL OF DIPLOMACY AND FOREIGN RELATIONS

Volume 15 Number 1 August 2015

CONTENTS

Geopolitical Trends in the South China Sea: 2013-2015 VIVIAN LOUIS FORBES AND SUMATHY PERMAL	5
Is the Universal Declaration of Human Rights 1948 a Culture Unto Itself? NURHALIDA DATO' SERI MOHAMED KHALIL	25
The India-ASEAN Strategic Partnership: Challenges and Prospects for India's Engagement in Southeast Asia K.S. NATHAN	53
East Asia's Future Maritime Highway: The Northeast Arctic Passage MOHD HAZMI MOHD RUSLI, ROMAN DREMLIUGA AND WAN IZATUL ASMA WAN TALAAT	71
BOOK REVIEW <i>The South China Sea: The Struggle for Power in Asia</i> by Bill Hayton Review by ROSIDA ISMAIL	85

EDITORIAL BOARD

Editor-in-Chief

Dato' Hussin Nayan

Editorial Members

Ambassador Aminahtun Haji A. Karim

Noraini Awang Nong

Azmah Mahmud

PUBLISHER

Institute of Diplomacy and Foreign Relations (IDFR)

Ministry of Foreign Affairs, Malaysia

Jalan Wisma Putra

50460 Kuala Lumpur

Tel: (603) 2149 1051

Fax: (603) 2144 3487

Email: journal@idfr.gov.my

URL: www.idfr.gov.my

The views expressed in the Journal of Diplomacy and Foreign Relations are entirely the writers' own and not those of the Institute or the Editors.

© 2015 Institute of Diplomacy and Foreign Relations (IDFR)

ISSN 1511-3655

URL: www.idfr.gov.my

All rights reserved. The Journal of Diplomacy and Foreign Relations encourages the reproduction of articles and other materials appearing in its pages. However no portion of this journal may be reproduced, by any process or technique, without the formal consent of the editors and publisher. Please email all inquiries about the Journal to journal@idfr.gov.my

The *Journal of Diplomacy and Foreign Relations (JDFR)* is a foreign affairs periodical published by the Institute of Diplomacy and Foreign Relations (IDFR), Ministry of Foreign Affairs, Malaysia. Founded in 1999, the Journal brings together noted scholars and policymakers to address current themes in international studies, foreign relations, diplomacy, strategic and security affairs and development studies. Each issue presents a multidisciplinary perspective. Our readership consists of individuals in government, specifically from the foreign service, business, academia and education locally, regionally and internationally. It is a forum that provides room for multiple appraisals of and diverse intellectual discourses on international studies, foreign policy and diplomacy that both directly and indirectly influence Malaysian regional and international policy. The primary objective of the Journal is to enhance international understanding of international studies, foreign policy and diplomacy as an art and science within the context of Malaysia both in particular and in general.

The *JDFR* welcomes manuscripts by experts in the field of foreign policy, diplomacy, international relations, security and strategic studies throughout the world. Submissions should be of interest to parties who specialise in the above areas as currently or formerly serving practitioners in government service as well as academics, thinkers and scholars. Papers from all regions around the globe are encouraged, as long as they are concerned with Malaysia's interest in global strategic, security, diplomatic and foreign policy issues.

Manuscripts should meet the professional standards of academic journals, make a significant contribution in empirical fact or interpretation, and use unpublished and primary sources or a broad range of relevant literature. Manuscripts that have been published elsewhere or that are under consideration for publication will not be considered by the Editorial Board of the Journal.

The Journal of Diplomacy and Foreign Relations (JDFR)

Guide to Contributors

SCOPE

JDFR is a journal committed to the advancement of scholarly knowledge by encouraging discussion among several branches of international studies, foreign relations, diplomacy, strategic and security studies and development studies. The primary objective of JDFR is to enhance international studies, foreign policy and diplomacy as an art and science within the context of Malaysia in particular and the world in general. Founded in 1999, the Journal publishes articles, book reviews and interviews whose content and approach are of interest to a wide range of scholars and policy makers. As such, readership consists of individuals in government, business, academia and education both locally and regionally as well as internationally. JDFR is published by an Editorial Board from the Institute of Diplomacy and Foreign Relations, Malaysia.

FORMAT AND STYLE

The editors invite submission of articles on subjects within the field of international studies, diplomacy, foreign relations, strategic and security studies and development studies. The length of a manuscript should be between 5000-7500 words (in Times New Roman, 12 points) for articles (exclusive of endnotes) and 1500 words for book reviews, which should contain full book details like the ISBN and total number of pages. Interviews should be up to 4000 words. All submissions should be double-spaced with one-inch margins (right margin unjustified) and conform to the latest edition of *The Chicago Manual of Style*. The citation method preferred is the social science rather than the humanities method; therefore, short author-date references should appear in the text and thus minimize the need for footnotes. Full bibliographical details, also in the social science style, should be provided at the end of the article. All articles must include an abstract of between 150-250 words describing its main points, followed by five keywords (separated

by commas) identifying the manuscript's content, for the purpose of retrieval systems. Authors of articles selected for publication and book reviews must provide a short paragraph of their respective profiles.

All illustrations, including figures, charts, graphs, maps and photographs must be labelled and supplied on pages separate from the text. Responsibility for securing permissions from copyright holders for reproduction of visual materials for JDFR lies with the author. Visual material should be drawn in permanent ink or photographed in sharp black and white or colour and reproduced in the form of high-contrast glossy prints or digital images and provided in camera-ready form.

SUBMISSION PROCEDURE

Manuscripts should be submitted in hard as well as soft copy (one copy each). JDFR does not accept manuscripts that have already been published or are being considered for publication elsewhere. Manuscripts will be edited for accuracy, organisation, clarity and consistency. Copy-edited manuscripts will be sent to the author for approval before a final proof is produced containing any final amendments before going to press. Further editions upon final proofs are strongly discouraged. All submissions should be addressed to:

Institute of Diplomacy and Foreign Relations (IDFR)

Ministry of Foreign Affairs, Malaysia

Jalan Wisma Putra

50460 Kuala Lumpur.

Tel: (603) 2149 1051

Fax: (603) 2144 3487

Email: journal@idfr.gov.my

Website: www.idfr.gov.my

Geopolitical Trends in the South China Sea: 2013-2015

Vivian Louis Forbes and Sumathy Permal¹

“Heaven has ushered in an era of renewal”

An inscription on Hanoi’s Temple of Literature

The more charming and hospitable you are to your neighbour,

The tougher they could decide to be with you.

You are approaching our military alert zone. Leave immediately.

ABSTRACT

For researchers and scholars interested in international relations and maritime affairs, it is not an easy task to keep abreast of developments in the South China Sea. The concerning trends and tensions accumulating in the semi-enclosed basin attract much attention. Within the basin are hotly contested territorial and jurisdictional disputes loaded with historical baggage awaiting solutions diplomacy with a measure of customary international law. Within the South China Sea, six littoral States are seeking part or majority portion of maritime jurisdiction over the sea’s surface, in the airspace, on the seabed and its substratum and sovereignty over the marine features and resources within the basin. The major actor is the Government of China and its claim to a vast area of the basin which is vaguely defined but portrayed on a map which was first published in 1947. This study examines the developments in excess of two years commencing in January 2013 to mid-2015 and presents an analysis of events.

Keywords: South China Sea, U-shaped line Map, geopolitical balance, arbitration, code of conduct

INTRODUCTION

Towards the end of the first half of 2015, the developments over the past two-year period demonstrated that resolution over the sovereignty of the marine features in the Spratly Archipelago and other marine features in the South China Sea is not in sight or slipping out of the grasp of the hands of politicians.

Indeed, on 25 May 2015, the *Global Times*, a nationalist tabloid owned by the ruling Communist Party's official newspaper the *People's Daily*, stated that "war is inevitable" between China and the United States over the South China Sea disputes unless the US Administration stops demanding the Government of China halt the building of artificial islands in the disputed South China Sea. Two days later, the Government of China issued its White Paper relating to the South China Sea.² The warning followed on the heels of an incident reported by a CNN reporter on 22 May 2015 who recorded the following: "This is Chinese Navy. You are approaching our military alert zone. Leave immediately". Such a stern warning was obviously not a warm welcome to users of the air corridors in the South China Sea nor could it be charming or hospitable. In the days immediately following the incident, the Philippines government expressed concern as did governments of States external to the dispute, such as Australia, Japan and the United States. Taiwanese President Ma Ying-jeou proposed a plan to ease tensions in the South China Sea suggesting that the sovereignty dispute should be set aside and that a cooperative approach be taken to explore, exploit and harvest the marine biotic and mineral resources of the semi-enclosed sea.³

If we could turn back the hands of the clock to early 2013, it would seem that heaven or at least the political leaders in the East Asian region had ushered an era of renewal. Indeed the reports of numerous diplomatic meetings of the leaders in the capital cities of the littoral States of the South China Sea; and, the actions being taken at sea especially within the Spratly Archipelago seem to be contradictory, for example, the announcement, on 21 March 2015, by the Peoples' Liberation Army (China, PLA) that '4G' connection is available on Fiery Cross Reef,⁴ a marine feature that has been transformed from a reef into an artificial island illustrates the desperation in order to justify territorial claim of a vast swath of maritime space. Is this a rush to prove administrative control over just one of some 150 marine features depicted on small-scale nautical charts of the South China Sea?

This narrative provides an analysis of the trends and developments particularly during the period 2013 to June 2015 both within and outside of the U-shaped territorial/sovereignty claim of China in the South China Sea. It examines the new political thinking of the littoral States beyond the horizon of the South China Sea against the backdrop of territorial claims, grandstanding,

actual and alleged military build-up and show of force and the prospects of legal advice from a third party on certain matters within this basin.

CHARM AND COOPERATION

An era of renewal was perceived to have entered into the geopolitical setting of the South China Sea by late-2012.⁵ Indeed it would seem that a period of charm and cooperation would be continued and witnessed in the Southeast Asian region. There were discussions on the establishment of an Asian Investment and Infrastructure Bank (AIIB), a China initiative, as with the development of a Maritime Silk Road, akin to the historical overland Silk Road, and many more gestures that suggest genuine cooperative moves within the Southeast Asian region.⁶ However, the mood changed when, on 22 January 2013, the Government of the Republic of the Philippines (hereinafter, the Philippines) instituted arbitral proceedings at the Permanent Court of Arbitration (PCA) against the Government of China (hereinafter, China). A tougher stance was perceived to have been taken by Philippines' authorities. The Philippines served China with a Notification and Statement of Claim with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea.⁷ The geographical setting indicated by the Philippines is the 'West Philippine Sea'.⁸ This unilateral decision to name the eastern sector of the South China Sea has only added confusion to the nomenclature used in the South China Sea. However, in the same token, Vietnam referred to the same sea as its "Eastern Sea".⁹ For the purpose of this study, we adopt the standard and most often used name: South China Sea. The Chinese name is *Nan Hai* (or Southern Sea).

On 19 February 2013, China presented to the Philippines with a diplomatic note in which it described its position on the South China Sea issues, and rejected and returned the Philippines' Notification. Using its options under the provisions of the 1982 Convention, the Government of China presented a *Note Verbale* to the Philippines rejecting the action by that government.¹⁰

As both States are party to the 1982 Convention, the Philippines brought China to arbitration as a "last resort" in the long-running dispute dating to about 1995 or even earlier.¹¹ In 1995, China seized possession of Mischief Reef and in the process transformed a marine feature – a reef – into an artificial

island that resembles houses on stilts which functions as a weather observation platform or some form of fortification, as depicted on images seen in electronic and print media.¹² At the time that Mischief Reef was being transformed, an alleged statement by the then President of the Philippines was a retort, the gist of which was that there was no need to be confrontational to the action taken by China at Mischief Reef.¹³ Is there now regret over that statement by the present (2015) Government of the Philippines; was the perceived flippant retort a signal for a more assertive action by the Government of China since 1995?

Since the mid-1990s the geopolitical balance has changed in East and South East Asia. The case taken by the Philippines in 2013 was a response to China's perceived assertiveness by the ASEAN States and the Governments of Japan and United States of America as individual concerns in the South China Sea, and the decision was taken so as to determine the 'rule of law' – international law to invalidate China's controversial 9-Dash Line Map of the South China Sea which entered into international focus in 2009.¹⁴ The claim, as depicted on the subsequent maps, has been altered at later times. The protest, the publication of the map and the pace of reclamation work in the South China Sea only hardened the resolve of some of the littoral States to the dispute to take some action.

On 24 April 2013, the President of the International Tribunal for the Law of the Sea (ITLOS), Judge Shunji Yanai, appointed three arbitrators to serve as members of the arbitral tribunal.¹⁵ The case is the first time an international body will make a decision on the legal basis of China's expansive, over nearly 3.5 million square kilometres, maritime claim and/or nearly 150 insular marine features – islands, isles, sand cays, reefs, rocks (Low Tide Elevations), seamounts and shoals. Yes, shoals! However, a shoal is a patch of shallower water which is surrounded by deeper water **and is not** a land feature as depicted on nautical charts. (Refer: chart extract MAL4508 at Figure 1). For example, James Shoal, is a patch of seabed (sand) of about 22 metres and lies a mere 66 nautical miles on an azimuth of 315°(NW) from the port of Bintulu, on the coast of Sarawak, Malaysia. The name given to this marine feature is *Zengmu Ansha*. The feature is on Malaysia's natural continental shelf which is normally defined as and extends to 200 metre isobath. The feature is known by its Bahasa Malaysia name, *Beting Semupal* (James Shoal).¹⁶



Figure 1: An extract of chart depicting the marine features north of Sarawak

On 7 December 2014, the Government of China noted that it was obliged to issue a position paper in which it listed 93 points relating to the action taken by the Government of the Philippines. At about the same time the Government of Vietnam lodged its interest in the case whilst the United States' Department of State issued a study in the series *Limits in the Sea* which offered an analysis of China's controversial map of its claim to sovereignty over the South China Sea. The Position Paper will be analysed later after discussion of events particularly during 2014.¹⁷

The PCA gave the Philippines until 15 March 2015, to file a "supplemental written submission." China, in turn, has until 16 June 2015, to respond to the written comments. The arbitral tribunal is composed of the world's premier experts on the law of the sea, with Judge Thomas Mensah of Ghana as chair. The other members are Judge Jean-Pierre Cot of France, Judge Stanislaw Pawlak of Poland, Professor Alfred Soons of the Netherlands, and Judge Rüdiger Wolfrum of Germany.¹⁸ So, what brought about the change in the attitudes of the neighbouring littoral States of the South China Sea?

EVENTS OF 2014

Official meetings between China and Vietnam during 2013 demonstrated positive moves that regional neighbours saw as glimmers of hope for a peaceful settlement or at least prospects of cooperation in the South China Sea basin. However, by April 2014, actions and counter-actions by some of the Governments of the States that dispute sovereignty over the insular features of the South China Sea created a cloud of uncertainty over the horizon and far out to sea and well beyond national jurisdiction, however defined.

DRILLING RIG: Haiyang Shiyou 981

The location of the *Haiyang Shiyou* 981 rig to waters, about 15M off Triton Island (a marine feature of the Paracel Group), and about 140M from the coast of Vietnam, in May 2014 triggered a low point in China-Vietnam relations. [See Figure 2] According to Vietnam, China brought about the dispute when it moved an oil rig to the disputed waters which sparked protests in Vietnam. Anti-China riots erupted in cities of Vietnam during which angry workers targeted foreign-owned factories in some areas, leaving at least two people dead and dozens injured. Several factories were burned down or damaged. Government ships from China and Vietnam clashed near the rig on several occasions, colliding and exchanging water cannon fire.¹⁹

By mid-July 2014, a series of typhoons created destruction on the coasts and to coastal communities in China, Taiwan, the Philippines and Vietnam.²⁰ An oil rig owned by China's national oil company which was exploring in an area, allegedly somewhere ten and 17 nautical miles (M) southwest of Triton Island, of the Paracel Group ceased operations. China eventually re-located the rig away in mid-July 2014, apparently a month earlier than planned. Could it also be that the rig was moved because of warnings that typhoon *Rammusan* was headed towards China, and in particular, Hainan Island after creating destruction on the islands of the Philippine archipelago? Were the objectives of the drilling programme achieved; or, the news of an approaching typhoon sufficient to cease exploration operations; or, was the cause based on the political concerns of and demonstrations in Vietnam?

Chinese energy company CNOOC Group studied the possibility of building a multi-billion-dollar floating liquefied natural gas (FLNG) vessel, as-yet untried technology that would likely be used to produce gas from the deep

waters of the South China Sea. While the state-run company has made no public announcement, a pre-feasibility study was well under way, according to CNOOC and other industry officials.²¹ (*Xinhua News*, 17 July 2014). CNOOC had discussed with global engineering firms about possible joint design of the vessel. FLNG ships are ocean-based liquefaction plants that can be positioned above reserves to chill extracted gas and load it into LNG tankers for delivery. That could make fields too remote or too small to develop using undersea pipelines viable for production. In the global context, there are at least ten FLNG facilities being planned with a few under construction, among them the biggest, Prelude, owned by Royal Dutch Shell which is planned to be in position and producing from an offshore Australian field by 2017. Shell has shied away from offering estimates of Prelude's likely cost, but analysts say it could be more than \$12 billion. Hence, it is not surprising that the Chinese national oil company is genuine about its intentions for the exploitation of the hydrocarbon reserves in the South China Sea.

CNOOC Group of China warned that its oil rig would continue drilling in contested waters in the South China Sea, despite angry anti-Chinese riots in Vietnam. General Fang Fenghui said his country could not "afford to lose an inch" of territory, blaming Hanoi for stirring up trouble in the region.²² (*Xinhua News*, 2 June 2014) In his public addresses during a tour of the United States, he also stressed that efforts of the government of USA – the 're-balance policy' to increase its focus on the Asia-Pacific region was in part stoking the fires of political tensions.

The serious break in relations between China and Vietnam were witnessed in the following examples during late-May and early-June of 2014: a national of China died in an attack on a steel mill in Vietnam; almost 150 other people were injured as protesters targeted the Taiwanese mill in the central Ha Tinh province; and, at least 15 foreign-owned factories were set on fire at industrial parks in Binh Duong province, and hundreds more attacked. No casualties were reported. The protests had allegedly been triggered by China's decision to move its *Haiyang Shiyou* 981 oil rig into waters west of the disputed Paracel Islands. However, reports in the electronic and print media inferred that domestic issues within Vietnam were being blanketed by the news of the location of the oil rig.²³

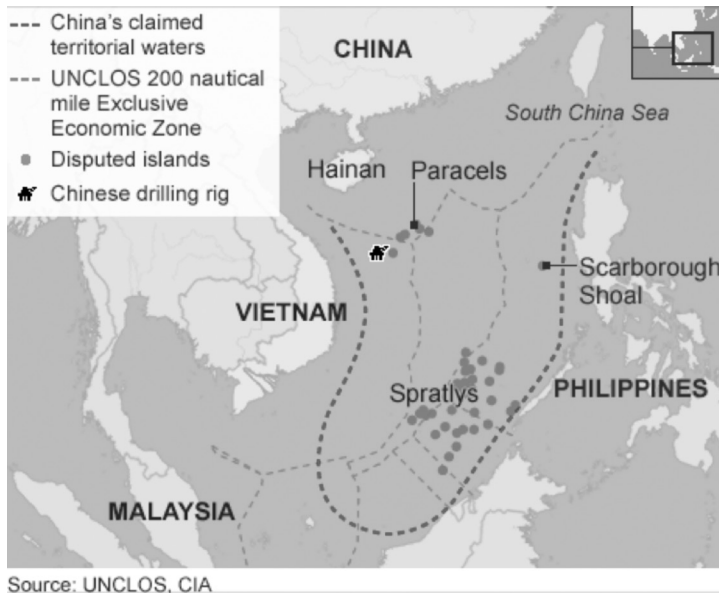


Figure 2: Location of the oil rig in the context of claims and counterclaims.
(Source: BBC World News; UNCLOS, CIA)

Such demonstrations of anger triggered confrontations between Vietnamese and Chinese ships in the vicinity of the oil rig southwest of the Paracel Group. Nationalist sentiments had reached a frenzy in China and Vietnam over the issue during May to July 2014. General Fang, Chief of General Staff of the People's Liberation Army commented during his visit to Washington, DC, "It's quite clear... who is conducting normal activity and who is disrupting it".²⁴ (*Xinhua News*, June 2014) He also insinuated that some nations, notably Japan and the Philippines, in the region had seized upon US President Barack Obama's so-called pivot to Asia to stir up trouble. General Fang urged the Government of USA not to take sides in China's escalating dispute with Vietnam. Vice-President Joe Biden of USA, however, expressed "serious concern" over the Chinese rig move.

The latest edition (2013) of an official atlas designates the line as a national boundary and uses identical shading to the lines on China's land borders. Exactly what China is claiming, however, remains somewhat mysterious, even to academics. China's claim to a large 'U-shaped Form' area in the South China Sea, including the disputed Spratly and Paracel Islands, has given rise

to a number of serious criticisms not only from neighbouring states, but also some states beyond the region. The claim also raises a number of theoretical questions, including whether historic title claims without hard evidence have validity under international law. An assessment of the legal nature of ‘Dashed lines Map’ regardless of the number on the map, it is in cartographic terms just a locational map. However, within the Government of China, there is implicit belief in its validity: China states it claims only the islands and adjacent waters. There are doubts within academic groups throughout the world as to the exact nature of the claim but for certain, it is about sovereignty to the marine features named on the nautical charts and maps, and hence, the general contention internationally is that the map is not valid. The argument about a claim on historical basis is flawed and apparently is open to conjecture in the context of contemporary international law only because of the vagueness as to what is claimed and from what period of time. For example, explanation is often sought as to the rationale taken to lay territorial claim to James Shoal, Parson Shoal and for that matter, to Scarborough Shoal and Macclesfield Bank.²⁵

The PRC could clarify its claim in the SCS without abandoning the infamous map it is now extensively publishing and displaying – yes, even a ‘water-mark’ on the pages of the 2013-issued passport. All the PRC needs to do is to make it clear, as implied by the narrative in its *Note Verbale* and in its historic documents, that it is claiming sovereignty over the islands and their adjacent waters inside the ‘U-shaped Polygon’ or ‘Nine-dashed Line Map’, as well as sovereign rights and jurisdiction in the EEZ and continental shelf measured from the islands. It could also issue a map of its EEZ in the SCS based on an approximate equidistance (median line) between the islands and the baselines of the ASEAN States that are directly involved in this regional sea set of disputes. This would then clarify which portions of the South China Sea are in dispute, and which are not in dispute. This would set the negotiating room for serious discussions on placing aside the sovereignty disputes and jointly developing the resources in the areas of the disputes.

THE CODE OF CONDUCT FOR ASEAN AND CHINA

Since 2002, the Government of China (PRC) has manifested that it would work with the ASEAN leaders to negotiate these differences in territorial issues peacefully but would exclude the Republic of China’s (ROC) participation,

even though the ROC is a major claimant of these disputed territories. Such a move signals new prospects of cooperation over the horizon of the South China Sea. The *Declaration on the Code of Conduct* of parties in the South China Sea dispute was adopted by the Foreign Ministers of ASEAN and the People's Republic of China at the 8th ASEAN Summit in Phnom Penh, Cambodia and signed on 4 November 2002.²⁶ In summary, Parties agreed to:

- Commit to explore ways for building trust and confidence
- Re-affirm respect for and commitment to the freedom of navigation and overflight
- Undertake to resolve territorial and jurisdictional disputes by peaceful means
- Undertake to exercise self-restraint in the conduct of activities
- Refrain from action of inhabiting the presently uninhabited islands, reefs, shoals, cays, and other features
- Pending peaceful settlement of territorial and jurisdictional disputes ... undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence.

In the Declaration, China and ASEAN recognised the need to promote a peaceful, friendly and harmonious environment in the South China Sea between them for the enhancement of peace, stability, economic growth and prosperity in the region.²⁷ The declaration, the first political document concluded between China and ASEAN over the South China Sea issue, bore a positive significance for enhancing mutual trust between the two sides. Promoting a 21st-century oriented partnership of good neighbourliness and mutual trust and a promise to safeguard peace and stability in the South China Sea region was a stated policy of the Government of China. ASEAN and China have publicly repeated the need to establish the Code to govern their behaviour in the South China Sea. However, not all members in the Group are involved in the disputes, a situation that has partly complicated efforts to draw up an agreement.

ASEAN and China commenced talks in July 2013 on a legally binding code, however, the discussions made little progress. There have been a number of press reports, satellite and aerial photographs about activities in the South China Sea, such as reclamation work and large scale construction of outposts that go far beyond what was considered consistent with the maintenance of the status quo. Coercion and the threat of force as a mechanism for advancing

territorial claims are simply unacceptable. The Philippines took its dispute to the United Nations' Arbitration Court – ITLOS, a process China has not recognised, and indeed, condemns. Over a period of two weeks in October 2013, Chinese President Xi Jinping and Premier Li Keqiang visited five Southeast Asian Nations, and attended the APEC (Asia-Pacific Economic Cooperation) Economic Leaders' meeting and a series of East Asia summits, and at each of these, the two Chinese leaders expressed the Government of China's opinion on China-ASEAN ties and the East and South China Sea issues as well as raising new cooperation proposals.

By June 2014, the electronic and print media offered comments of senior government officials from the littoral States that varied in their opinions on the *Code of Conduct*. For example, on 2 June 2014, the Prime Minister of Malaysia, whilst on a visit to China, stressed that continuing talks and actions was a 'step in the right direction' but urged that the talks should be concluded sooner rather than later. They conveyed positive messages on actively and steadily handling the issue, reflecting a will to make a breakthrough on the political issues through innovative thinking. In short, the incumbent Government of China put forward three 'breakthrough' ideas to handle maritime disputes, particularly in the South China Sea, in a peaceful manner:

- controlling divergence;
- exploring joint development; and,
- promoting maritime cooperation.

26th ASEAN SUMMIT, 2015: SOUTH CHINA SEA

Regional unity, stability, and prosperity is what Malaysia, as the Chairman for ASEAN in 2015, envisages. At the 26th ASEAN Summit held on 26 and 27 April 2015,²⁸ discussion focused on setting priorities to formally establish the ASEAN Community; to develop the ASEAN Community's post-2015 vision; to steer ASEAN closer to its peoples; to strengthen the development of SMEs in the region; to expand intra-ASEAN trade and investments; to strengthen ASEAN's institutions; to promote regional peace and security through moderation; to enhance ASEAN's role as a global player; and to address the sovereignty issues of the South China Sea and the management of the semi-enclosed sea.

The Heads of State/Government of ASEAN Member States jointly issued a very strong statement on ASEAN's external issues in particular on the South

China Sea at the 26th ASEAN Summit.²⁹ Key points expressed in the statement were that ASEAN leaders are seriously concerned on the land reclamation being undertaken in the South China Sea which to them has eroded trust and confidence between the concerned parties as well as undermined peace, security, and stability in the South China Sea. As a follow-up action, ASEAN Foreign Ministers were tasked to urgently address this matter constructively including under the various ASEAN frameworks such as ASEAN-China relations, as well as the principle of peaceful co-existence.

That urgent task was essential to ensure that peace, stability, security, and freedom of navigation and the over-flight over the South China Sea are maintained and not jeopardised by any parties. In this regard, all parties concerned are to ensure the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea towards building, maintaining, and enhancing mutual trust and confidence among them and exercising self-restraint in their actions. Leaders at the ASEAN Summit made a strong commitment to ensure the peaceful management of the South China Sea. As Chairman of ASEAN in 2015, Malaysia demonstrated to the regional and the international community that it takes the tack of ensuring that ASEAN holds centrality on issues concerning its members as well as that involving their dialogue partners.

In response to the development at the 26th ASEAN Summit, the Chinese government raised its concerns regarding the statement issued at the forum, raising three points that needed further deliberation.³⁰ Firstly, China views that the South China Sea is not an issue between China and ASEAN. This perception may run contrary to the view of the ASEAN member states because, to them the South China Sea has been an “obstacle” in ASEAN-China relations. Four members of ASEAN are claimants to overlapping disputes in the South China Sea and the rest have pledged their commitment towards managing the disputes for a peaceful and durable solution. The Declaration on the Conduct of Parties in the South China Sea signed in 2002 highlighted the commitment on the Charter of the United Nation, the 1982 UN Convention on the Law of the Sea and the Treaty of Amity and Cooperation in Southeast Asia and other universally recognised principle of international law as a basis for resolving disputes in the South China. As such, China may have to revisit its perspective and acknowledge that the South China Sea is indeed an issue that remains an

obstacle in ASEAN-China relations, in particular where political and security matters are concerned.

Secondly, China stated that “China and ASEAN countries are implementing the DOC in an all-round and effective way, and are pressing ahead with the consultation on the COC in a bid to finalize the COC based on consent at an early date; and there has never been any problem concerning the freedom of navigation and over-flight in the South China Sea that all countries are entitled to under the international law; nor will there be any in the future”.³¹ While welcoming this commitment, ASEAN nevertheless believes that China’s recent activities such as land reclamation on reefs including construction of runway strips and other fortifications may impose operational challenges for other entities operating in the areas. In fact, China acknowledged that the construction in the Spratly (Nansha) islands and reefs with the main purpose of optimizing their functions, improving the living and working conditions of personnel stationed in the artificial islands (military outpost?) was to better safeguard China’s territorial sovereignty and maritime rights and interests and to assist in search and rescue operations in this typhoon-affected regional sea. This action is alarming seeing that China is a major claimant to the disputes. In this regard, the Malaysian government has taken a clear position that parties involved in the dispute must “negotiate without the show of force, without raising tension or using tactics such as applying pressure on smaller countries”. As such, China’s recent extensive land reclamation could undermine the mutual trust and confidence-building among the claimants in the South China Sea.

Thirdly, China reiterated that her construction on the islands and reefs of Nansha is completely within her sovereignty, and does not target or affect anyone. This may not be true for the other claimants. China’s expansion and upgrading of the land cover seven features i.e., Chigua, Johnson South Reefs, Gaven Reefs, Cuarteron Reefs, Subi Reef, and Fiery Cross Reefs. The Philippines claims that China’s expansion of the reefs is largely within the Philippines’ Exclusive Economic Zones, especially Mischief Reef, which is approximately 135 km from the west of Philippines. On the other hand, Vietnam opposes China’s construction and expansion of structures as well and has requested “China to desist from these wrongful actions”. Malaysia’s extended continental shelf covering an area up to latitude 12°30`N or an area

up to 350 nautical miles from the baselines and Cuarteron Reef in which China is conducting construction works may also be affected.³²

Malaysia assumed Chairmanship of ASEAN in November 2014 and will be the lead member country towards achieving the vision of becoming a security community by the end of 2015. The primary challenge that Malaysia shoulders is to ensure that members remain united to maintain a central role in the regional architecture, contribute to regional stability, and promote closer economic integration. Economic integration will be more easily achieved than regional stability because economic development generally benefits member states and external parties. The issue of maintaining a coherent political security community is far more difficult due to the fragile strategic environment especially if it involves multiple stakeholders.

The primary objective to achieving an ASEAN Political Security Community (APSC) is to have higher levels of cooperation on security issues among member states, focus on priority areas including political developments in line with democratic processes, promote rules-based governance and the promotion and protection of human rights and freedom. It also seeks to have mutually beneficial relations between ASEAN and its Dialogue Partners and friends. In this regard, ASEAN pledges to maintain its centrality and play a proactive role in the regional architecture. APSC is intended to achieve a comprehensive security in the region, reject aggression and the threat of use of force, be consistent with the precepts of international law, and aim at achieving dispute settlement by peaceful means. Notwithstanding the obstacles towards realising a mature APSC, Malaysia has successfully bridged the gap and diverging approach to form a common intra-ASEAN perspective in dealing with issues in the South China Sea. The 26th ASEAN Summit statement clearly shows that ASEAN is serious in achieving a peaceful settlement of disputes in the South China Sea; it's beyond rhetoric and showcases the unified position of its members.

ASEAN's rules-based community of shared values and norms stipulates that it aims to promote good conduct among its member states, consolidate and strengthen ASEAN solidarity, cohesiveness and harmony, and contribute to the building of a peaceful, democratic, tolerant, participatory, and transparent community in Southeast Asia. In this regard, Action Plan A.2.3 in the APSC

Blue Print calls to ensure full implementation of the DOC for peace and stability in the South China Sea based on agreed principles among the concerned parties.³³ The agreement promotes member countries and interested parties to continue the existing practice of close consultation to implement the agreed activities under the DOC, undertaking cooperative activities in the DOC, and ensuring those activities do not infringe upon the sovereignty and integrity of member countries. The action plan also aims towards adoption of a regional Code of Conduct in the South China Sea.

In line with this, the statement reiterated the progress made in the consultations on the Code of Conduct in the South China Sea (COC), and urged that consultations be intensified to ensure the expeditious establishment of an effective COC. Although achieving an early conclusion of the COC is a difficult task, the momentum towards a COC is positive. In 2002, ASEAN and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC) which reaffirmed their determination, consolidation of efforts and cooperation among them for a peaceful and durable solution which is now being translated into practical cooperation by having functional activity. There are priority areas under the DOC, namely, marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crimes. Further to this positive momentum, ASEAN and China are working to conclude a rules-based framework to regulate activities or conduct that would further promote peace and stability. This is expected to elevate current efforts in implementing the DOC towards a more meaningful Code acceptable to both. Eventually the COC will serve as an effective tool for preventive diplomacy.

As far as South China Sea disputes are concerned, Malaysia's role as the Chairman of ASEAN has to be applauded. This is in line with the shared vision for ASEAN to coordinate action on issues of common interest and concern, leading to ASEAN becoming a global player. Although there are differences in opinion among member states on their approaches with their dialogue partners, the 26th ASEAN Summit 2015 shows that ASEAN and its member states can overcome their differences in order to maintain peace and stability in the South China Sea.

PROVOCATIVE MOVE OR ALLIES ASSISTING

In late-July 2014, in what may appear to be provocative moves, the Government of Japan announced during a visit by Japanese Foreign Minister Fumio Kishida to Hanoi that it will give Vietnam six naval ships for patrols in the South China Sea, amid regional tension over competing maritime claims with China. The offer was an estimated worth of 500 million yen (£2.9 million, \$5 million), (BBC *World News*, 1 August 2014) for the six boats and will be accompanied by training and equipment to help coastguard and fisheries surveillance. The two Governments agreed on maintaining peace and stability in the regional seas, and were in accord that disputes must be settled in accordance with international law.

Vietnam's *Thanh Nien News* quoted China's security policy expert Yun Sun as saying Japan's gift could be seen as an "alignment of positions" with Vietnam that is "perceived as hostility by China". Such generosity follows hot on the heels following the Government of the Philippines signing a military pact with the United States in April 2014 to increase the latter's troop presence in that country, a move which naturally angered the administration in China. The Philippines is also in territorial disputes with China.

The Government of China has repeatedly stressed that it prioritises regional stability and that it favours peaceful development. However, such claims continue to be met with wariness by neighbouring States given the rapid build-up of China's military and even economic presence in the disputed waters and littoral States from about 2005. China has made it clear on multiple occasions that the construction on maritime features of the Nansha Islands is to better fulfil China's international responsibilities and obligations in maritime search and rescue, disaster prevention and mitigation, marine science and research, meteorological observation, protection of the ecological environment, safety of navigation, fishery production and services, and ensuring the freedom of navigation. The South China Sea is a vital passage for maritime transport and one of the important fishing grounds in the world. A large number of vessels pass through this area, which is under complicated conditions and vulnerable to marine accidents. China's construction of lighthouses on Huayang Jiao and Chigua Jiao of the Nansha Islands is to implement China's international obligations and responsibilities, and provide passing vessels with efficient guidance and aiding services which will substantially improve navigation safety

in the South China Sea. Going forward, the Chinese side will continue to build other civilian facilities on relevant maritime features of the Nansha Islands and offer better services to vessels from littoral countries of the South China Sea and those sailing through this area. China argues that the construction of lighthouses is not only beneficial to China but to the whole international community. Nevertheless, there are growing concerns that the Government of China is using the marine features, once transformed, for military defence.

On 3 June 2015, the *Borneo Post* stated that a ship from China had been detected encroaching in Malaysian waters in the vicinity of Luconia Shoals, which are known as *Gugusan Beting Patinggi Ali*, located just 84 nautical miles from the coast of Sarawak. On the same day, Mr. Shahidan Kassim, Malaysian Minister in the Prime Minister's Department, posted a collection of pictures showing a Chinese Coast Guard ship and 'an island' purportedly Luconia Shoal well above the waterline. An investigation of the international nautical charts and available satellite imagery in numerous data bases suggest that Luconia Shoal is a mere cluster of reefs.

CONCLUSION

China's neighbours are understandably alarmed by that country's increasingly coercive efforts to assert and enforce its claims in the South China and East China Seas. A pattern of unilateral Chinese actions in sensitive and disputed areas raised tensions and is damaging China's international standing. For that matter, Vietnam has also undertaken development of its marine features in the Spratly Group.

Will Malaysia lodge a formal diplomatic protest with China over the presence of a Chinese Coast Guard vessel during May-June 2015 near Luconia Shoal which is well within Malaysia's claimed 200-M EEZ? Apparently, the Malaysian Prime Minister, Najib Razak, will raise the issue directly with Chinese President Xi Jinping, according to cabinet minister, Shahidan Kassim. A more vocal Malaysian protest to perceived Chinese aggressiveness in the South China Sea suggests an apparent departure from Malaysia's previous low-key responses to China's claims. A positive, emphatic protest would lead to significant changes in its bilateral relationship with China, or in the collective consensus on the South China Sea among Southeast Asian nations.

Officials in China consistently stress that asserting China's claims to disputed waters is a national 'core interest' and that the Government will not countenance 'compromise' or 'concessions' in pursuing its territorial ambitions. ASEAN's total GDP was less than 35 per cent of China's in 2013, while the combined military spending of ASEAN member States was less than the equivalent of 25 per cent of China's defence budget in 2012. Deploying damaging trade barriers is fraught with problems and could have detrimental effects in the long term.

ENDNOTES

¹Professor Dr V. L. Forbes' affiliations include: Guest Professor, CIBOS, Wuhan University; SCSL, Xiamen University; Adjunct Research Professor, National Institute for South China Sea Studies, Haikou; Visiting Research Fellow, Maritime Institute of Malaysia; and Adjunct Associate Professor at the School of Earth and Environment, UWA, Perth.

Ms. Sumathy Permal is a Senior Researcher, Centre for Maritime Security and Diplomacy, The Maritime Institute of Malaysia in Kuala Lumpur, Malaysia.

²Comments in the *Global Times* of 25 May 2015 followed by the White Paper published by the Ministry of Defence and available on the web pages of the Ministry for Foreign Affairs, China on 17 May 2015. Further reports can be read in the *New Straits Times*, 29 May 2015 p. 25; and *The Star*, 29 May 2015, p.29 both noting the US future role in the Asia-Pacific and China's rock-firm stance in the South China Sea, respectively.

³CNN Reporter on board a US military plane flying over the South China Sea on 23 May 2015 broadcasted on *BBC World News online*. <Accessed on 23 May 2015>

⁴PLA's comment re: 4G on Fiery Cross Reef, *Global Times*, 21 March 2015.

⁵An era of renewal appeared to have entered into the region with the many promises and handshakes between the leaders of the Government of China and those of the region and in particular the ASEAN leaders during the timeframe in the context of this narrative.

⁶Maritime Silk Road, the Old Silk Road (Belt and Road concepts) and China's charm and promises to provide infrastructure by constructing roads and railways in Pakistan and Thailand and even the Kra Canal through the Kra Isthmus are taken as 'good faith' cooperative ventures.

⁷Philippines's notice to UN Arbitration available on the UN Law of the Sea website.

⁸West Philippine Sea is the name given to the body of water to the west of the Philippine Archipelago.

⁹Vietnam's East Sea is the name of the body of water given to the sea east and adjacent to the coast of Vietnam. These names are confusing to the reader as they are not recognised by the international community; and they refer to the South China Sea. The names are given to generate national fervour and demonstrate to the Government of China that this semi-enclosed sea is NOT the sole domain of Chins.

¹⁰China's *Note Verbale* available on the pages of the UN Website.

¹¹The hearing set down for 16 July 2015 at the PCA, The Hague.

¹²Mischief Reef is no longer a feature that warrants that title because it is, by May 2015, being transformed into a large island as witnessed by satellite imagery.

¹³Comments by Philippine's then President when requested to comment on the actions by China's naval force when it occupied the reef which was claimed by the Philippines.

¹⁴The Nine-dash line Map of 2009 is and has been the focus of many research papers. A full listing of citations would be too cumbersome in this briefing for the reader; suffice to list just one and that is the publication by Zhiguo Gao and Bing Bing Jia which offers an analysis of the history, status and implications of the map. It is a bi-lingual publication.

¹⁵Details of the Arbitrators who have been appointed can be viewed at the PCA's website.

¹⁶James Shoal as the name suggests is a shallow patch of water near the north coast of Sarawak, Malaysia northwest of the port of Bintulu. This marine feature is on Malaysia's natural continental shelf.

¹⁷China's position paper on the case taken by the Philippines to the PCA was published in December 2014 and it listed 93 points of the official view of the Government. The full text is available on the web pages of the Ministry of Foreign Affairs of China.

¹⁸The 16 June 2015 hearing and proceedings thereafter will be closely followed by all parties to the dispute and naturally by researchers who follow the debate and issues.

¹⁹The Drilling rig No 981 was located some 19 nautical miles south west of Triton Island of the Paracel Group which China claimed was within its sovereign rights; however, this was disputed by Vietnam who counter-argued that the rig was within Vietnam's EEZ.

²⁰Numerous typhoons in mid-2014 and indeed during the year created much havoc to the coastal towns of China, the Philippines and Vietnam.

²¹Statements by the CNOOC and other officials from China and Vietnam were reported by *Xinhua News* 7 July 2014.

²²*Xinhua News* 2 June 2014.

²³Refer *Xinhua News* and *Global Times*. There were daily reports of incidents during May and June 2014.

²⁴See *Xinhua News* June 2014.

²⁵Artificial islands do not generate maritime jurisdictional limit, however, this is queried only because of conjecture as to what constitutes an artificial island. The 11-, 9-, 10-Dash Line Map: the number of dashes have varied as have their distances and orientation from the coastlines of the neighbouring states. Ref: Gao's comments re: 9-Dash Line Map. See Note 16, above

²⁶The text of the Declaration on the Code of Conduct is available on the website of ASEAN.

²⁷The Code of Conduct for the claimant States is a hotly debated topic at various discussions relating to the South China Sea both at academic and administrative fora. Hainan Provincial Government enacted legislation relating to fisheries in the South China Sea which was seen by other littoral States as defiant to international law and 'good faith' in the regional sea. Citing Mira Rapp-Hooper, director of CSIS's Asia Maritime Transparency Initiative (amti.csis.org/), Satellite images shared with Reuters by Washington's Centre for Strategic and International Studies (CSIS),

²⁸26th ASEAN Summit, Kuala Lumpur & Langkawi, Malaysia, 26-28 April 2015, Available from <http://www.asean.org/asean/asean-structure/item/26th-asean-summit-kuala-lumpur-langkawi-malaysia-26-28-april-2015>

²⁹Chairman's Statement Of The 26th Asean Summit Kuala Lumpur & Langkawi, 27 April 2015 "Our People, Our Community, Our Vision", Available From http://www.Asean.Org/Images/2015/April/26th_Asean_Summit/Chairman%20Statement%2026th%20ASEAN%20Summit_Final.Pdf

³⁰Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on April 28, 2015, Available from http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1258874.shtml

³¹The Prime Minister was interviewed by Bernama deputy editor-in-chief Mokhtar Hussain and editors, Nor Faridah Abd Rashid, Abdul Rahman Ahmad and Jamaluddin Muhammad. Transcript-of-bernamas-interview-with-pm-on-26th-asean-summit/

³²Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam, Available from http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm

³³ASEAN Political-Security Community Blueprint, Available from <http://www.asean.org/archive/5187-18.pdf>

Is the Universal Declaration of Human Rights 1948 a Culture Unto Itself?

Nurhalida Dato' Seri Mohamed Khalil

Nurhalida Dato' Seri Mohamed Khalil was Principal Assistant Secretary of the Human Rights and Humanities Division, Ministry of Foreign Affairs, Malaysia. She was seconded to the Ministry of Foreign Affairs from 6 August 2010 to 6 August 2015, from the Faculty of Law, University of Malaya where as a Senior Lecturer, she lectured on the subject matter of International Human Rights and Humanitarian Law, Public International Law as well as Constitutional Law. She was appointed Deputy Dean of Student Affairs and Alumni at the Faculty of Law, University of Malaya, for the period of February 2010 to August 2010.

ABSTRACT

The article explores mainly the issue concerning cultures and evaluates their implications for universal human rights from various aspects including the inextricable linkage between culture and human duties and their ties to human rights, posing fundamental questions, the crux of which is: Is the Universal Declaration of Human Rights of 1948 a Culture Unto Itself? The article argues that much could be learned from a greater awareness of human diversity and human dignity. In a global community, the universal recognition of the fundamental principles of human rights and the universal acknowledgement of the diversity of cultures in different areas of human endeavours can serve as a copacetic basis for a constructive and ameliorating human rights dialogue.

Keywords: Universality, cultural diversity, parameters of human rights, human duties, human dignity

Sixty seven years ago, the United Nations General Assembly adopted the Universal Declaration of Human Rights 1948 (UDHR).

By 10 December 1948, when the UDHR was put to vote, the United Nations had fifty-eight Member States – 22 from the Americas, 16 from Europe, five from Asia, eight from Near and Middle East, four from Africa, and three from Oceania.¹

¹See M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House New York, 2001), at p. 50.

The UDHR was adopted by 48 votes, with eight abstentions (South Africa, Saudi Arabia, Byelorussia, Czechoslovakia, Poland, the Ukraine, the USSR and Yugoslavia) and none opposed. Two countries (Honduras and Yemen) were absent.²

The UDHR is the only official international document with the title “Universal”, taking into account that the UDHR was meant to be morally binding on everyone and not only on the governments that voted for its adoption.³

The Chair of the Drafting Committee of the Human Rights Commission was Mrs. Eleanor Roosevelt. Peng-chun Chang, from China, was the Vice Chair whilst Charles Malik, from Lebanon, was the Rapporteur. The first draft of the UDHR, described by the United Nations as the most exhaustive documentation on the subject of human rights ever assembled, was produced by a John P. Humphrey of the Human Rights Division of the United Nations Secretariat. Subsequently, when the Human Rights Commission decided that it could draft the UDHR by committee, Rene Cassin, a civilian lawyer, was tasked “to undertake the writing of a draft declaration, based on those articles in the Secretariat outline which he considered should go into such a Declaration.”⁴

The task of drafting the UDHR took two years to complete. The document underwent a lengthy and tedious process, first through the Working Group of the Human Rights Commission, then through the full Commission and proceeding to the United Nations’ Economic and Social Council (ECOSOC) and the Third Committee on Social, Humanitarian and Social Affairs of the General Assembly and finally the General Assembly itself.

The Preamble of the UDHR states:

“[In] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...[and] promotion of universal respect for and observance of human rights...the General Assembly proclaims this Universal Declaration of Human Rights *as a common standard of achievement for all peoples...*to secure their

²*Ibid* at pp 169-170.

³*Ibid* at p.161.

⁴*Ibid* at pp 61.

universal and effective recognition...among the peoples of Member States..." (emphasis added)

Nonetheless, we would do well to remember that the UDHR as 'a common standard for achievement for all peoples', is not intended to exhibit a particular point of view of any one people or group of peoples, or any particular political or philosophical system. In essence, the UDHR does not mandate a single approved model of human rights for the entire world.

In fact, due to the extensive variety of its sources, the UDHR had been constructed on a "firm international basis wherein no regional philosophy or way of life was permitted to prevail."⁵ According to Rene Cassin, the main challenge in drafting the UDHR was to find a formula that did not require the Commission to take sides on the nature of man and society, or to confine itself to metaphysical controversies, notably the conflict between the spiritual, rationalist and materialist doctrines on the origin of human rights.⁶

Evidently, the goal was not on the affirmation of one and the same conception of the world, of man, and of knowledge. Article 1 of the UDHR simply asserts: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Therefore, the first line of the article neither refers to nature nor to God⁷ and leaves it to each culture to share its own account of the philosophical underpinnings of being human.

As such, the UDHR was drafted by the Human Rights Commission with the aim to present a framework embodying only the most basic ideas to be supplemented and elaborated by different nations, in their own ways.⁸

To illustrate, Article 3 of the UDHR states that '[e]veryone has the right to life, liberty and security of person', reflects the decision of the Human Rights to state the general principle without taking an explicit position on either abortion, euthanasia or the death penalty⁹.

⁵*Ibid* at p.165.

⁶*Ibid* at p. 68.

⁷*Ibid* at p. 146.

⁸*Ibid*, at p. 180.

⁹*Ibid* at p. 152.

Kofi Annan, upon becoming the UN's secretary-general in 1997, said that "no single model of human rights, Western or otherwise, represents a blueprint for all states."¹⁰ In sum, the UDHR was not intended to impose a standardized way of thinking, nor to constitute a single way of life.¹¹ It is not necessary for one model of human rights to triumph over another model.

However, a source of difficulty in arguing about human rights is, what passes for such an argument is in fact nearly always an argument about the parameters of the human right in question, as anyone who has, for example, followed contemporary human rights debates which include those on the act of renouncing one's faith on demand in exercising one's freedom of religion and on same sex marriages, may surely attest. One may not, therefore, merely presume common agreement on the parameters of this or of that, human right.

This situation exacerbates a longstanding dilemma: In a culturally diverse world, what is the role of culture in defining the parameters of the application of human rights? At this juncture, it is timely to revisit the UDHR as a source of reference to address fundamental questions, the crux of which is: Is the UDHR a culture unto itself?

DISTINCTION BETWEEN CULTURAL RELATIVISM AND CULTURAL DIVERSITY

At the outset, it is imperative to distinguish the notion of cultural diversity from that of cultural relativism.

Relativism is derived from both anthropology and the philosophy of ethical relativism. Cultural relativism is the assertion that human rights, far from being universal, does vary a great deal depending on the introduction of different cultural perspectives. In a nutshell, according to this viewpoint, human rights are culturally relative rather than universal.

At the United Nations Conference on Human Rights in Vienna, held in June 1993, and attended by 171 States, the relativist position was repudiated in The Vienna Declaration and Programme of Action of 1993 which declared:

¹⁰*Ibid* at p. 230.

¹¹See the speech of P.C. Chang, one of the drafters of the UDHR, at the General Assembly on 10 December 1948. *Ibid* at p.166.

“All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” (emphasis added)

Indeed, the Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization 1945, embraces cultural diversity when it declares, inter alia, “[t]hat the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.”

MEANING OF CULTURE

In addition, in the ongoing debate concerning the relationship between cultural values and human rights, the human rights discourse of the previous and current centuries have not posed the question of what the different proponents in the debate have meant by culture, or cultural tradition, or identity.

The term ‘culture’ has various broader or narrower interpretations and meanings, as observed by Janusz Symonides:

“The term ‘culture’ may be used both in a wide and in a restricted sense, that is, as admitted in specialized literature: small ‘c’-culture day-to-day social relations, the sum total of human activities, the totality of knowledge and practice, everything which makes man different from nature; and capital ‘C’-culture linked with creative activities of cultural man different from nature; and capital ‘C’-culture linked with creative activities of cultural elites, the highest intellectual achievements of human beings, music, literature, art and architecture. In practice, the division between these two anthropological definitions can cause problems because the same object or activity can be seen by some as belonging to culture with a small ‘c’ and by others as belonging to culture with a capital ‘C’.”

There is a tendency towards a broader meaning of ‘culture’ in various UNESCO documents. The Recommendation on Participation by the People at large in Cultural Life and Their Contribution to It of 26 November 1976 makes the following observation in its Preamble:

“... that culture is not merely an accumulation of works and knowledge which an elite produces (...) is not limited to access to works of art and the humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.”

The Final Report of the 1982 World Conference on Cultural Policies sets forth a definition of culture in the sense of distinctive and specific features and ways of thinking and organising people’s lives, as stated below:

“Culture therefore covered artistic creation together with the interpretation, execution and dissemination of works of art, physical culture, sports and games and open-air activities, as well as the ways in which a society and its members expressed their feeling for beauty and harmony, and their vision of the world, as much as their modes of scientific and technological creation and control of their natural environment.”

In September 1976, the Canadian Commission for UNESCO arranged for a meeting to elaborate on a definition of culture based on a threefold assumption: that culture is basically a value system, a learned behaviour and that it possesses a creative potential, as reflected in the following working proposal:

“Culture is a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential.”

For the purposes of this article, a broad understanding of culture is adopted so as to encompass religion. In other words, culture in this context refers to a way of life.

ISLAM AND THE SYARIAH

The word 'Islam' is derived from the Arabic root word *salam*, which means peace. Literally, the word Islam means 'to surrender or to submit' to the will of God, whose proper name is *Allah*. In Islam, Man's dignity is an affirmation of God's love for human beings.

Islam constitutes the guide and the way of life for those who submit their life to *Allah*. A Muslim is committed to follow this way of life, to bear witness to it by word and deed, and to strive in order to make it prevail in the world.

In Islam, men are created in the image of God whereby the light of revelation of God, is a guide in the affairs of mankind and provides spiritual nourishment to the human soul. This accords to mankind an added measure of veneration, prestige and sanctity.

Man's duty is to preserve the pattern on which God made him. By making man his vicegerent, God exalts man a position even higher than that of the angel, as the angel makes obeisance to man. Man's position as vicegerent, however, also gives him will and discretion and if he uses them incorrectly, then he falls to a level even lower than that of beasts.

According to the noble Quran, man is under a duty to expend his life to the discharge of his covenant with *Allah* whereby, he is promised an immensely beatific life in the hereafter. The noble Quran prescribes the performing of exemplary behaviour and forbids the performing of non-exemplary behaviour. Man is enjoined to seek development and amelioration within the principles established by the Quran, and is forbidden from trespassing what the noble Quran describes as 'limits prescribe by Allah'.

The theory of law and theology in Islam is inseparable. No distinction is made between rules of law and rules of religion. The term *fiqh* or understanding is applied to this joint body of learning-understanding of the word of God and of human duties under it. The discipline of the law rather than the theology plays the primary role in the development of this understanding as law became the central discipline of Islam. Thus, the phrase *fiqh* came to have an exclusively legal flavour. Eventually, the *Syariah* or 'The Way of Life' became the accepted expression for describing this discipline.

The *Syariah* means the body of Islamic law. The sources of the *Syariah* are divided into two classifications: the primary sources, which consist of the *Quran* and the *Sunna*; and the secondary or dependent sources, which are not sources per se but are rather a means for discovering the law. The latter are reasoned deduction (*ijtihad*), consensus (*ijma*) and reasoning by analogy (*qiyas*) This reasoned deduction not only distinguishes between specific and general rules of the noble *Quran* and *Sunna* but also derives and integrates from the general rules of the same, the Islamic laws best suited to the relevant epoch and community.

The *Syariah* concerns two broad dimensions of regulation: First, a set of laws dealing with human duties towards Allah (*Ibadat*) – the five pillars of Islam (the profession of faith, prayer, fasting, alms giving and pilgrimage) and second, a set of laws governing human relations (*mu'amalat*) such as marriage and divorce.

Thus, the primary characteristics of the *Syariah* include that, firstly, they are not solely human understanding of duties owed by the believer to God; and secondly, neither are they purely reflective of a historically conditioned understanding of the same, since they are derived from direct revelation.

In sum, the idea of human duties is, for Islam and the *Syariah*, inextricably integrated into every facet of life. Most importantly, this notion of human duties is set forth in view of the intrinsic measure of value, worth and dignity of human beings.

THE SYARIAH AND HUMAN RIGHTS

There is, however, increasing literature on Islam and human rights which claim that certain *Syariah* based duties as interpreted 1400 years ago, appears to contradict human rights, in the present century. The examples, in particular, are cited in the arena of discrimination against women, freedom of religion and apostasy.

The purveyors of human rights, particularly in the Occident, tend to argue, premised on a two-tier presupposition that underpins, firstly, the supremacy of human rights norms over *Syariah* based duties, assuming a conflict between *Syariah* based duties and human rights norms and, secondly, the understanding that the universal human rights order is secular in nature in terms of the total separation between religion and the state.

Hence, there is an urgent and crucial need to examine whether the above two-tier presuppositions are embraced in the UDHR of 1948.

ARTICLE 29(1) OF THE UDHR

Thus, in response to a tendency on the part of human rights advocates to impose a standardized way of thinking and a single way of life, it may be argued that the development of the human personality need not be applied in one specific manner for all communities, as illustrated in Article 29(1) of the UDHR.

Human rights could not evolve in a vacuum nor could it be applied in one. Thus, Article 29(1) of the same declaration, declares:

‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’

Article 29 (1) of the UDHR is perceived by the drafters of the UDHR as part of a ‘pediment’ of the portico of a temple, as they bring under one ‘roof’ individuals, civil society, and the state, with all their respective rights and responsibilities, and address the conditions that are necessary to the realization of the rights and freedoms as enumerated in the Declaration.¹²

One might recall Mahatma Gandhi’s response to UNESCO’s inquiry in 1947 when he was asked to comment on the project of a UDHR. Declining to give a substantial answer he observed briefly that “All rights to be preserved and preserved came from duty well done.”¹³

In the words of Article 29(1) of the same declaration, the community is not merely important, it is considered essential. The link between individual duties and the valorization of the communal dimension of life reflects the concern that inspires the insistence on duties.

In sum, based on Article 29(1) of the UDHR, not only do rights conferred on an individual entail individual liberty but it confers duties and responsibilities to the community at large as well.

To illustrate, Eleanor Roosevelt, on explaining why the United States was opposed to the inclusion of an article on minorities in the UDHR, thought that it was evident that the aim of states in accepting immigrants was “to make

¹²*Ibid* at p. 190.

¹³*Ibid* at p. 75.

them part of their nation.” Unless all citizens could speak the same language she continued, “there was the danger that public order might be disrupted by persons who might not understand their duties as citizens of the country in which they were a minority.” She emphasized that it was not “a question of teaching children in a language different from that of the majority, but of adult persons, who would be unable to assume their duties as citizens of the larger country.”¹⁴

Article 29(1) of the UDHR is intended to offer a clear and concise relationship between human rights and human duties of the individual. Human duties of the individual play a pivotal role in determining the parameters of human rights of the individual.

Now, it is generally stated by rights theorists that there can be no rights without duties; but this is generally regarded as stating the obvious, that a right is only wishful thinking unless it can be made good by the performance of someone else’s duty. The two are thus conceived as two sides of the same coin.

This symmetry, however, is incomplete. There is the idea of duty which recognizes the interests of another or others, as coming before one’s own. It is this duty that governs the parameters of human rights of a person claiming to exercise rights. Thus, the inherent third side of the same coin.

It is essential for human duties to be envisaged in relation not only to the State, but to the different social groups to which [one] belongs, including that of religion, whose sanctioned modes of life shape his or her behaviour.

The UDHR 1948 does not elaborate on the meaning, origin and enumeration of such duties, so much so that this is open to interpretation and incorporation according to varying religious norms.

THE *SYARIAH* AND HUMAN DUTIES

Religious beliefs, such as Islam, invoke the language of duties and are chiefly concerned with the parameters of human rights.

¹⁴*Ibid* at p. 119-120.

The parameters of duties of man is succinctly stated in the Prophet's celebrated sermon on his last pilgrimage to Mecca:

"Allah says: 'O Mankind, We have created you from a male and a female, and We have made you into families and tribes that you may recognize one another.' Verily, the most honourable in the sight of Allah is he who is most righteous amongst you. A coloured man has no superiority over a white man, nor a white man over a coloured man, nor an Arab over a non-Arab, except for righteousness. O people, your lives, your honours, and your properties are to be respected by one another till the Day of Reckoning comes. They are as sacrosanct as this day, as this month, in this city."

It takes a proper understanding of the sources of the *Syariah* to realise that they do not discriminate against any and all human beings, including women.

For example, the Last Sermon of Prophet Muhammad (peace be upon him), delivered on the Ninth day of *Dhul-Hijjah*, 10 A.H. (623AD) in the *Uranah* valley of Mount Arafat in Mecca included the following words:

"O People it is true that you have certain rights with regard to your women but they also have rights over you. Remember that you have taken them as your wives only under Allah's trust and with His permission. If they abide by your right then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friends with any one of whom you do not approve, as well never to be unchaste."

Equality remains the overriding principle and norm of the *Syariah* in gender-related matters. However, the parameters of equality between men and women, particularly in the fields of marriage and family relations, are determined by reference to the norms of the noble *Quran* and *Sunnah*, which are inextricably linked to the notion of human duties and responsibilities of the individual. The idea of human duty for Islam is closely related to every facet of life.

As an illustration, under the *Syariah*, a woman requires consent of her *wali* (guardian) before she can enter into a marriage but the same requirement is

not applicable to a man. The requirement of the consent of *wali* as mentioned is not discriminatory against women but based on the distinction in terms of the responsibility and role between men and women under the *Syariah*. This status of men and women is not based on the idea of the inferiority or superiority of either men or women. It is about the status of their individual and collective duty and responsibility rather than their individual and collective authority.

Both men and women bear duties in the exercise of claiming their rights which regulate the pattern of social relations and other aspects of life including family life.

HUMAN RIGHTS AND THE OCCIDENT

It was observed by J.M. Kelly in *A Short History of Western Legal Theory* (1992) that human rights, as perceived and applied in the Occident, traces their ancestry to the philosophical and intellectual development in the same, starting from the moral theories of natural law of the ancient Greeks and Stoics and continuing with the divinely appointed natural law of Aquinas and the medieval Catholic. Natural law was defined as a set of legal norms, which applied per se and was believed to have universal application and was to be discovered by means of reasonable understanding. Aristotle identified natural law with the principle of justice and enunciated the distinction between what is naturally just, to that which is just as a result of having been prescribed by man-made laws. What is by nature just, according to Aristotle, has the same force everywhere. St. Thomas Aquinas derived from Aristotle the notion of God as the author of the law of nature.

However, the Renaissance period saw the transitional movement in Europe from the Middle Ages to the modern world and saw two major events which influenced intellectual life, namely, the revival of the Graeco-Roman tradition in art and literature which influenced the disintegration of the old Catholic unity of Western Europe and the Protestant Reformation. Both events led to factors which led to the creation of modern Europe: the secularisation of public life and the emancipation of the individual from spiritual control. Hence, the Renaissance period saw the development of modern theories of natural law which detached natural law from religion, constituting the foundation for the secular and rationalistic notion of natural law.

The modern theories of natural law which unhinged natural law from religion, had laid the foundation for the secular and rationalistic version of natural law. It was seen, starting with Grotius, that the notion of a transcendent system of values with which human law ought to conform, was gradually detached from the medieval theology which had given it shape and thus acquired a secular existence of its own based simply on reason.

The 17th and 18th centuries saw the emergence and ascendance of the theory by several influential thinkers of the European Enlightenment, such as Locke, Montesquieu, Grotius, Rousseau, and Kant.

Most of these contributors, in the realm of political philosophy during this period, acknowledged a law of nature in terms, essentially, of reason, with its occasional ascription to God, appearing purely perfunctory. Their collective work both mirrors the development of the theory of legitimacy of State power, which in turn, had its impact upon real politics and political theory.

In the Occident, during the modern period, the doctrine of natural law was replaced by the theory of natural rights with greater emphasis on individualism. The shift from the term law to that of rights signalled a change in political and social values. There was a reduced stress on confronting the new state with universal religious or moral norms but the shift heightened the emphasis on confronting the state with the freedoms of the individual. The central theme is that all people have certain inherent natural rights such as 'life, liberty and happiness' which are not dependent upon a sovereign grant or legislative action.

The so-called inherent or natural rights, found legal expression in many historic documents of the 17th and 18th centuries, such as, in the American Declaration of Independence (1776), the Constitution of the United States of America (1787), the French Declaration of the Rights and Duties of Man and Citizen (*declaration des droits de l'homme et du citoyen*) (1789), the French Constitution (1791) and the American Bill of Rights (1791). Thus the concept of natural rights was institutionalized in the domestic context in the Occident during the 17th to the 19th centuries.

Alongside the doctrine of the individual's natural rights was found the theory of social contract. Closely related to these ideas were the ideas of the development of the modern state and democracy.

According to the theory of social contract, rulers derive their authority only from some notional agreement under which their peoples have delegated to them the power of government during those peoples' pleasure, subject to implied but ascertainable conditions i.e. the preservation of inalienable rights that every ruler was obliged to respect. As for the origin of these rights, however, there are various differences to be found in the way in which the conception of the foundation of natural law is set forth. These contracts are seen as preserving certain rights for men while preventing the State from interfering in the exercise of the claims of these rights.

The theory of natural rights helped to shape the legal and political institutions of democracy which symbolized a change in the economic, political and social values in the Occident. A capitalist system emerged and a new industrial class demanded political freedom while claiming the ethics of social contract. It was evident in the Occident, the idea of a transcendent system of values was gradually disassociated from Christianity, which had previously given its shape and acquired a secular existence of its own based upon reason. While the medieval Christian knew a theory of natural law in which the main stress was on man's duties to his sovereign or to his fellow men, the system of values based upon reason in the Occident gave a new meaning to the doctrine of natural law by encompassing man's rights, independent and autonomous of his sovereign. Hence, the stress on the unique importance of the individual, led not only to a change of emphasis from natural law to natural rights but also conveniently, from man's duties to that of man's rights.

In the Occident, the concept of human rights has a deeply rooted link with political modernity which was initially created upon the premise of philosophical principles proper to the Occident in the 18th century. Political modernity, in turn, rests on the secularization of the state and the law. If Islam continues to identify in God the creator of law, the Occident, in inventing secularism, has substituted the State for the Will of God. Hence, the necessity for the State to guarantee individual rights by declaring them.

SECULAR LIBERAL STATE AND THE OCCIDENT

The secular liberal State is inextricably connected to the political and philosophical intellectual developments in the Occident. Henceforth, it is secularism, the social contract theory of the State where the idea of man as an

autonomous being possessed of inalienable rights, and most importantly, the emphasis on rights rather than on human duties, which forms the Occidental liberal State. The position of the individual is set forth exclusively in terms of rights.

The secular liberal State is predicated on the duality of interests between the individual human being and the State. The assumption is that the State posed a risk to the human rights and liberties of the individual. These human rights were potentially in conflict with the power of the State to regulate its individual citizens. The secular liberal State was created in the Occident as a means to regulate the conflict between the individual and the State.

To exemplify, the Western objection to the emerging norm labelled 'defamation of religion' is derived from the gradual decoupling of religion and State in the Occident which has led to efforts to abolish offences of blasphemy and to oppose any extension of the law of blasphemy for the purpose of protecting religions other than Christianity. In the Occident, efforts to devise a satisfactory definition of religion in order to include faiths other than Christianity were deemed as difficult, and the perpetuation of the offence of blasphemy was perceived as an unreasonable interference with freedom of expression.

Thus, the current trend in the West acknowledges firstly, that the offence of blasphemy is anachronistic in a multicultural, pluralistic and secular society which maintains a strict separation between Church and State; and secondly, the offence of blasphemy impinges upon the right of freedom of speech which is deemed to be fundamental.

At this point, it was observed by Fernand Braudel in *A History of Civilizations* (1995) that, with very few exceptions, 'no such turning away from religion is to be found in the history of the world outside of the West'.

Indeed, according to John P. Humphrey, the Canadian international lawyer who worked closely with the Human Rights Commission throughout the entire period of the preparation of the UDHR, none of the international human rights instruments, including the UDHR, "calls for the separation of church and state, a prescription that is dear to the United States tradition and enshrined in the first amendment to the United States Constitution".¹⁵

¹⁵See John P. Humphrey, 'Political and Related Rights'. In Theodor Meron (Ed.), Human Rights in International Law Legal and Policy Issues (Oxford University Press, 1984 at p. 178.

LIBERAL DEMOCRACY AND THE OCCIDENT

The human rights movement in the Occident is based on the tenets of liberal democracy and is a natural product of this political system.

There are two quite different roots of democracy as embodied in the Occident. The first root is the universal desire of people to manage their own affairs, or at least to have a say in who manages their affairs. The second root is that of liberalism, defined as that set of social and political beliefs, attitudes and values which assumes the universal and equal application of the law and the existence of basic human rights superior to those of state and community. It does imply that the State's interests cannot override those of the citizenry. Derived from a variety of secular and religious tenets, liberalism affirms the basic worth of individuals, their thoughts and their desires. In the liberal canon, no one person, whether king or majority, has the right to direct or dictate to people how to think or even act (except in instances of imminent threats to social well-being).

Mill's essay *On Liberty*, an analysis of the nature and limits of the powers which can be legitimately exercised by society over the individual, stated:

'... the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.'

During the process of the drafting of the UDHR, one of the lengthiest and heated debates involved political philosophy including the fundamental question, whether the human person comes first or the society. In the end, however, the UDHR reflects a vision of ordered liberty, grounded in an understanding of human beings as both individual and social. The reference to "the community in which alone the free and full development of the personality is possible" in Article 29(1) of the UDHR, is an important recognition of the role of the community in the UDHR, which is often misconceived as the epitome of individualism.

Interestingly, the UDHR 1948 is silent on the meaning of “community” in the provision cited above. Thus, a community may be based on religious affiliation, cultural affinity, demography, the State, the international community or mankind.

THE UDHR 1948 AS A COMMON STANDARD FOR ACHIEVEMENT FOR ALL PEOPLES AND ALL NATIONS

Although the General Assembly of the United Nations adopted the UDHR in 1948, as ‘a common standard for achievement for all peoples and all nations’, the parameters of human rights are absolutely dependent upon man’s acceptance of human duties and their application, which are shaped and defined by the religious, legal and political discourses.

Henceforth and forthwith, 193 nations currently make up the membership of the United Nations which exemplifies further the need to impress upon a universal document such as the UDHR to welcome and accommodate and to leave room for an ample degree of cultural diversity in the understanding and implementation of the parameters of its rights. Only then would every Member State of the United Nations have a sense of ownership with respect to the Declaration.

Thus, in any discussion of the parameters of human rights that entails inevitably the issue of the State, religion as well as that of human duties, it cannot be presupposed that the UDHR 1948 requires the separation of the religion and State, nor can it be assumed that the *Syariah* necessarily stands in conflict with human rights norms.

A universal document such as the UDHR would have to leave room for an ample degree of cultural diversity in the understanding and implementation of the parameters of its rights. Only then would every Member State of the United Nations have a sense of ownership with respect to the Declaration.

The efforts of creating the UDHR should be to offer a framework succinctly definite to enjoy true significance both as an inspiration and as a guide but sufficiently general and flexible to apply to all men. What was sought by the drafters of the UDHR was not cultural hegemony but cultural diversity, for guidance in human action and behaviour.

The UDHR as such accommodates divergent religious, philosophies and even economic, social and political theories, which allows their contribution to the delineation of the parameters of human rights embodied therein. Human rights, in terms of its parameters, is not a one-size-fits-all concept and must be seen through the context of a country's political, social and cultural dimensions.

After all, the UDHR 1948 is indeed not a culture unto itself.

THE PARAMETERS OF FUNDAMENTAL FREEDOMS IN MALAYSIA

Given that Article 29(1) of the UDHR is silent on how individual religious denomination conducts its religious affairs in each State, the formulation of specific duties remains an issue of domestic law. Catalogues of human duties differ from one State to another which is a reflection of the cultural heritage each community that has been molded by its historical, economic, social and political discourses.

The Constitution of each State is perceived as a historical, economic, social, cultural and political testament to the embodiment of assumptions and values of a community as a whole.

The Federal Constitution of Malaysia of 1957 (FCM) is no exception. The FCM represents the choices and values accepted by Malaysians for the good and benefit of all.

Against this backdrop, Malaysia has a practicable constitution befitting the Malaysian community and her licit landscape.

In the case of Malaysia, how human rights are to be translated into practice depends upon the vision of the Malaysian communities to provide a scale of values governing their exercise and manifestation.

The acceptance of human duties is inextricably linked to the cultural heritage of a particular state.

In a plural society such as ours, the constitution rests on fundamental values and assumptions which mirror the character of the society at large.

These in turn influence the essence and nature of the constitution, determining its viability and progress.

The FCM is a historical, economic, social, cultural and political testament of the framework assumptions and values of the Malaysian communities.

In particular, the FCM must always be read in light of the history of Malaysia, which encompasses various historical documents, including the *Rukunegara* (Principles of State).

Although none of these documents have the status of law, the ideas embodied in them may assist in terms of understanding and appreciating the realities of today and to study the FCM from a historical perspective.

The FCM, after six decades, still rests on assumptions and values agreed to by the bulk of the communities through their representatives in 1956-57, although the challenge facing the FCM today is the maintenance of these assumptions and values.

In any case, we would do well to remember that the *Rukunegara* indirectly reflects the proposition that rights conferred on a citizen of democracy entails not only individual liberty but also duties and responsibilities to the community at large

Whilst the parameters of such freedoms as underlined in the FCM would not necessarily be apt for everybody else, we ought always to remember that it is a law that suits and exemplifies the Malaysian temperament.

Given that there is no single model of democracy that fits all societies, the FCM reflects the reinforcement of democratic practices, institutions and values including the freedoms of expression, assembly, and association, taking into account the domestic cultural values and traditions. Democracy should not be imposed from outside but instead it should be nurtured through a gradual process which takes place internally.

PARAMETERS OF FREEDOM OF RELIGION IN MALAYSIA

In Malaysia, the FCM defines the parameters of human rights and fundamental freedoms, including individual rights of freedom of religion and religious practice.

Article 11 of Part II of the FCM reads:

- “(1) Every person has the right to profess and practise his religion and subject to Clause (2), to propagate it.
- (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
- (3) Every religious group has the right-
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes; and
 - (c) to acquire and own property and hold and administer it in accordance with law.
- (4) State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
- (5) This article does not authorize any act contrary to any general law relating to public order, public health or morality.”

ARTICLE 11(4) OF THE FCM

Under Article 11(4), state law and federal law (for federal territories) may control or restrict the propagation of any religious doctrine or belief amongst Muslims.

An issue arising from Article 11(4) restriction is that state laws may prohibit the propagation of other doctrines within Islam itself, such as the *Shia* doctrine.

On this limitation as embodied in Article 11(4), Tun Mohamed Salleh Abas argues that:

“[T]his limitation is logical as it is necessary consequence that follows naturally from the fact that Islam is the religion of the Federation.

Muslims in this country belong to the *Sunni* Sect which recognizes only the teachings of four specified schools of thought and regards other schools of thought as being contrary to true Islamic religion. It is with a view to confining the practice of Islamic religion in this country within the *Sunni* Sect that State Legislative Assemblies and Parliament, in respect of the Federal Territory, are empowered to pass laws to protect Muslims from being exposed to heretical religious doctrines, be they of Islamic or non-Islamic origin and irrespective of whether the propagators are Muslims or non-Muslims.”

Although there is an absence of any constitutional provision entrenching the position of Sunni teachings among Muslims in Malaysia, the States’ legislation provides that Muslims must conform with Sunni teachings, with emphasis given to the *Shafi’i* school of thought.

ARTICLE 11(5) OF THE FEDERAL CONSTITUTION OF MALAYSIA

Under Article 11(5), the religious conduct of every person can be regulated on the grounds only of public order, public health and morality.

In other words, the FCM gives every person including a Muslim a right to profess and practise his religion save to the extent that he/she does not endanger public order, public health or morality.

However, Muslims are subject to additional religious restraints due to the power of States in accordance with Schedule 9, List II, Item 1 of the FCM.

The Ninth Schedule to the FCM, List II, Item 1, enumerates matters that fall under the legislative powers of the State:

“Except with respect to the Federal Territories, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions operating wholly within the State: Malay Custom; Zakat, Fitrah and

Bait-ul-Mal or similar Islamic religious revenue: mosques or any Islamic public place of worship, *creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion*, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.” (emphasis added)

In essence, State Enactments are permitted to create and punish offences by persons professing the religion of Islam against precepts of that religion.

The power of the states to punish Muslims for Islamic crimes was underlined by the Court of Appeal in *Kamariah bte Ali lwn. Kerajaan Kelantan*. The Court held that:

“Article 11 of the Federal Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam. This was because the standing of Islam in the Federal Constitution was different from that of other religions. First, only Islam, as a religion, is mentioned by name in the Federal Constitution as the religion of the Federation and secondly, the Constitution itself empowers State Legislative Bodies (for States) to codify Islamic law in matters mentioned in List II, State List, Schedule Nine of the Federal Constitution (‘List II’).”

Therefore, persons of the Islamic faith and Muslim religious groups that are not mainstream may be subject to restraints in relation to what are deemed to be “deviationist activities”.

In Malaysia, the parameters of freedom of religion are shaped by historical, social and religious discourses as reflected in the Federal Constitution of Malaysia as well as its laws and regulations.

THE FEDERAL CONSTITUTIONAL OF MALAYSIA (FCM) AND THE *SYARIAH*

Recent decided cases in Malaysia have grappled with the ramifications of the meaning and parameters of freedom of religion and the related role and position of the *Syariah* Court, as respectively enshrined in Article 11 and 121 (1A) of the FCM.

At the forefront is the legal debate on whether freedom of religion includes freedom of a Muslim to renounce the Islamic faith and whether the validity of a Muslim's renunciation of the Islamic faith is to be solely determined by the *Syariah* Court in Malaysia.

In response, human rights advocates argue that firstly, any rules, man-made or otherwise, that prohibit or seriously impede the renunciation of the Islamic faith, would seem difficult or impossible to reconcile with the universal human right to renounce one's religion, as contemplated by the UDHR; secondly, no court including the *Syariah* Court or authority should be easily allowed to curtail renunciation of faith.

The FCM, as it stands today, determines to a large extent the position and status of Islam in Malaysia. Article 3(1) of the FCM:

"Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

The *raison d'être* of Article 3 was elaborated by Tun Mohamed Salleh Abas as follows:

"...that 'Islam is the religion of the Federation' represents a principle or a conviction held by the Malays for all time, even before the British entry into Malaysia. During the period of the British colonial administration, however, the British brought in Christianity whilst the immigrant races brought in other religions, such as Hinduism and Buddhism. Thus the enacting of the Islamic religion as the religion of the Federation has to take into account the practice of other faiths also. Therefore Article 3 provides a balancing clause in that '...other religions may be practised in peace and harmony in any part of the Federation.'"

Malaysia is a federation of 13 States and the Ninth Schedule FCM outlines the matters into Federal and State Lists.

The Federal Parliament of Malaysia can only legislate on matters dealing with Islamic law and religion for the Federal Territories of Kuala Lumpur and Labuan, and has no power to legislate for the rest of Malaysia.

Article 76 of the FCM thus stipulates that Parliament can legislate on matters pertaining to the State List in order only to realize 'uniformity of law and policy' and in matters of Islamic law and the Malay custom 'if so requested by the legislative assembly of any state'.

Legislation and personal status relating to non-Muslims is within the Federal Legislature's jurisdiction (governed by the Malaysian Law Reform (Marriage and Divorce) Act 1976 that repealed all previous statutes on marriage and divorce governing non-Muslims).

The State List specifies personal law which includes matrimonial law.

As the personal law of Muslims in Malaysia is a matter under the jurisdiction of the State, each of the 13 States are able to enact its own set of laws governing the personal laws of Muslims in that State.

Thus, personal matters of Muslims are to be regulated by the state enactments and the power to legislate on these matters is vested in the state legislature and the Sultan.

Each enactment establishes a Council of Religion of Islam (*Majlis Agama Islam*) for the state, the role of which includes the issuance of *fatwa*. In issuing a *fatwa*, the *Mufti*, Legal Committee and the *Majlis* are required ordinarily to follow the orthodox tenets of the *Shafi'i* school but where the public interests so requires, the *fatwa* may be given according to the tenets of the other schools of Islamic law. As for the legal effect of such a *fatwa*, the Selangor Enactment provided in section 42(3) that any ruling passed by the *Majlis*, whether directly or through the legal Committee, if the *Majlis* so determines or if the sultan so directs, be published by notification in the Gazette and "shall thereupon be binding on all Muslims resident in the State".

The substantive provisions including those concerning family law of these enactments are based on the *Syariah* law and although these enactments are similar in content, there are differences between them in terms of certain matters including administrative procedures.

In order to coordinate the administration of *Syariah* law at the national level, the National Council of Islamic Affairs, with its related functions, was established in October 1968 by the Conference of Rulers.

Its members include a chairman appointed by the Conference of Rulers (the Prime Minister is usually appointed); a representative of each state in Peninsular Malaysia appointed by the ruler concerned; and five persons appointed by the *Yang di-Pertuan Agong* with the consent of the Conference of Rulers.

The function of the National Council is to advise and make recommendations to the Conference of Rulers, State government and State Religious Council on the administration of Islamic law with a view to encouraging uniformity among the various states of Malaysia. The Council has a *Fatwa* Committee that comprises the Muftis of all the member states and five other Muslim scholars appointed by the *Yang di Pertuan Agong*.

THE FEDERAL CONSTITUTIONAL OF MALAYSIA (FCM) AND THE *SYARIAH* COURT

It is pertinent to note that Malaysia operates a dual legal system, based on both civil law and *Syariah* law.

The competent body to decide on *Syariah* law matters under the FCM is the *Syariah* Court.

The related role and position of the *Syariah* Court, is enshrined in 121 (1A) of the Federal Constitution of Malaysia.

Article 121 (1) of the FCM, introduced in 1988 by constitutional amendment, states that the civil courts have no jurisdiction in matters that fall within the *Syariah* Court jurisdiction.

The reference to the *Syariah* Courts is the Ninth Schedule to the Federal Constitution, List II, Item 1, which enumerates matters that fall under the legislative powers of the State.

The *Syariah Courts* have jurisdiction only over persons who are of the Islamic religion and on matters which are enumerated in the said item.

In relation to Article 121 (1A) of the Federal Constitution of Malaysia, it is well to remember the *raison d'être* of the said article.

As a starting point, in 1927, in the case of *Ramah v Laton*, a majority of the Court of Appeal in the Malay States held that Islamic law is not a foreign law but it is the law of the land and as such it is the duty of the courts to declare and apply the law and it is not competent for the courts to take evidence on what the Islamic law is.

Consequently, however, as the judges of the civil courts felt that they were incompetent to deal with questions of Islamic law, a device was created to give the civil courts power to refer questions of Islamic law and Malay custom to the State Executive Council of the various States. This power or authority was conferred by the Determination of Muslim Law Enactment of 1930, Cap 196 of the Revised Edition, 1935.

The above power was terminated with the enactment of a legislation for the administration of Muslim law in the states and the *Syariah Courts*, which were established to address cases under the said legislation.

Hence, a dual system of courts was set up in West Malaysia, that is, the Civil courts and the *Syariah Courts*.

After the Federation of Malaya was constituted in 1948, the Courts Ordinance 1948 established a judicial system for the Federation which omitted the *Syariah Courts* which then ceased to become the previously de facto Federal Court.

Before independence and when the Malay States were under the authority of the British, the position of the *Syariah Courts* and their judges was subordinate.

After independence, the judicial power of the Federation was vested in the Federal Court, and the two high Courts in Malaya and Borneo, and the lower courts comprising the session courts, magistrate courts and *penghulu* courts.

The *Syariah* Courts were relegated to the position of State courts and their jurisdiction was limited by the Ninth Schedule, List II of FCM.

In a similar vein, the definition of law under the Federal Constitution of Malaysia did not mention Islamic law.

Based on the reading of the said provision, the scope of jurisdiction given to the States and the *Syariah* Courts is restricted.

In addition, the subordinate position of the *Syariah* Courts is also reflected by the fact that in many cases decisions of the *Syariah* Courts could be overridden by the decisions of the Civil Courts.

Article 121(1A) of the Federal Constitution of Malaysia, introduced in 1988 by constitutional amendment, states that the civil courts have no jurisdiction in matters that fall within the *Syariah* Courts' jurisdiction. The reference to the *Syariah* Courts is the Ninth Schedule to the Federal Constitution, List II, Item 1, which enumerates matters that fall under the legislative powers of the State:

'Except with respect to the Federal Territories, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions operating wholly within the State: Malay Custom; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue: mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of *Syariah* courts,

which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.'

Based on Item 1, as cited above, the *Syariah* Courts should have jurisdiction only over persons who are of the Islamic religion and on matters which are enumerated in the said item and of the matters in the item is Islamic Law.

In the Lina Joy case, the Federal Court, in a majority decision, opined, *inter alia*, that an order by the *Syariah Court* concerning the religious status of Lina Joy is required as the issue of renunciation of the Islamic faith is a matter of Islamic law which falls under the jurisdiction of the *Syariah Court*. The Federal Court further opined that '[t]he way a person renounces a religion must essentially be carried out pursuant to the rules or laws or practice followed or set by the religion itself' and that 'one cannot at one's whims and fancies renounce or embrace a religion'.

The India-ASEAN Strategic Partnership: Challenges and Prospects for India's Engagement in Southeast Asia

K.S. Nathan

Professor K.S Nathan is a senior researcher at the Institute of Ethnic Studies (KITA) in the National University of Malaysia (UKM), Malaysia. His teaching, research, and publications are largely in the area of international relations and strategic studies including civil-military relations in Malaysia, big power relations in the Asia-Pacific region, U.S. foreign policy, ASEAN's relations with major external powers (USA, China, Japan, India and EU), Malaysian politics and foreign policy, and regional security. He is also an Advocate and Solicitor, having been called to the Malaysian Bar on 31 July 2015.

ABSTRACT

India and ASEAN as two major political entities are empowering themselves by discovering and developing synergies and points of convergence that are strengthening their bilateral interactions for the peace, security and development of Asia as a whole. In this evolving context of enhanced cooperation, they have elevated their relationship at the Commemorative Summit held in New Delhi in 2012 to the level of a Strategic Partnership. This new and higher level of engagement is a key factor in strengthening India's engagement with ASEAN as a regional force, and in enhancing India's strategic role in Southeast Asia. Thus, what is equally evident in this interactive process is the phenomenon of mutual empowerment. The emerging security dynamics in the second decade of the 21st century, marked principally by the rise of the two Asian giants – China and India – have obliged regional and global players to formulate new strategies and alignments to better defend as well as promote their interest in the region. Since 1991 when India started to actively Look East in the Post-Cold War era of Globalization, New Delhi identified ASEAN as a regional institution that could welcome and promote India's proactive engagement with Southeast Asia. India's growing political, military, economic and technological capacity also suggests the availability of

greater resources for capacity building with ASEAN in terms of strengthening the region's counter-terrorism and maritime capabilities. This article therefore focuses primarily on India-ASEAN political and security cooperation, and the challenges and prospects that lie ahead in translating the 2012 India-ASEAN Vision Statement creating a 'strategic partnership' into reality as the regional body itself progresses towards establishing the ASEAN Community by the end of 2015.

Keywords: India-ASEAN Vision Statement, strategic partnership, political and security cooperation, India and EAS, capacity building for regional security

INTRODUCTION

ASEAN and India elevated their relationship at the Commemorative Summit held in New Delhi in December 2012 to the level of a Strategic Partnership.¹ This new and higher level of engagement is a key factor in moving forward towards strengthening India's role in ASEAN and in Southeast Asia. The focus of this article is on political and security cooperation. It is a well acknowledged fact that the geopolitical dynamics of the region do play a very important role as these strategic dynamics are clearly driven by considerations such as the increasing pace of globalization and also the whole concept of ASEAN centrality. All the major powers have actually bought into this concept of ASEAN centrality because ASEAN does not threaten anyone and that has made it very comfortable for every external power to contribute to this regional process and to find space within which they can engage themselves very positively. Therefore, as India is rising, it is increasingly evident that India is having the space and the opportunity to contribute to regional integration and development led by ASEAN.

Over the past 20 years India has emerged as an important partner in the political, security and economic dimensions of ASEAN's development. But it should also be noted that there are other major powers which are also of concern to India as India increases its engagement – and quite clearly these powers are the United States and of course China. China's increasing role in this region is clearly providing strong incentives for India to engage itself in Southeast Asia given the fact that Asia has always been influenced and energized by these two major civilizations – China and India. ASEAN is an embodiment of 10,000 years of civilizational history, influenced by India on one side, and China on the other, with both impacting on culture, economics and society of Southeast

Asia. This process of political, economic, cultural and strategic engagement has been going on albeit intermittently, but has intensified with the demise of the Cold War and the onset of Globalization. What we are witnessing now is the re-emergence of India under new circumstances informed by the twin forces of ever-increasing globalization and interdependence. As one analyst observes, the sheer numbers of its growing population, the expanding middle class, the robust military establishment and the country's increasing sophistication in high-technology are shaping India's inevitable rise as a major global political, economic and military power in the 21st century.² India's rise would invariably impact the foreign policies of other major political units such as the United States, China, Russia, Japan, and in Southeast Asia, ASEAN. As equally noted by a leading Indian scholar, "In the coming years, it will have an opportunity to shape outcomes on the most critical issues of the twenty-first century: the construction of Asian stability, the political modernization of the greater Middle East, and the management of globalization".³

ASEAN and India as two major political entities are empowering themselves by discovering and developing synergies and points of convergence that are strengthening their bilateral interactions for the peace, security and development of Asia as a whole. Thus, what is equally evident in this interactive process is the phenomenon of mutual empowerment: this new scenario has produced the rationale for the India-ASEAN strategic partnership. Both entities have now been freed from the clutches of Cold War politics, and have developed a new sense of confidence and self-reliance in addressing the era of post-Cold War globalization and the attendant constraints and opportunities embodying this new era of international relations.

THE RATIONALE AND MOMENTUM TOWARDS A STRATEGIC PARTNERSHIP

Both India and ASEAN are experiencing a period of strategic transformation occurring within the broader geopolitical landscape of Asia. Both entities would like to ensure that they have a role in shaping the future rather than be shaped by it. In this period of power transition marked principally by the phenomenal economic rise of China, the major as well as medium and small powers in the region are obliged to adjust their foreign policies to cope with emerging uncertainties while also leveraging new opportunities presented by this geopolitical transformation.

In conceptual and definitional terms, the key elements of a strategic partnership are not merely limited to bilateral cooperation but are anchored within a larger framework of regional and global security. Briefly stated, the goals are: (a) to promote mutual understanding; (b) to strengthen the rules based systems of global governance, (c) to promote regional and global security, (d) to promote respect for the rule of law, including human rights, (e) to increase economic and social sustainability. Evidently, all parties must converge on their objectives for creating a strategic partnership⁴. The term “strategic” implies that both parties wish to establish a cooperative relationship to achieve common high-priority goals, which in the India-ASEAN relationship, are aimed at strengthening political, cultural, economic and security cooperation that is sustainable over time and which consolidates the existing regional security architecture. India and ASEAN are therefore working proactively towards expanding their areas of political and security convergence, and to take joint political action at the regional and global level.

India has built the momentum for such a partnership from 1991 with the inauguration of its Look East Policy. Since then, the ASEAN-India partnership has broadened and deepened over the years, with India becoming the ASEAN Sectoral Dialogue Partner in 1992, and a full Dialogue Partner as well as a member of the ASEAN Regional Forum (ARF) in 1996. India’s accession to ASEAN’s Treaty of Amity and Cooperation in Southeast Asia on 8 October 2003 signalled its desire to be an active partner in maintaining as well as promoting regional stability and security in Southeast Asia. Additionally, India and ASEAN signed the Agreement on Partnership for Peace, Progress and Shared Prosperity at the 3rd ASEAN-India Summit in October 2010. This Agreement was a landmark document which created the roadmap for long-term engagement for ASEAN-India partnership, followed by a specific Plan of Action to implement the Partnership. And following the entry into force of the ASEAN Charter in December 2008, India has accredited its Ambassador to ASEAN based in Jakarta, particularly to work closely with the Committee of Permanent Representatives to ASEAN (CPR) and the ASEAN Secretariat.

Efforts to identify specific areas for mutual cooperation began to gain momentum. The ASEAN-India Eminent Persons Group (AIEPG) was established in Hanoi at the 8th ASEAN Summit in October 2010 to review the ASEAN-India dialogue relations and explore ways to widen and deepen existing

cooperation towards a long-term strategic partnership between ASEAN and India. The AIEPG submitted a report to the Leaders during the meeting for adoption containing several recommendations for enhanced political, security, economic and social-cultural cooperation in the decade ahead.⁵ India will continue to support the notion of ASEAN centrality in both economic and security structures and institutions that are currently emerging in this region while both entities will forge common positions at the global level on matters pertaining to global trade, development, and international security. Thus, India's efforts to elevate its interactions with ASEAN to a "strategic" level coincided with ASEAN's push towards establishing the ASEAN Community by 2015.

ASEAN-INDIA STRATEGIC PARTNERSHIP: MOVING FORWARD ON POLITICAL AND SECURITY COOPERATION

Southeast Asia is a region that conjoins the interests of all major powers, especially the United States, China, India, Japan and Russia. All of them are major players and the ASEAN approach has been very inclusive and this is also the reason why this regional entity encompassing all ten states is able to work quite harmoniously with all the major powers. ASEAN is a very inclusive region, and importantly, it is the ASEAN process that is facilitating a regional environment that ensures mutual security, development and prosperity for all actors. ASEAN regionalism is anchored in the principle of cooperative security which desists from identifying any major power as a threat to regional security; rather, the focus is on inclusive security whereby every actor – big, medium and small – finds sufficient opportunity to make a positive contribution to building an Asian security community. The principle and practice of cooperative security by ASEAN incorporates and does not exclude the operational dynamics of the balance of power.⁶ Indeed, the 'ASEAN Way' has never been a zero-sum game in international politics. Rather, the regional entity has always attempted to find a *modus vivendi* in accommodating and not rejecting diverse approaches to regional security. A cooperative security regime is by definition a non-threat based approach to regional order, but is not an alternative to the balance of power. The ASEAN Regional Forum (ARF) demonstrates that both concepts – balance of power and cooperative security – can coexist and contribute to dynamic stability in Asia's regional order in which endogenous and exogenous forces can cooperate. ASEAN therefore welcomes the engagement of all major powers, and this has made possible India's increased participation.

India fully supports ASEAN centrality because as long as ASEAN is the driver, mover, facilitator, and moderator, there is room for everyone to engage without the external powers themselves conflicting with each other in Southeast Asia. Indeed, the essence of the concept of ASEAN centrality lies in ASEAN's dexterity in managing the involvement and engagement of all the major powers in the region in a cooperative manner, and as far as possible, to reduce conflict. It is this scenario that offers the right prospects for the growth of the ASEAN-India partnership. India's strategic role and contribution to ASEAN security and the regional balance of power is welcomed by most of the countries in the region, many of whom "are wary of Chinese expansionism and are looking for a viable alternative. India, therefore, tends to be viewed as a countervailing force to China. The ASEAN countries mainly view India's naval growth as a promising development".⁷ Over the past 20 years since China occupied the Philippines-claimed Mischief Reef, Beijing has begun flexing its newfound political, economic and military power in the South China Sea (SCS), causing tension and concerns among other claimants – Vietnam, Philippines and Malaysia, all members of ASEAN.

The SCS disputes have thus far prevented ASEAN from moving forward in implementing the concept of ASEAN centrality in maintaining regional order and resolving the SCS claims via the 2002 DOC (Declaration on Conduct of the Parties in the South China Sea), and progressing towards the COC (Code of Conduct). Moreover it has split the ASEAN consensus whereby the non-claimant states such as Cambodia and Myanmar, through Beijing's influence, have stalled the COC. India's rise and power-projection capability has triggered Chinese concerns over New Delhi's expression of interest in ensuring the security of sea lanes and the importance of resolving overlapping claims by peaceful means. China's 9-dash U-shaped line in SCS proclaims sovereignty over 90 per cent of the South China Sea thereby basically nullifying the legitimate claims of other littoral states, and also attracting greater attention from the big powers, especially from New Delhi and Washington. While India might cautiously welcome the U.S. pivot to Asia in balance of power terms, China views the "pivot" as an effort to encircle and contain China.

Since India became a Dialogue Partner of ASEAN, India has participated in a series of consultative meetings with ASEAN under the framework of ASEAN-India Dialogue Relations including summits, ministerial meetings, senior

officials meetings, and meetings at experts' level. Other related dialogue and cooperation frameworks initiated by ASEAN – such as the ASEAN Regional Forum (ARF), the Post-Ministerial Conference (PMC) 10+1, the East Asia Summit (EAS), Mekong-Ganga Cooperation and Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) – are all designed to contribute towards strengthening regional dialogue and accelerating regional integration.⁸ To intensify their engagement, the ASEAN-India Partnership for Peace, Progress and Shared Prosperity was signed at the 3rd ASEAN-India Summit in Lao PDR on 30 November 2004. A Plan of Action (2004-2010) was also developed to implement the Partnership. Subsequently, the new ASEAN-India Plan of Action for 2010-2015 was developed and adopted by the Leaders at the 8th ASEAN-India Summit in October 2010 in Hanoi, Vietnam.

While these measures provide evidence of intent of deeper bilateral engagement in the 21st century, there needs to be a greater focus on cooperation in non-traditional security (NTS) where implementation of the Vision Statement is arguably less problematic and less controversial. Key areas where India-ASEAN bilateral cooperation can be enhanced, as outlined in the Vision Statement, include maritime security, terrorism, drug trafficking and cyber crime. Since India launched its Look East Policy in 1992, the level of India-ASEAN engagement on political, economic and security issues has grown, with a substantial increase in cooperation following India's accession to ASEAN's Treaty of Amity and Cooperation (TAC) in 2003. Over the past 20 years, India has emerged as an important political, security and economic partner of ASEAN. The rising economic and military power of China and its growing assertiveness in the South China Sea provides added incentives for India and ASEAN to shape the balance of power for promoting mutual interests. ASEAN and India view each other's expanding international capacity for sub-regionalism and broader Asia-wide regionalism as opening up many new frontiers for closer engagement and cooperation. The Indo-Pacific region today represents the conjunction of the strategic interests of six major political entities: USA, China, India, Japan, Russia and ASEAN.

International cooperation to combat transnational terrorism, especially since the 9/11 terrorist attacks in the United States and terrorist bombings in Bali (2002) and Jakarta (2005) has become a high priority agenda of ASEAN's engagement with external powers. ASEAN and India recognize

the importance of addressing this NTS issue impacting regional and global security. Globalization has increased the pressure on the State and regional institutions to cope more effectively with transnational ideological forces that are bent on destroying the current world order through violence and terror. Both India and ASEAN continue to face the challenge of religious militancy and extremism. The framework for joint ASEAN-India cooperation to combat terrorism was endorsed during the ASEAN leaders' Bali Summit on 8 October 2003. Since then, both parties have continued to implement the various measures identified in the Joint Declaration: (i) Continue and improve intelligence and terrorist financing information sharing on counter-terrorism measures, including the development of more effective counter-terrorism policies and legal, regulatory and administrative counter-terrorism regimes; (ii) Enhance liaison relationships amongst their law enforcement agencies to engender practical counter-terrorism regimes; (iii) Strengthen capacity-building efforts through training and education, hold consultations between officials, analysts and field operators, and organise seminars, conferences and joint operations as appropriate; (iv) Provide assistance on transportation, border and immigration control challenges, including document and identity fraud to stem effectively the flow of terrorist-related material, money and people; (v) Comply with United Nations Security Council Resolutions 1373, 1267, 1390 and other United Nations resolutions or declarations on combating international terrorism; and (vi) Explore on a mutual basis additional areas of cooperation.⁹

INDIA AND THE EAST ASIA SUMMIT (EAS)

India's membership and role in EAS is a grudging recognition by certain countries that it is no longer possible to talk about Asian security by focusing only on China's rise and influence. More ASEAN members, especially Indonesia, Vietnam, and Singapore as well as Japan now have recognized the role India can play as a counterweight to balance China. ASEAN as a whole too has come around to accept that India can play a positive role in the emerging Asian security architecture as its economic, political, diplomatic and military influence expands in the region. The EAS, in practical terms may deliver less in comparison to more formalized cooperation under ASEAN. Yet, the EAS is reflective of the strategic concerns and unresolved issues in Asian security – and the need to create a diplomatic framework to strengthen the dialogue process, and to avert tensions and untoward incidents. In this regard, India is most comfortable with an ASEAN-led EAS.

The East Asia Summit (EAS) forum is, of course, an emerging regional architecture. The EAS is still a very loose organization, and will probably remain so given the huge political, economic and cultural diversity of Asia. ASEAN has never really believed in tight institutionalism. Tight institutionalism requires very high levels of commitment and obligations and binding agreements and legal procedures. ASEAN is essentially a consensus-based organization that privileges consensus building through more informal channels. Here is where the argument that ASEAN regionalism is process regionalism gains credence. It is a process which gradually produces the product and once that product is produced, it begins another process. Thus, if ASEAN regionalism is viewed as process-oriented, it generates more results than if it were viewed from the perspective of being product-oriented – which is very much a western notion of viewing and evaluating regionalism in the non-western world. As such, the western approach cannot strictly be applied to Southeast Asia because ASEAN regionalism has evolved from an indigenous strategic culture that generally accords greater priority to processes and procedures that facilitate accommodation rather than confrontation. It is this regional confidence in conflict management that has enabled ASEAN to be the central interlocutor with external powers even in times of challenge. The EAS is therefore a broader and constructive framework for discussion and dialogue. ASEAN together with India and other powers are engaged in this process as yet another institutional mechanism by which we try to reduce tension and promote regional security. Indeed, an ASEAN-centric regional architecture would be viable only through the practice of inclusive security that welcomes the participation of external powers in ASEAN's regional order.¹⁰ ASEAN's unique ability to synergize the various concentric circles of regionalism is a major attraction for India to participate actively in regional confidence-building and conflict-management processes.

INDIA-ASEAN COOPERATION IN CAPACITY BUILDING FOR REGIONAL SECURITY

Over the past decade, the track record of bilateral cooperation indicates that both parties are working closely to realize the 2012 Vision Statement which provides a roadmap on how they would move forward in the next decade. One key area where India's expertise could be effectively deployed is in capacity building to combat transnational threats. India and ASEAN have been working together for nearly two decades on enhancing political and

security cooperation since 1996 when India gained formal admission to the ASEAN Regional Forum (ARF). From India's perspective, the India-ASEAN strategic partnership is a logical bi-product of the Look East Policy and further strengthening of the Dialogue Partner relationship with ASEAN. As evidence of New Delhi's commitment to regional security cooperation, India has co-chaired the ARF Inter-sessional Support Group (ARF-ISG) on Confidence Building Measures (CBMs) and Preventive Diplomacy. It has also organized various workshops and seminars for ARF members including: (a) Anti-Piracy Training by the Indian Coast Guard at Mumbai, 18-20 October 2000, (b) The 3rd ARF Workshop on Cyber Security in New Delhi, 6-8 September 2006, (c) Advanced Maritime Security Training Course in Chennai, 17-22 November 2008, and (d) UN Peacekeeping Course in Delhi, 18-22 May 2009. All of the above efforts have stimulated the rationale for launching the India-ASEAN Strategic Partnership in 2012.

India's interest in providing anti-piracy training for ARF members must be located in a strategic context. For a rising India, energy security is becoming more central to foreign policy and national security. New Delhi is busy looking for oil and gas supplies from Myanmar, Vietnam and Indonesia. A major foreign policy announcement in 1999 stated that India's strategic interests extend all the way from the Persian Gulf to the Straits of Malacca. The security of the Straits of Malacca and Straits of Hormuz in IOR (Indian Ocean Region) directly impacts India's national interests. Since 2001, India has deployed its navy to East Asia, from Singapore to Japan. In this regard, the ANC's (Andaman & Nicobar Command) force projection capabilities have been enhanced, partly also to monitor and check Chinese naval power and developments in the South China Sea and IOR. In the event, India's pro-active engagement via the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) and other multilateral fora to strengthen maritime security as a major stakeholder together with China, Japan and the United States is understandable. As over 60,000 ships carrying 80 per cent of the oil transported to Northeast Asia pass through the Straits of Malacca annually, sea lane security is not just a matter of concern for the littorals, but would invariably demand the attention and involvement of external powers whose economic security is equally at stake.

On cyber security, India highlighted at the 3rd ARF Workshop the economic and demographic indicators, and protection of critical information structure with particular emphasis on security breaches including the National Information Security Assurance Programme (NISAP).¹¹ The Indian presentation also identified areas for possible cooperation, namely, coordination in early warning, threat and vulnerability analysis, and incident tracking. Given India's rise as an ICT power in the past two decades, the exposure gained by ASEAN participants has been valuable in designing their own national cyber security plans to cope with this new and rising threat to national security.

The ARF Maritime Security Training Workshop in Chennai, Tamilnadu from 24-29 March 2008 specifically focused on enhancing maritime security in Asia. The training programme was aimed at disseminating important aspects of marine security to middle-level officers. It covered the themes of search and rescue, smuggling, piracy, hijacking and armed robbery, port security and ship security, confiscation and repatriation of ships, fishing rights including fishing by foreign vessels, drug trafficking and narco-terrorism.

Peacekeeping is a very important activity not just for ARF members but also for the UN's role in international security. Like ASEAN, India is very committed to peacekeeping, and has contributed over 100,000 peacekeepers to 40 UN operations in the past 50 years. The course, organised by the Centre for United Nations Peacekeeping (CUNPK) in New Delhi from 18-22 May 2009, was aimed at enhancing the understanding of middle-level officers in the nuances of UN peacekeeping and peace building. This multi-disciplinary training programme covered *inter alia* the following themes: Legal Framework; Rules of Engagement; Safety & Security; Code of Conduct; International Humanitarian Law; Sexual Exploitation and Abuse; Child Protection; Cross-Cultural Issues; and Inter-Operability Challenges.¹² India's vast experience in this field of international diplomacy and security represents a significant contribution to capacity building for regional security in the ASEAN Member States, especially the CLMV (Cambodia, Laos, Myanmar and Vietnam) countries that have suffered the consequences of much internal and international conflict.

In the past decade, India has expressed greater concern over maritime security in Southeast Asia as current geopolitical trends are raising the premium on the deployment of naval power in the Indo-Pacific region. India's advocacy of a "stable and secure Asian order" places considerable emphasis on maritime security, freedom of navigation, unimpeded lawful commerce, peaceful resolution of maritime disputes, and access to resources as per the norms of international law.¹³

THE ADMM AND ASEAN SECURITY

In terms of specific areas of cooperation, the ADMM (ASEAN Defence Ministers Meeting) process is evidently working very well. India is an active participant and it is this ADMM Plus process which also keeps the region in a very secure and stable manner because security cooperation is very important. It also means that we are able to harmonize realism with constructivism, taking into account that the nation-state will continue to function as a political unit as there is no visible alternative yet to replace it. The nation-state also cannot be wished away under globalization as this political animal is highly resilient in withstanding, and even modifying global pressures impacting its survival. It is the best handle that we have despite its limitations but ASEAN clearly has shown that we can work the nation-state and we can get the nation-state to foster neighbourly cooperation within ASEAN in a constructive way and also engage the external powers in ways that are mutually beneficial.

The ADMM Plus (Defence Ministers of the ten ASEAN states and eight Plus countries, namely Australia, China, India, Japan, New Zealand, Republic of Korea, Russian Federation, and United States), inaugurated in Hanoi on 12 October 2010, is positive evidence of this trend of intra-regional and extra-regional engagement. Looking ahead, we can expect the further intensification and institutionalization of political, economic and security processes. The ADMM Plus is suitably designed to play a key role in many areas of Non-Traditional Security (NTS) where the 'eight plus' including India have various expertise in the area of capacity building to deal with such issues as disaster relief, pandemics, humanitarian assistance, climate change, peace-keeping operations, piracy and counter-terrorism. The ADMM Plus is yet another mechanism that complements, rather than conflicts with existing regional processes such as ARF and other bilateral and multilateral security arrangements that ASEAN countries have with external powers, primarily the

United States. The ADMM Plus Concept and Framework pointedly indicates that threat perceptions are less important while potentials for cooperation are being steadily explored, including in defence and security matters. In June 2008, the ADMM Plus Ministers took a major step forward by launching its first Humanitarian Assistance & Disaster Relief [HADR] programme and Military Medicine [MM] Joint Exercise [HADR/MM] in Bandar Seri Begawan, Brunei. More than 2,000 troops from 18 member-states in the ADMM-Plus, including India, participated. Indeed, the ADMM-Plus is becoming a major building block in the security architecture of Southeast Asia and has become an important forum in which Asian powers such as India and China seek to engage the ten ASEAN nations, with their rapidly growing economies and combined population of over 600 million people.¹⁴ India hosted the 2nd ADMM-Plus Experts' Working Group on Humanitarian Mine Action (EWG on HADR) in New Delhi from 3-5 December 2014.

Nevertheless, India's strategic partnership with ASEAN goes beyond the ADMM Plus framework. Like the United States, India too believes in security bilateralism (India-ASEAN) and security multilateralism (India with ARF members). Thus, India also hosts multilateral exercises in the Indian Ocean region that include a number of ADMM-Plus members. The Milan naval exercises which started with four participating countries in 1995 have now grown to fourteen. India's first integrated military command at the Andaman & Nicobar Islands at Port Blair hosted 'Milan 2003' (11-15 February 2003), a confluence meeting of navies from Indian Ocean countries including Australia, Indonesia, Malaysia, Myanmar, Thailand, Sri Lanka and Singapore. Again, from 1-6 February 2012, India organised Exercise Milan which involved 14 participating countries including Singapore, Australia, Indonesia, Malaysia and Thailand. These naval exercises are aimed at promoting understanding and cooperation in the areas of common interest and safeguarding sea lanes of communication from poaching, piracy and terrorist activities, as well as engaging in joint search and rescue and humanitarian operations. These activities undoubtedly contribute towards ARF's 3-step multilateral approach to Asian regional security: confidence building, preventive diplomacy and conflict resolution, besides evidently strengthening India's strategic engagement with ASEAN.

CONCLUSION: ASEAN AND INDIA – THE WAY FORWARD

It can be argued that ASEAN-style regionalism strengthens both the Track 1 and Track 2 processes of regional cooperation. A unique feature of ASEAN regionalism is that it supports the principle of neutrality and non-alignment although some of its members continue to have bilateral and multilateral alliances. There is apparently a contradiction in terms when neutrality and alignment are juxtaposed, but the “ASEAN Way” makes it possible for the regional entity to pursue constructive regionalism and engagement with external powers amidst these contradictions. Indeed, ASEAN has a proven record of doing well in the grey area as the reality for ASEAN statesmen is neither white nor black. In other words, it is possible to promote neutralism while also maintaining national and regional security via security cooperation and security alliances with external powers. So, there is a hybrid here and it is not really text-book international relations but it is the way of operating and managing a given reality. By learning to manage contradictions, ASEAN-style regionalism has enabled the development of an ideology of moderation that can harmonize all these differences and create the needed space and time for intra-regional and extra-regional cooperation. Indeed, the secret of ASEAN regionalism that has facilitated positive engagement with India and also with other external powers can be stated as follows. ASEAN believes in informality and loose arrangements. It places great reliance on personal relations and has a preference for gradualism and incrementalism, decision making by consensus, sovereign equality of Member States, avoidance of confrontational diplomacy, and dialogue to manage conflict. Indeed, these principles have actually held ASEAN together over the past 48 years, and are likely to serve as a strong platform for intra-regional and extra-regional cooperation. This is the very basis by which ASEAN has developed and evolved as a regional institution and it will also be the terms of reference by which external powers including India will engage the region.

ASEAN gives face to both established powers as well as emerging powers. ASEAN and India can be viewed as emerging powers with capability to shape the regional balance as well as the global balance in the military, political, economic, diplomatic and strategic dimensions. This capability is also measured in terms of the relative rise and decline of the principal actors in the international system. The era of American dominance of the global order, i.e. the Pax Americana is clearly in decline and the ensuing power vacuum in Asia

is being filled essentially by the rising powers of China and India and also by the collective power of ASEAN. Even Japan, under Prime Minister Shinzo Abe has enunciated a more active foreign policy towards Asia and is strengthening its security engagement with the region. The U.S. has welcomed Abe's decision to reorient Tokyo's collective defence posture and his desire to refurbish the 63-year U.S.-Japan Alliance to address the new security environment in Asia.¹⁵ As power abhors a vacuum, the demising Pax Americana in Asia is being replaced by a more pluralistic engagement of Asian powers that were subdued in the era of Cold War politics. The United States is particularly comfortable with India playing a larger security role in the region as its own power declines in the region. Regional concerns to balance the rise of China have created the necessary impetus to forge an India-ASEAN strategic partnership.

In Asia there are five principal actors – USA, China, India, Japan and ASEAN. The India-ASEAN partnership endorses the ASEAN way of promoting regionalism and Asian integration, i.e. India recognizes the regional entity as a principal actor in Asia. This elevation of the ASEAN-India strategic partnership from dialogue relations to strategic partnership level now is clearly also to serve notice that India wants to be an active player in the New Asia and that India has acquired the strategic vision, capacity and resources to contribute effectively to the region's development, security and prosperity.

Nevertheless, translating the ASEAN-India Vision Statement into reality, i.e. moving the "strategic partnership" forward, will invariably be accompanied by prospects as well as challenges given ASEAN's own political/ideological diversity and India's democratic diversity and bureaucratic complex. Implementation of the ASEAN-India Vision Statement to realize the strategic partnership in the coming decades should encompass the whole spectrum of political and security, economic, socio-cultural and development cooperation. This strategic vision can be promoted through the further strengthening of relevant institutional mechanisms that have already been established under the framework of the India-ASEAN Dialogue Partnership. India's political and security commitment to, and engagement with ASEAN are bound to increase as their economic and trade relationships become deeper. The value and volume of India-ASEAN trade is still low compared to ASEAN's trade with its other major Dialogue Partners, especially China, Japan, U.S. and EU. Besides the public sector, the role of the private sector and civil society

is equally important in contributing to the full maturation of this strategic partnership. A holistic as well as comprehensive and cooperative endeavour that expands networking between government institutions, parliamentarians, business circles, scientists, think-tanks, media, youth, Non-Governmental Organizations (NGOs) and other stakeholders collectively can better ensure the successful creation of the three-pronged ASEAN Community (ASC, AEC and ASCC). Additionally, this new framework of cooperation would also expand the security insurance provided by ASEAN's inclusive engagement with India and all the major external powers in the Asia-Pacific region.

Since Prime Minister Narendra Modi assumed office following the General Elections in May 2014, he appears to be ready to give more teeth and substance to New Delhi's political and security engagement with Southeast Asia and the Pacific region. Modi is now willing to move from "Look East" to "Act East" signalling the desire for a more robust Indian security role in Southeast Asia. The emerging "Modi Doctrine" for enhanced military cooperation and strategic partnerships with the U.S., Japan, ASEAN, and Australia places a strong emphasis on maritime security in the "Indo-Pacific".¹⁶ Within this broader strategic imperative of India's regional security policy, ASEAN can expect more visible demonstrations and presence of India's maritime power being projected into Southeast Asia particularly from its bases in the Andaman and Nicobar islands. Clearly, India can play a pivotal role as ASEAN's Dialogue Partner in strengthening the political and security dimensions – a key pillar of the three-tiered ASEAN Community – to be realized by the end of 2015. Nevertheless, an important caveat would be whether India can muster the needed political will at home to translate the Modi Doctrine abroad from the level of a mere declaration to the stage of implementation for ASEAN to more seriously reckon with India's political, economic and military rise in the New Asia.

ENDNOTES

¹⁶This article is a revised version of a paper titled "Translating the ASEAN-India Vision Statement into Reality: Challenges and Prospects", presented at *Delhi Dialogue IV: Realizing the India-ASEAN Vision for Partnership and Prosperity*, organized by the Institute for Defence Studies and Analyses (IDSA), New Delhi, India, 6-7 March 2014.

¹⁷Yevgeny Bendersky, "India as a Rising Power", *Asia Times*, 21 August 2014: http://atimes.com/atimes/South_Asia/FH21Dfo4.html (date accessed: 27/8/14).

³C. Raja Mohan, "India and the Balance of Power", *Foreign Affairs*, Vol. 85, No. 4, July-August 2006, p. 17.

⁴V. Nadkarni, 2010, *Strategic Partnerships in Asia: Balancing without Alliances*, London; New York: Routledge, pp. 44-51.

⁵ASEAN-India Eminent Persons' Report to the Leaders, Jakarta: ASEAN Secretariat, October 2012, p. 10: [http://mea.gov.in/Uploads/PublicationDocs/20831_ASEAN-India Eminent Persons Report to the Leaders.pdf](http://mea.gov.in/Uploads/PublicationDocs/20831_ASEAN-India_Eminent_Persons_Report_to_the_Leaders.pdf) (date accessed: 10 August 2015).

⁶For details on the role of ASEAN and ARF as cooperative security regimes, see Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF*, New York: Routledge, 2003.

⁷Dalbir Ahlawat, *India's Strategic Perceptions: Dilemmas and Opportunities, Future Directions International*, 12 July 2012, p. 4: http://www.futuredirections.org.au/files/Associate%20Papers/FDI_Associate_Paper_-_12_July_2012.pdf (date accessed: 31/8/14).

⁸Association of Southeast Asian Nations, "Overview of ASEAN-India Dialogue Relations": <http://www.asean.org/asean/external-relations/india/item/overview-of-asean-india-dialogue-relations> (date accessed: 5 September 2014).

⁹ASEAN-INDIA Joint Declaration for Cooperation to Combat International Terrorism, Bali, Indonesia, 8th October 2003: <http://www.asean.org/news/item/asean-india-joint-declaration-for-cooperation-to-combat-international-terrorism-2> (date accessed: 31/8/14).

¹⁰Vannarith Chheang, "India-ASEAN Going Beyond Delhi Dialogue IV", *Diplomatist*, April 2014: <http://www.diplomatist.com/dipomo4y2014/articleo23.html> (date accessed: 10/9/14).

¹¹ASEAN Regional Forum: Summary Report of the 3rd ARF Workshop on Cyber Security New Delhi, 6-8 September 2006: <http://www.asean.org/archive/arf/14ARF/ISG%20on%20CBMs%20and%20PD-Batam/Annex%20F%20Summary%20Report%20of%203rd%20Cyber%20Security%20New%20Delhi.PDF> (date accessed: 10 September 2014).

¹²UN Peacekeeping Course for ARF Member States, New Delhi, India, 18-22 May 2009: <http://aseanregionalforum.asean.org/files/Archive/16th/UN-Peacekeeping-Course-for-ARF-Participants-New-Delhi-18-22May2009/Report%20on%20ARF%20Peacekeeping%20Course.pdf> (date accessed: 5/9/14).

¹³Speech by External Affairs Minister on "India's Foreign Policy Priorities for the 21st Century" at the launch of the "India Initiative" by Brown University. Ministry of External Affairs: Government of India, September 28, 2012: <http://www.mea.gov.in/Speeches-Statements.htm?dtl/20639/> (date accessed: 1/10/14).

¹⁴Martin Seiff, "ASEAN Defense Ministers Host Disaster Relief, Military Medicine Exercise", Asia-Pacific Defense Forum, 28 June 2013: http://apdforum.com/en_GB/article/rmiap/articles/online/features/2013/06/28/asean-disaster-relief (date accessed: 28 September 2014).

¹⁵"US Backs More Active Security Role for Japan: Chuck Hagel", Agence France Press (AFP), 31 May 2014: <http://www.ndtv.com/article/world/us-backs-more-active-security-role-for-japan-chuck-hagel-533672> (date accessed: 2/9/14). See also, "Japan Prime Minister Signals Assertive Asian Security Role at Shangri-La Dialogue 2014: Analysis", South Asia Analysis Group, Paper No. 5715, 2 June 2014: <http://www.southasiaanalysis.org/node/1533> (date accessed: 2/9/14).

¹⁶Patrick M. Cronin and Darshana M. Baruah, "The Modi Doctrine for the Indo-Pacific Maritime Region", *THE DIPLOMAT*, 2 December 2014: <http://thediplomat.com/2014/12/the-modi-doctrine-for-the-indo-pacific-maritime-region/> (date accessed: 12/8/15).

East Asia's Future Maritime Highway: The Northeast Arctic Passage

Mohd Hazmi Mohd Rusli, Roman Dremluiga and Wan Izatul Asma Wan Talaat

Dr. Mohd Hazmi Mohd Rusli is a senior lecturer at the Faculty of Syariah and Law, Universiti Sains Islam Malaysia and a visiting professor at the School of Law, Far Eastern Federal University, Vladivostok, Russia. He is also an associate research fellow at the Asian-African Legal Consultative Organization, New Delhi, India. Dr. Roman Dremluiga is Associate Professor and Vice Dean of the School of Law, Far Eastern Federal University, Vladivostok, Russia. He is also a researcher at the Joint Institute of Marginal Seas and the Arctic Studies, Shanghai Jiao Tong University, Shanghai China. Dr. Wan Izatul Asma Wan Talaat is Professor at the Institute of Oceanography and Environment, Universiti Malaysia Terengganu.

ABSTRACT

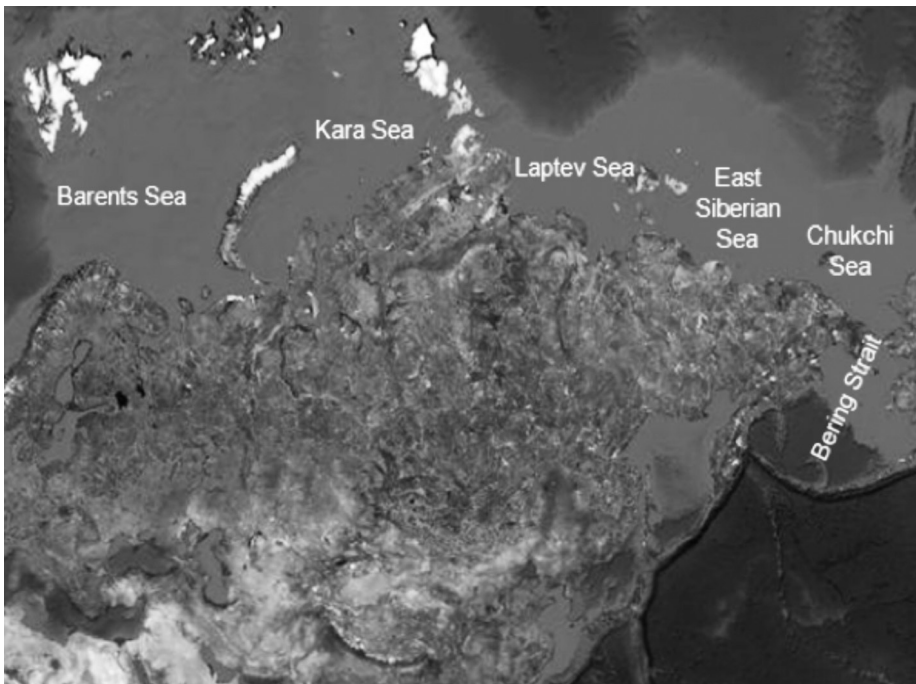
Global warming is seen as a curse by some and as a blessing for others. The increasing world temperature has allowed for mariners to discover an alternative maritime passageway connecting Europe and the Far East other than the conventional Suez Canal-Straits of Malacca and Singapore maritime route i.e. the Northeast Arctic Passage (NAP). This article discusses the potentials for the NAP to be East Asia's future maritime highway. Comparisons are made between the NAP and the Straits of Malacca and Singapore in terms of practicality of these routes for maritime navigation. This article concludes that so long as the Far Eastern economic powerhouses depend on the Middle East as the source of petroleum, the NAP will just become an alternative to the more popular Straits of Malacca and Singapore route for the shipping industry particularly in oil transportation.

Keywords: Shipping, Marine Pollution, Oil Transportation, Arctic, Law of the Sea

INTRODUCTION

The Northeast Arctic Passage (NAP) is gaining popularity as the shortest route connecting Europe and the Far East. The Eurasian continental landmass sprawls from Europe in the west to Asia in the east. For centuries, trade has

flowed from Europe to India and the East Asian nations. After the opening of the Suez Canal in 1869, ships from Europe travelled to the Indian Ocean through the Strait of Gibraltar and the Suez Canal and linked with the East Asian ports via the Straits of Malacca and Singapore as well as through the Indonesian archipelagic straits.¹ Like the Suez-Malacca route, the NAP, or as it is popularly known in Russia, the Northern Sea Route, is also a passage that connects Europe and East Asia using the route on the Arctic coast of Russia.² From as early as the 18th century, ships plying this route would travel from St. Petersburg in Russia through the Barents, Kara, Laptev, Chukchi and East Siberian Seas, ultimately making their way to the Bering Strait on the eastern side of the Eurasian mainland, connecting Europe to the ports of East Asia.³ Map 1 shows the seas within the NAP.



Map 1: The Seas within the NAP
(Source: Modified from Google Maps)

¹Rakish Suppiah, 'The Northeast Arctic Passage: Possibilities and Economic Considerations' (2006) 151 (Nov/Dec 2006) *Maritime Studies*, 12-13.

²Claes Lykke Ragner, 'The Northern Sea Route' (2008) *Norden Association's Yearbook*, 114.

³William E. Butler, 'Northeast Arctic Passage' in Gerard J. Mangone (ed), *Northeast Arctic Passage* (Sitjhoff & Noordhoff 1978, 1978), 1-4.

THE HISTORY OF THE NAP

The NAP is not thought of as a clearly defined linear route, but is instead perceived as the whole sea area north of Russia.⁴ The environmental condition of waters in the NAP is invariably hostile, with extreme winters, icy waters and unpredictable weather.⁵ The English and Dutch explorers also contributed towards the discovery of the NAP⁶ in their attempts to find alternative routes to the east to escape the Spanish and Portuguese dominion over the southern seas.⁷ Russian vessels have used this route for hundreds of years, establishing a shipping route from Vladivostok on the Asian side of the country to the counterpart port of Leningrad on the European side of Russia.⁸ For a considerable period of time, Russia has used its northern coast for shipping oil and gas, ores, processed materials, building materials, foodstuffs and other goods to its remote Arctic settlements,⁹ though funding for such shipments dwindled after the collapse of the Soviet regime.¹⁰ As Ragner comments:

At its peak in 1987, almost 7 million tonnes of cargo was moved along the northern sea route, most of it goods transported to or from Russian Arctic ports. After the Soviet Union's disintegration, volumes gradually fell, before having come to a relatively stable level of 1.5-2.0 million tonnes per year since 1996.¹¹

The Arctic region is managed and governed by a high level intergovernmental forum called the Arctic Council (the Council), established by the Declaration on the Establishment of the Council, otherwise known as the Ottawa Declaration of 1996.¹² The member states of the Council are Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russian

⁴Claes Lykke Ragner, 'The Northern Sea Route' (2008) *Norden Association's Yearbook*, 114.

⁵William E. Butler, 'Northeast Arctic Passage' in Gerard J. Mangone (ed), *Northeast Arctic Passage* (Sitjhoff & Noordhoff 1978, 1978), 5-8.

⁶*Ibid.*, 42-45.

⁷*Ibid.*

⁸*Ibid.*, 42-43.

⁹Claes Lykke Ragner, 'The Northern Sea Route' (2008) *Norden Association's Yearbook* 117.

¹⁰MSNBC News, *Ships Cross Arctic Passage in Milestone: Scientists say global warming opens ice-choked passages* (2009) MSNBC News <http://www.msnbc.msn.com/id/32800658/ns/us_news-environment/>.

¹¹Claes Lykke Ragner, 'The Northern Sea Route' (2008) *Norden Association's Yearbook*, 117.

¹²The Arctic Council, *About Arctic Council* (2007) The Arctic Council <<http://arctic-council.org/article/about>>.

Federation, Sweden and the U.S.¹³ There are six Working Groups that are attached to the Council. Each of these has a specific mandate with that related to shipping being the Working Group on the Protection of the Arctic Marine Environment (PAME).¹⁴ Established in 1991 and incorporated into the Arctic Council in 1996, the focal point of PAME is on the protection and sustainable use of the Arctic marine environment.¹⁵ Under the patronage of the Council, PAME has conducted an assessment to evaluate the future of shipping in the Arctic region.¹⁶ As reported in the 2009 Arctic Marine Shipping Assessment (AMSA) Report, the volume of shipping traffic going through the NAP in 2004 is as shown in Table 1:

Name of Sea	Average Shipping Traffic (per day)
Barents Sea	21-50
Kara Sea	51-100
Laptev Sea	11-20
East Siberian Sea	1-10
Bering Strait	11-20

Table 1: Average Shipping Traffic in Sea Areas Within the NAP in 2004

(Source: AMSA 2009)¹⁷

The focal points of the AMSA are the potential effect of shipping on humans and the Arctic marine environment, and marine infrastructure requirements for shipping in the Arctic region.¹⁸

¹³Ibid.

¹⁴Ibid.

¹⁵The Arctic Council, *The Protection of the Arctic Marine Environment* (2010) The Arctic Council <<http://www.pame.is/>>.

¹⁶The Protection of Arctic Marine Environment Working Group of the Arctic Council, 'Scenarios on the Future of Arctic Marine Navigation in 2050' (The Arctic Council, Arctic Maritime Shipping Assessment, Protection of the Arctic Marine Environment, Institute of the North, 2004), 1-4.

¹⁷Note: There are differences in the average volume of shipping traffic in different areas of seas within the NAP. This is because not all vessels that sail the NAP from European ports are bound for Asia-Pacific destinations. Some are bound for destinations within Russia and/or Scandinavia. This explains why there is more shipping traffic in the Kara and Barents Seas as compared to the Laptev Sea, East Siberian Sea and the Bering Strait. See Ibid., 189.

¹⁸The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 4-5.

NAVIGATION THROUGH THE NAP

In 1991, the Russian government (then the Union of Soviet Socialist Republics [USSR]) formally opened the passage for international shipping to vessels of all nationalities without discrimination when it issued the 1991 Regulations for Navigation on the Seaways of the Northern Sea Route (1991 Regulations),¹⁹ based on the provisions of Article 234 of the LOSC on navigation through ice-covered areas. Article 234 of the LOSC provides:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ... Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

The 1991 Regulations established certain requirements for vessels seeking passage through the NAP, including:

- (a) A vessel navigating the NAP shall satisfy special technical and operational requirements, while the Master or the person that performs his duties shall be experienced in operating the vessel in ice-stricken waters. In cases where those persons have no such experience, a pilot must be engaged to assist in manoeuvring the vessel;²⁰
- (b) A vessel intending to navigate the NAP must produce a certificate of due financial security with respect to the civil liability of the owner for damage inflicted by polluting the marine environment;²¹

¹⁹Sergey O. Frank, 'Opening Speech: International Shipping on the northern Sea Route - Russia's Perspective' in Claes Lykke Ragner (ed), *The 21st Century- Turning Point for the Northern Sea Route* (Kluwer Academic Publishers, 1999) , 11. For further information on the 1991 Regulations for Navigation on the Seaways of the Northern Sea Route, see The Russian Government, 'Rules of Navigation : Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990), 1-8.

²⁰Article 4 of the 1991 Regulations. See The Russian Government, 'Rules of Navigation: Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990), 1-8.

²¹Article 5 of the 1991 Regulations. See The Russian Government, 'Rules of Navigation: Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990).

- (c) Shipping traffic through the Passage is monitored by the Marine Operations Headquarters (MOHs) and all vessels are subject to its constant control;²²
- (d) Vessels wishing to sail the NAP must notify their intention to MOHs and apply for an icebreaker escort.²³

In view of the increasing importance of the NAP to the international shipping industry, Russia, or the then USSR, took affirmative measures to improve the environmental protection of its marine Arctic areas through the promulgation of the 1990 Decree of the Council of Ministers of the USSR.²⁴ This Decree proclaimed Russia's initiative to protect the sensitive marine environment of its waters within the NAP route.²⁵ Following this, Article 9 of the 1991 Regulations allowed MOHs to suspend the navigation of vessels that either caused damage or that posed a threat to the marine environment of the NAP and its surrounding areas. Article 9 of the 1991 Regulations stipulates:

In cases where an obvious necessity of environment protection or safe navigation dictates so, the Administration, or Marine Operations Headquarters, can suspend navigation of vessels on specific parts of the Northern Sea Route for the period during which there exist the circumstances that have caused such a measure.²⁶

On this issue, the IMO adopted Resolution A.1024 (26) on Guidelines for Ships Operating in Polar Waters (IMO Polar Waters Guidelines) on 2 December 2009.²⁷ The IMO Polar Water Guidelines are recommendatory and their wording should be interpreted as providing recommendations rather than mandatory directions for ensuring safety of navigation and preventing

²²Article 8.1 of the 1991 Regulations. See The Russian Government, 'Rules of Navigation : Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990).

²³This is mentioned in Regulations 2.1, 2.6 and 2.7 of the Regulation for Icebreaker and Pilot Guiding of Vessels Through the Northern Sea Route. See The Russian Government, 'Rules of Navigation : Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990).

²⁴Donald R. Rothwell, *The Polar Regions and the Development of International Law* (Press Syndicate of the University of Cambridge, 1996), 370-374.

²⁵*Ibid.*, 370-374.

²⁶The Russian Government, 'Rules of Navigation: Regulations for Navigation on the Seaways of the Northern Sea Route' (Decision No 565 of 1 June 1990, The Russian Ministry of Merchant Marine, 1990), 1-8.

²⁷International Maritime Organization (IMO), 'Resolution A.1024(26): Guidelines for Ships Operating in Polar Waters' (A 26/Res. 1024, IMO, 2010), 1-33.

pollution from shipping operations in polar waters.²⁸ Due to the increasing importance of the polar regions to international shipping activity, there have been calls to make the IMO Polar Waters Guidelines mandatory for all ships and mariners plying these waters.²⁹

Despite being the shortest route connecting Europe and the East Asia, the NAP is a perilous route as the waters within the passage are ice-stricken.³⁰ Global warming may be seen as a threat by many, but, as far as the shipping industry is concerned, it is viewed as an advantage. The rapid melting of the Arctic ice cap due to global warming means that within the next 15 years, the NAP, which is now open only two months of the year may eventually be accessible for navigation throughout the year.³¹ In other words, international shipping traffic in the NAP will increase as the floating icebergs in these waters begin to disintegrate.³²

In September 2009, German ships transited the NAP from the South Korean port of Ulsan to Yamburg in Siberia.³³ A year later, in July 2010, two Russian

²⁸Section P-1.3 of the Preamble of Resolution A.1024(26) states that 'The Guidelines for ships operating in polar waters...are intended to address those additional provisions deemed necessary for consideration beyond existing requirements of the SOLAS and MARPOL Conventions, in order to take into account the climatic conditions of polar waters and to meet appropriate standards of maritime safety and pollution prevention' See International Maritime Organization (IMO), 'Resolution A.1024(26): Guidelines for Ships Operating in Polar Waters' (A 26/Res. 1024, IMO, 2010), 4.

²⁹Oystein Jensen, 'The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection' (FNI Report 2/2007, Fridtjof Nansen Institute, 2007), 19-24.

³⁰Mohd Hazmi bin Mohd Rusli, 'Attempts to Seek Alternative Routes to the Straits of Malacca and Singapore' (2010) 1(1) *Journal of Maritime Geopolitics and Culture*, 3-5.

³¹Rakish Suppiah, 'North East Arctic Passage: It's Viability for Shipping Transit' (2009) 16(4) *MIMA Bulletin*, 8-9; Svend Aage Christensen, 'Are the northern sea routes really the shortest: Maybe a too rose-coloured picture of the blue Arctic Ocean' (DIIS Brief March 2009, Danish Institute of International Studies, 2009), 1-7.

³²Rob Huebert, in Alex G. Oude Elferink and Donald R. Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Kluwer Law International, 2001), 266-267; Svend Aage Christensen, 'Are the northern sea routes really the shortest: Maybe a too rose-coloured picture of the blue Arctic Ocean' (DIIS Brief March 2009, Danish Institute of International Studies, 2009), 1-7.

³³Matt Moore and Seth Borenstein, *Two German Merchant Ships Conquer Famed Arctic Passage: Climate Change is Blamed for Opening of Path* (2009) Globe Newspaper Company <http://www.boston.com/news/world/europe/articles/2009/09/12/two_german_merchant_ships_conquer_famed_arctic_passage/>.

oil tankers, the Varzuga and Indiga, plied the NAP sailing from Murmansk to Chukotka in Russia's far eastern corner.³⁴ In August 2010, Russia's largest independent gas producer, Novatek, completed its tanker delivery to the Asia-Pacific region via the NAP.³⁵ These navigational successes reveal that navigation through this passage is far from impossible. Utilising the NAP would cut the navigational distance from Europe to East Asia significantly as compared to a similar voyage via the Suez Canal and the Straits of Malacca and Singapore.³⁶

Ports	Suez–Malacca (nautical miles)	NAP (nautical miles)	Distance saved (per cent)
Rotterdam–Yokohama	11,205	7,345	34.45
Rotterdam–Shanghai	10,521	8,079	23.2

Table 2: The Length of a Voyage to Rotterdam from Different Ports by the Routes of Malacca–Singapore and the NAP³⁷

Based on Table 2, the voyage from Rotterdam to Yokohama via the Suez–Malacca route is around 11,205 nautical miles. By travelling northward and using the NAP, the distance between these two ports would be approximately 7,345 nautical miles, cutting approximately 34.45 per cent the distance of the conventional Suez–Malacca route, which would translate into lower fuel costs.³⁸

³⁴Barents Observer, *Oil tankers through North East Passage* (2010) Barents Observer <<http://www.barentsobserver.com/oil-tankers-through-north-east-passage.4800813.html>>.

³⁵Dmitriy Korobeinikov, *Novatek Sends First Fuel Consignment to Asia via Northern Sea Route* (2010) RIANOVOSTI <<http://en.rian.ru/business/20100817/160232307.html>>.

³⁶Matt Moore and Seth Borenstein, *Two German Merchant Ships Conquer Famed Arctic Passage: Climate Change is Blamed for Opening of Path* (2009) Globe Newspaper Company <http://www.boston.com/news/world/europe/articles/2009/09/12/two_german_merchant_ships_conquer_famed_arctic_passage/>.

³⁷Svetlana Chernova and Anton Volkov, *Economic feasibility of the Northern Sea Route container shipping development* (Master of Science in Business Thesis, Bodø Graduate School of Business, 2010), 14.

³⁸*Ibid.*, 12–14; Matt Moore and Seth Borenstein, *Two German Merchant Ships Conquer Famed Arctic Passage: Climate Change is Blamed for Opening of Path* (2009) Globe Newspaper Company <http://www.boston.com/news/world/europe/articles/2009/09/12/two_german_merchant_ships_conquer_famed_arctic_passage/>.

Research has discovered that the Arctic is rich in oil and gas reserves, with the U.S. Geological Survey estimating that up to 25 per cent of the world's remaining oil and gas lie beneath the icy seabed of the Arctic Ocean.³⁹ This survey also reported that the Arctic may contain as much as one-fifth of the world's unexplored oil and natural gas, potentially containing 90 billion barrels of undiscovered oil and 1,670 trillion cubic feet of undiscovered gas.⁴⁰ These resources are primarily located in three areas within the Arctic; namely, the West Siberian Basin, the East Barents Basin and the Alaska Arctic,⁴¹ also believed to contain significant mineral resources.⁴²

With the depletion of oil reserves in the Middle East, the developed economies of East Asia, including Japan, China and South Korea, may seek to import oil from the Arctic region if this research by the U.S. Geological Survey is validated.⁴³ Japan has been looking for alternatives for its sources of oil supply in view of the ongoing turmoil in the Middle East.⁴⁴ It fears that its industries will be affected if there are changes in production policies by Middle East oil producers, or embargoes and unpredictable events such as wars, coups and revolutions.⁴⁵

All these factors show that the NAP and the Arctic Region may in the future become maritime superhighways as well as being the location of significant global oil and gas reserves. As shipping activity in the Arctic region is expected to grow, the Arctic is likely to experience an extraordinary transformation;

³⁹Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor* (2007) National Geographic <<http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>>.

⁴⁰The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 97-98.

⁴¹Ibid.

⁴²Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor* (2007) National Geographic <<http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>>; Øystein Jensen, 'The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection' (FNI Report 2/2007, Fridtjof Nansen Institute, 2007), 1-3.

⁴³Rakish Suppiah, 'North East Arctic Passage: It's Viability for Shipping Transit' (2009) 16(4) *MIMA Bulletin*, 12-13; Mohd Hazmi bin Mohd Rusli, 'Attempts to Seek Alternative Routes to the Straits of Malacca and Singapore' (2010) 1(1) *Journal of Maritime Geopolitics and Culture*, 3-5.

⁴⁴Valerie Yorke, 'Oil, the Middle East and Japan's Search for Security' (1981) 57(3) *International Affairs (Royal Institute of International Affairs 1944-)*, 428-429.

⁴⁵ Ibid.

natural resource development, governance challenges, climate change and marine infrastructure issues will continue to influence the future marine uses of the Arctic.⁴⁶ The increasing shipping volume that plies the NAP will have a significant impact on the marine environment of that region of the Arctic.⁴⁷ AMSA 2009 also reported that there is a lack of Arctic marine infrastructure, such as adequate aids to navigation, limitations to radio and satellite communications, and proper vessel traffic systems in the Arctic.⁴⁸ Therefore, there is much to be done to improve navigational facilities along the NAP in order to make it safer and more viable for future shipping activity.⁴⁹

THE NAP VERSUS THE STRAITS OF MALACCA AND SINGAPORE

There are a variety of advantages and disadvantages for ships travelling via the NAP and the Straits of Malacca and Singapore. The Straits of Malacca and Singapore are considered as important Asia-Pacific maritime shipping highways. They are equipped with numerous aids to navigation and considerable marine infrastructure and are reasonably safe for international shipping.⁵⁰ There are many ports along the Straits for vessels to call at, such as Dumai, Port Klang, Penang, Tanjung Pelepas and the Port of Singapore. Piracy and other maritime crimes have posed a threat in the past, but these incidents have been dramatically reduced in recent years due to the improved security measures introduced by the littoral states to safeguard the Straits.⁵¹ The shortcomings of navigation through the Straits of Malacca and Singapore include that they are constricted and shallow, forcing ships to slow down,

⁴⁶The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 8.

⁴⁷The noise from the icebreakers will cause disturbance to both wildlife and the local community that live along that area of the Arctic. Furthermore, vessel collisions, resulting in death or serious injury of marine mammals and other marine organisms pose threats to the marine environment of that area. See The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 146.

⁴⁸The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 97.

⁴⁹*Ibid.*, 186.

⁵⁰David Tharp, *Nippon Maritime Center: Keeping the Malacca Straits Safe* (2010) The Nippon Foundation <<http://www.nippon-foundation.or.jp/eng/current/20100204NipponMaritimeCenter.html>>.

⁵¹Ramli Hj Nik and Sumathy Permal, 'Security Threats in the Straits of Malacca' in H.M Ibrahim and Hairil Anuar Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (Maritime Institute of Malaysia, 2008), 195-198.

especially in the TSS areas and the eastern exit of the Strait of Singapore to the South China Sea.⁵² The Straits are also exposed to harsh weather during the monsoon season⁵³ and voyages from Europe to East Asia take a longer time using the Straits of Malacca and Singapore route than compared to the NAP,⁵⁴ and longer journeys mean more expensive shipping costs.

Voyages through the NAP also have advantages and disadvantages to be considered by shipping companies. Ships may save on operational costs if they choose to use this route.⁵⁵ Another advantage is that the Russian government consistently monitors the passage of ships and provides adequate navigational aids such as pilotage and icebreakers for transiting vessels.⁵⁶ Due to its harsh conditions and sparse population, especially in the Siberian region, piracy is not a threat for ships traversing the NAP.⁵⁷ Despite the shorter duration of passage through the NAP, ships are likely to incur additional costs such as dues payable to MOHs and payments for services such as pilotage and escort icebreakers.⁵⁸ Sea ice and water depths are the two main impediments to navigation in the NAP,⁵⁹ and voyages through the NAP may be frustrated should the route be closed due to ice accumulation during winter.⁶⁰ Even though the NAP has calmer waters, ships using this route would have to reduce speed to ensure their propellers are not damaged by the layers of ice.⁶¹ In addition, there are serious limitations to radio and satellite communications in certain areas of

⁵²Naoya Okuwaki, 'Improving Navigational Safety Governance in Straits of Malacca and Singapore' (Paper presented at the International Symposium on Safety and Protection of the Marine Environment of the Straits of Malacca and Singapore, Kuala Lumpur, 2007), 21-22.

⁵³H. M Ibrahim, Hairil Anuar Husin and Daneswari Sivaguru, 'The Straits of Malacca: Setting The Scene' in H.M Ibrahim and Hairil Anuar Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (Maritime Institute of Malaysia, 2008), 40.

⁵⁴Rakish Suppiah, 'North East Arctic Passage: It's Viability for Shipping Transit' (2009) 16(4) *MIMA Bulletin*, 14.

⁵⁵*Ibid.*, 14.

⁵⁶*Ibid.*, 14.

⁵⁷*Ibid.*, 14.

⁵⁸*Ibid.*, 14.

⁵⁹Jan Drent, 'Commercial Shipping On The Northern Sea Route' (1993) III(2) *The Northern Mariner/Le Marin du nord*, 1-3.

⁶⁰*Ibid.*

⁶¹Rakish Suppiah, 'North East Arctic Passage: It's Viability for Shipping Transit' (2009) 16(4) *MIMA Bulletin*, 14; International Maritime Organization (IMO), 'Resolution A.1024(26): Guidelines for Ships Operating in Polar Waters' (A 26/Res. 1024, IMO, 2010), 4-5.

the NAP, making it difficult to mount an effective emergency response should a maritime casualty or other emergency occur on this route.⁶²

CONCLUSION

The NAP is seen as a potential new global maritime highway of the future.⁶³ Some commentators anticipate that the importance of NAP as an important shipping route will continue to grow when oil and gas industries begin to develop extensively in the Russian Arctic region.⁶⁴ In fact, research has revealed that by the year 2020, 70 per cent of the overall cargo transported via the NAP will be oil and gas.⁶⁵

Nevertheless, so long as the East Asian nations continue to turn to the Middle East for their supplies of oil and gas, the Straits of Malacca and Singapore will remain as busy as they are today.⁶⁶ Maritime voyages from the Middle East to East Asian nations would obviously take longer via the NAP route, hence it may not be a viable option for many shipping owners, as shown in Map 2:

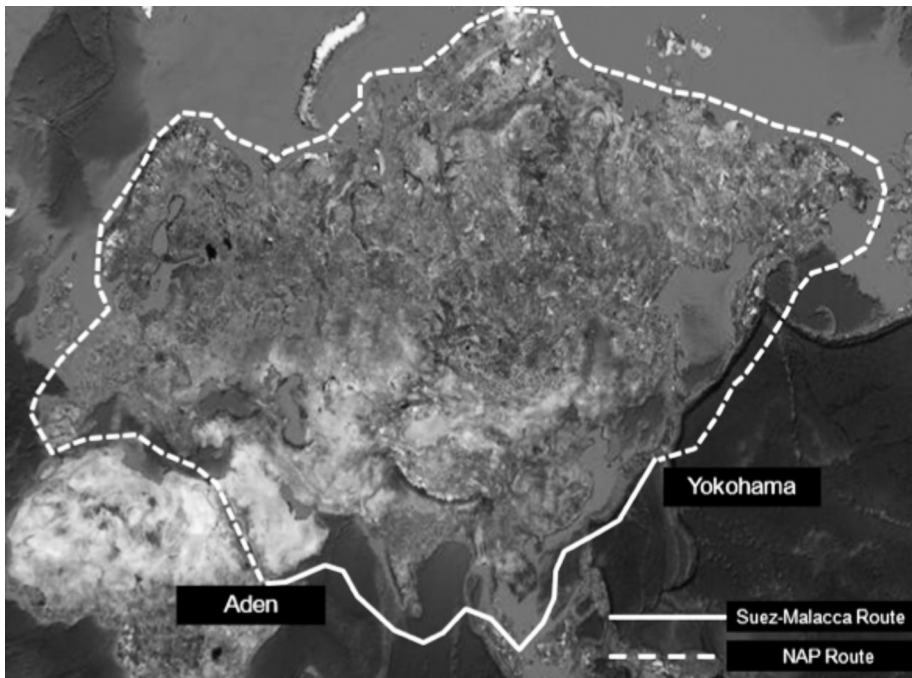
⁶²The Arctic Council, 'Arctic Council: Arctic Marine Shipping Assessment' (The Arctic Council, Protection of the Arctic Marine Environment, 2009), 187; International Maritime Organization (IMO), 'Resolution A.1024(26): Guidelines for Ships Operating in Polar Waters' (A 26/Res. 1024, IMO, 2010), 4-5.

⁶³Øystein Jensen, 'The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection' (FNI Report 2/2007, Fridtjof Nansen Institute, 2007), 1-3.

⁶⁴Richard A. Lovett, *Arctic Oil Rush Sparks Battles Over Seafloor* (2007) National Geographic <<http://news.nationalgeographic.com/news/2007/08/070823-arctic-oil.html>>; Rakish Suppiah, 'North East Arctic Passage: It's Viability for Shipping Transit' (2009) 16(4) *MIMA Bulletin*, 8-15; Claes Lykke Ragner, 'The Northern Sea Route' (2008) *Norden Association's Yearbook*.

⁶⁵Svetlana Chernova and Anton Volkov, *Economic feasibility of the Northern Sea Route container shipping development* (Master of Science in Business Thesis, Bodø Graduate School of Business, 2010), 83.

⁶⁶Mohd Hazmi bin Mohd Rusli, 'Attempts to Seek Alternative Routes to the Straits of Malacca and Singapore' (2010) 1(1) *Journal of Maritime Geopolitics and Culture*, 3-5.



Map 2: Routes via the Suez–Malacca and NAP (Aden–Yokohama)
(Source: Modified from Google Maps)

In the long term, the Straits of Malacca and Singapore may ultimately be preferred and the NAP may only ever be a secondary, but less navigationally convenient, alternative route to the more important Straits of Malacca and Singapore.

The South China Sea: The Struggle for Power in Asia

By Bill Hayton

Review by Rosida Ismail

The South China Sea: The Struggle for Power in Asia

Yale University Press, 2014

ISBN 978-0-300-21172-6

Softcover 298pp

Bill Hayton is a journalist with 20 years of experience in reporting political news of the Middle East, Central and East Europe as well as SouthEast Asia. Thus, his journalistic style of writing can be clearly observed in this book. He penned the substantive political South China Sea disputes in an illustrative narrative style which at some points, added drama to the subject in discussion and induced the feeling of reading a fiction rather than a substantive material.

Having said that, the author successfully provides a comprehensive view of the South China Sea contests. His approach towards illuminating the issue was systematic and focused. It was analysed based on several benchmarks - (1) chronology of the issue; (2) perspective of the parties involved; and (3) factors which contributed to the disputes.

In this book, the author provides an elaborated chronology of the development of the South China Sea disputes from prehistoric period to recent developments. It offers a distinct understanding on the root of the issue, at least from the standpoint of the initial to the growth of the disputes. The author started by describing the discovery of the early human at the Illé Cave, the Philippines together with sea ornaments, which indicates that there were already a maritime people within the Southeast Asia region since 4,200 years ago. This led him to support the idea by Bill Solheim, an archaeologist, in rebutting the current theory that the earliest human in Southeast Asia originated from Taiwan based on the "Taiwan Model". Instead, they suggested that the origin was probably spread from all over the region to the other parts of the world via a maritime network of semi-nomadic communities. This claim

was also supported by findings of several maritime society since pre-historic period such as the Badjao in the Philippines, Orang Laut in Indonesia, Tanka of Southern China, Bajau of Malaysia and Dan of Vietnam. The findings refute the argument of the Chinese that the South China Sea historically belongs to China due to the orig in of the population within the region (believed to be originated from China).

The book also states that the existence of the early kingdoms in the region; Funan (1st-4th century), Champa (6th-15th century), Srivijaya (7th-12th century), Angkor (9th-15th century), Majapahit (12th-16th century) and Malacca (15th-18th century) were based on the Mandala system. According to this system, the kingdoms saw themselves as centres of networks, rather than sites with defined borders. Their legitimacy came less from physical control over territory and more from recognition by other rulers. The author also debated on the idea of colonialism in the early Southeast Asia. He believes that the community was not actually colonised but instead, the rulers of the region chose to adopt foreign ideas. This applied to the influence of India and China in the region. The giving of tributes by the kingdoms to China also was not a sign of feudal relationship but simply as trading partnership. As such, the author concluded that during prehistoric to 1500, the South China Sea does not belong to any kingdom or anybody.

The author then elaborated on the chronology of the disputes during the dated period from 1500 to 1995. He argued that ancient China's belief was inward looking, and isolationist power was obsolete through the discovery of a map in 2008. The map which dated pre-1600 consists of detailed instructions of connecting every point in Southeast Asia, which include distance and compass bearing. The map belongs to the Chinese. This further supported his arguments that the South China Sea originated as a region uncontrolled by formal borders. However, the hunger for power in Europe in the 1500's had spread to this region and introduced the concept of borders and territory. In fact, the name of South China Sea was first given by the Portuguese via the Treaty of Zaragoza (1529) signed with the Spanish. During that period, even the Chinese refers to the sea as the "Southern Sea" or Nanhai only. The current territorial claim, according to the author, originated from the colonial powers who provided foundations for the current boundaries issues in the South China Sea, on top of other boundaries issues in the region – (1) disputes between

the Philippines and Indonesia is inherited from the Portugal and Spain's agreement in 1529; (2) disputes between Malaysia and Indonesia is inherited from the British and Dutch's agreement in 1824; (3) dispute between China and Vietnam is inherited from the French's arrangements in 1887; and (4) disputes between Malaysia and the Philippines is inherited from the British and America's arrangement in 1930.

The scenarios then led to the beginning of the transition from the Mandala system to the Westphalian system. Immediately after World War II, none of the Paracel or Spratly islands was occupied or controlled by anyone. But 50 years later, almost all of them were. The occupations and claims were sparked by various motives. Mostly was nationalism, but economic motivations were among the earliest one. Even though there is no evidence of oil and gas found within the disputes area, some claimants remain optimistic. Another possible reason is the rights of Exclusive Economic Zone (EEZ).

The author also looked at the disputes from the perspective of all claimants. For China, Vietnam and the Philippines, the claim was mostly driven by nationalism or state pride. It even stirred domestic sentiments which led to street protests. However, the same issue failed to stir emotions in Malaysia. According to the author, Malaysians are much occupied with "bread and butter" issues. Personally, I have to agree with the author's observation. However, the issue of nationalism is not the biggest threat. Instead, conflict between the superpowers over the region (China and the United States) is more apparent. In this book, the author does not limit the scope to the perspectives and roles of the claimants countries only (China, Malaysia, the Philippines, Vietnam and Taiwan) but he also discussed the involvement and roles played by other ASEAN member states and other super powers such as Russia, Britain and France. The aspects in discussions covered economic, military as well as diplomatic.

Economically, the race for finding oil and gas as well as increasing the EEZ are the main theme. In the context of military, the author elaborated on the possible involvement of military actions in resolving the disputes, even though the chances are slim. The author believes that most of the ASEAN member states have limited military strength; technologically and financially, compared to other super powers. The same scenario is also faced by China as opposed to

the United States. The author claimed that China's military technology and human strength are far behind that of the United States. However, as time progresses, China has all the time to develop its capabilities.

Diplomatically, the author argued on the roles played by China and United States in the region especially involving ASEAN and in getting ASEAN's buy-in. In one part of the book, the author claimed that Cambodia has been "bought" by China which led to a series of failures among ASEAN member states to conclude a consensus in dealing with China to resolve the South China Sea disputes. The author was bold over the ASEAN establishment by describing ASEAN as: *"They pioneered the 'ASEAN Way' pledging to work by 'consensus' and turning a blind eye to unpleasant events in each other's countries"*. As such, it is not surprising to find the author sceptical over the capability of ASEAN in playing a significant role to resolve the South China Sea disputes. Furthermore, the author described ASEAN as 'small ants' in between the fight of 'elephants'. It is a game of finding allies within the region of either pro-China or pro-United States.

In this book, the author also discussed the arguments of the claimants in defending their case: of grounding over the International Law or the United Nations Convention on the Law of the Sea (UNCLOS). It is where the two forms of law intersect. Over the century, the claim on territory has been laid upon claim with governments reaching far into the past and the furthest recesses of legal theory in searching for evidence and arguments that might make their actions compatible with International Law. Unfortunately, in the South China Sea, the law is far from clear. The UNCLOS, on the one hand, provides solution as it governs the maritime claims that can be measured from territorial claims, and ASEAN in general has agreed to this approach. On the other hand, according to China, it has the right to claim the 'U-shaped Line' within the South China Sea based on the traditional form of International Law as Chinese explorers and fishermen have roamed the waters for centuries. However, simultaneously, China has already ratified the UNCLOS in 1996, which denied their eligibility to claim 'historic right' in other countries' EEZ. The author viewed the mobilisation of these arguments as an attempt to rewrite International Law in China's favour and legitimise a territorial claim on everything within the 'U-shaped Line'. In conclusion, having elaborated in detail on actions taken by the claimants in supporting their demands,

the author argued that from the historical perspective, none of the claims to the islands – whether by Britain, France, Taiwan, China, Vietnam or the Philippines, appears to be entirely convincing.

Overall, I found this book to be a good read, especially in introducing the South China Sea disputes to readers with no background of this subject. The language used was simple, even though at times the author was too illustrative in setting the scenes of some of the plot. It is not a conventional way of describing a political subject. I also found that the author managed to provide a genuine and honest scenario of the disputes. But yet, it was apparent that the author's view is sometimes biased against China as well as ASEAN.

Rosida Ismail is Deputy Director at the Competency Enhancement Centre of the Institute of Diplomacy and Foreign Relations (IDFR), Malaysia.

