In November 2009 I presented a paper at the International Conference on the South China Sea in Hanoi about territorial disputes. The paper concluded as follows:1

There are several concrete steps that can be taken. The claimants could implement an early warning system “based on existing mechanisms to prevent occurrence/escalation of conflicts” as agreed in their March 2009 ‘blueprint for peace.’ 2 They could formalize a code of conduct [building on the 2002 Declaration on Conduct] for the South China Sea and adhere to it. They could dispense with nationalist rhetoric and legally unsupportable aerial and baseline claims. They could build a web of functional co-operative arrangements in marine environmental protection, marine scientific research, navigational safety and search and rescue. None of these arrangements would threaten existing positions and they can all contain a clause that affirms that such arrangements are non-prejudicial to sovereignty and jurisdictional claims. As for a grand solution to the South China Sea disputes, this will be a long time in coming, if ever. But the alternative — a festering sore covered by a scab that can be picked every time relations deteriorate or extra regional powers wish to do so — should be a nightmare that no regional state wants to repeat. But the window of opportunity [for an interim resolution] is closing.

Unfortunately, since then there has been little progress to resolve the disputes. On the contrary, over the past two years there have been a number developments regarding the South China Sea that have significant implications for regional security. These include the March 2009 incident in which a US naval surveillance ship, Impeccable, was harassed repeatedly by five Chinese vessels near Hainan; China’s unilateral ban on fishing in the Gulf of Tonkin and its detention of Vietnamese fishing boats;3 China’s declaration that it views the South China Sea as a “core interest;” 4 Vietnam and Malaysia’s joint submission to the UN on extended continental shelf claims in the South China Sea; and the March 2010 incident in which five Vietnamese vessels were fired upon by a Chinese coast guards vessel near the Paracel Islands.

Although maritime security is an issue in many parts of Asia, the South China Sea poses some of the most vexing challenges. Maritime policy analyst Mark J. Valencia argues that these waters are quickly shaping up as a dangerous area of dispute in the struggle for hegemony in Asia between China and the United States.

Caught in the middle are the nations of Southeast Asia, which have many territorial and jurisdictional disputes in the South China Sea between themselves as well as with China.
Sea and China’s objection to that submission; the US statement that it has a “national interest” in the outcome of the disputes and its offer to mediate; China’s strong rejection of that US statement and offer; and the recent “softened” statement by the US and ASEAN on the South China Sea. These developments have occurred in the context of deteriorating US-China relations and a regional debate regarding the nature and even desirability of a US security role in the region. Moreover, these developments have become self-reinforcing, raising fundamental questions for Southeast Asia’s regional security. In this essay I analyze these threads, identify some of the fundamental questions they raise and conclude that a dramatic compromise may be necessary to avert a worst-case scenario.

ANGRY RESPONSE
US Secretary of State Hillary Clinton’s statements at the July 2010 ASEAN Regional Forum in Hanoi, which included a US offer to mediate the South China Sea disputes, triggered not only an angry response from China at what it saw as US interference in its affairs, but also a wave of China “threat” pieces in the Western media. In taking the position it did, the US cleverly played to the fear in some ASEAN countries concerning China’s aggressive stand on various maritime disputes while expressing its own angst about freedom of navigation. But as Washington well knows or should know, Beijing’s objections to certain US military intelligence gathering activities in its exclusive economic zone — as in the Impeccable incident — have little or nothing to do with its purported claim to much of the South China Sea. Indeed, China is not challenging freedom of navigation itself, but what it perceives as US abuse of this right. The activities of US EP-3 surveillance planes and the oceanographic survey and surveillance ships Bowditch and Impeccable probably collectively included active “tickling” of China’s coastal defenses to provoke and observe a response, interference with shore-to-ship and submarine communications, “preparation of the battlefield” using legal subterfuge to evade the consent regime for marine scientific research, and tracking China’s new nuclear submarines for potential targeting as they enter and exit their base. Few countries would tolerate such provocative activities by a potential enemy without responding in some fashion. If this is indeed an accurate description of these classified US activities, these are not passive intelligence collection operations commonly undertaken and usually tolerated by most states, but intrusive and controversial practices that China regards not only as a violation of the 1982 UN Convention on the Law of the Sea but tantamount to a threat to use force. A threat to use force is a violation of the UN Charter let alone the 1982 Convention. These activities should be carefully examined and adjudicated by a neutral body to determine if they are “legal” or not.

At the Hanoi summit, the US verbally ambushed and embarrassed China in front of an Asian audience in Vietnam, China’s sometime nemesis. It did this at a time when it knew ASEAN claimants in the South China Sea disputes were concerned about China’s aggressiveness, and the US itself was still smarting from the Impeccable incident and China’s lack of cooperation in punishing North Korea for its alleged sinking of the South Korean warship Cheonan. What made it worse for China was that the US call for multilateral negotiations was publicly supported by several ASEAN countries, despite the fact that

5 Jiang Yu, Chinese Foreign Ministry spokesperson “We resolutely oppose any country which has no connection to the South China Sea getting involved in the dispute, and we oppose the internationalization, multilateralization or expansion of the issue. It cannot solve the problem, but make it more complicated.” “China tells US to keep out of South China Sea dispute,” Reuters, Sept. 21, 2010
China had privately asked them not to broach the subject and not to present a common position. Now China believes the US has fundamentally changed its policy on the South China Sea disputes and is essentially taking sides. The key phrase in Clinton’s speech was: “Legitimate claims in the South China Sea should be derived solely from legitimate claims to land features,” implying that China’s claims are illegitimate.

But if the ASEAN claimants — Brunei, Malaysia, the Philippines and Vietnam — think such US statements favor their claims, they may need to think again. Clinton also said the US “has a national interest in freedom of navigation, open access to Asia’s maritime commons and respect for international law in the South China Sea.” Various claims by the Philippines (pre-2009) and Malaysia are as spurious and weak as China’s historical “nine-dotted line” claim in the South China Sea. Moreover, Vietnam and Indonesia (which also objects to China’s claims), contrary to the UN Convention that they have ratified, do not allow innocent passage of foreign warships in their territorial seas without their consent, while Malaysia does not allow foreign military exercises in its exclusive economic zone without its consent. The ASEAN claimants also need to sort out the differences in their territorial and jurisdictional claims with each other and international law.

Despite US arrogance in offering to “facilitate” multilateral talks on the South China Sea disputes — which is what really infuriated China — it is clear that China has been its own worst enemy in this matter. It filed an official objection to the Malaysia-Vietnam joint extended continental shelf claim, attaching a map with its nine-dotted line ambiguously claiming most of the Sea. It publicly described the South China Sea as a “core interest” akin to Tibet or Taiwan — in other words, something that it would fight over — and allowed Ministry of Defense spokesperson Geng Yanshen to say “China has indisputable sovereignty of the South Sea and China has sufficient historical and legal backing” to underpin its claims. These actions, its rising nationalism and accompanying large military exercises in the area provided a diplomatic opportunity for the US and pushed some ASEAN countries into the US corner.

But it is still not clear whether China’s claim is to the small islands and sand bars, chiefly in the Spratly chain (and their territorial seas), or to the sea as well. To ameliorate ASEAN fears, China should immediately clarify exactly what it claims and why in the context of the 1982 Convention on the Law of the Sea. It should also elaborate in contemporary intelligible legal language its objections to US military intelligence gathering activities in its exclusive economic zone. And to counter the US diplomatic advantage, it should agree with ASEAN on a formal code of conduct for the South China Sea. If this transpires, then the US ploy will have helped tamp down the disputes over claims.

But the cost may have been high. China is unlikely to forgive or forget the fact and especially the manner of US interference. If anything, China may be convinced that the die is cast and that the US is stealthily trying to draw ASEAN or some of its members together with Australia, Japan and South Korea into a soft alliance to constrain if not contain China. This could set the stage for rivalry and tension in the years ahead. Reflections of this dialectic can be found in US Secretary of Defense Robert Gates remarks at the ASEAN defense ministers meeting. “We have a national interest in freedom of navigation, in unimpeded economic development and commerce in respect for international
INTENTIONS AND STRATEGIES

China: What is China’s intent regarding the South China Sea? China maintains that it is simply defending its security and sovereignty and preventing what it perceives as “containment.” It also denies that it will inhibit freedom of navigation. But some say that China intends to regain its historic hegemony over the South China Sea and Southeast Asia. Others argue that it is just concerned with control of resources — oil, fisheries and sea lanes. Perhaps it also wants to make the South China Sea a “sanctuary” for its nuclear-armed submarines for a potential attack on India, or to deter possible intervention by US forces in the event of a conflict over Taiwan.

Alongside the growing US-China military competition is political competition for the hearts and minds of Southeast Asians. The Beijing-based and state-owned Global Times, which often reflects official positions, has warned that “regional stability will be difficult to maintain” if the Southeast Asian states “allow themselves to be controlled” by the US. China has had some success in splitting Southeast Asian countries on the basis of relations with the US. Australia appears to favor China’s bilateral approach to resolving the South China Sea disputes. Non-claimants like Singapore and Thailand, and the flip-flopping Philippines, also seem to prefer the current arrangement to placing the matter on the ASEAN summit agenda.

But China has also contributed to its image problem by lapsing into episodes of bullying and fervent nationalism, scaring southeast Asians as well as South Korea and Japan into closer security ties with the US. Indeed, China’s increasingly prickly behavior has led some Western and Southeast Asian analysts to agree that Beijing deserves some comeuppance.

The United States: The US military believes China’s military is undergoing a “strategic shift” as it moves from a focus on ground forces to a focus on naval and air power, according to Admiral Mike Mullen, chairman of the US Joint Chiefs of Staff. Being more specific, Defense Secretary Gates says China’s investment in anti-ship weapons and ballistic missiles could challenge America’s primary means of projecting power and helping allies in the Pacific. Whatever the reason, the US believes that China’s military has recently been more assertive in Asia, particularly in the South China Sea, and that “this assertiveness has caused concern among China’s neighbors in the region.”

US maritime security priorities in East Asia are supposedly better known than those of China.
The US Navy currently has clear military superiority over Chinese naval forces, an advantage that is likely to extend for many years to come. However, this does not negate real concerns about a Chinese threat to US naval operations close to China’s coasts, which raises doubts about the US ability to defend Taiwan. And China is unlikely to “outsource” the security of its sea lanes to the US forever. Moreover, US defense spending is expected to steadily decline in the aftermath of the 2008 financial crisis and there is a growing domestic debate about the size and cost of the US military. To compensate, some even predict the US-led evolution of a pan-Asian NATO-like organization involving most nations in Asia except China, North Korea, Burma, Bhutan and Iran. Already the US and ASEAN have agreed to elevate their relationship to a “strategic level.” At the least, circumstances may be encouraging the US to seek military friends in the region, like Vietnam and India. But some analysts think there is disagreement in the US government over how to deal with China, with one faction emphasizing economic benefits while the security establishment emphasizes a hard-line approach. The US government certainly faces a dilemma: how to build trust with China while maintaining its naval presence in Asia and reassuring its anxious partners who feel threatened by China’s more assertive stance.

Southeast Asia: These events are all surface manifestations of deeper shifts — indeed, the East Asian security paradigm may be at a tipping point. Southeast Asia needs to determine what role it wishes the US to play: to contain China, as some Chinese military leaders believe, to balance it, or a combination. Southeast Asians should be careful what they wish for. They face the funda-
mental question of “whether, how much and for how long Asians should remain complicit in facilitating, legitimizing and essentially sustaining US hegemony.” But without the US, can ASEAN stand united against a rising China, not only on South China Sea issues, which may be a litmus test of China’s “peaceful rise,” but in general? Can hegemony and hegemonic change in Asia be negotiated? Or is ASEAN essentially unable or unwilling to present a united front that would influence the outcome of the China-US struggle? Worse, has the semi-united stand of ASEAN at the 2010 Hanoi ASEAN Regional Forum supporting the US call for multilateral negotiations with China only encouraged China’s advance towards hegemony in Southeast Asia?

As Surin Pitsuwan, Secretary General of ASEAN, has said, “The US-China rivalry is certain to play out in ASEAN.” Of course, “nobody in Southeast Asia wants to choose between the United States and China.” But that is not the reality. Vietnam is leading and prodding ASEAN on the South China Sea issue and simultaneously edging closer to the US. It seems to want to balance China (with US support) and seems willing to risk its relations with Beijing to do so. This may be a dangerous game in more ways than one. But already, the Philippines appears to have dissented from a united stand, preferring to negotiate bilaterally with China. Cambodia and Laos, meanwhile, are said to be pro-China on this issue.

ROUGH SEAS AHEAD
It appears these disputes over the South China Sea may get worse before they get better, and that they will be influenced by competition and tensions between big powers. Perhaps when they become serious enough to no longer be ignored by the international community, a resolution or temporary solution will be imposed from the outside. This scenario may be beginning to play out now. It is not too late to avoid the worst-case scenario: conflict. In that hope I present below some possible ways to lessen tension. They are not new, but they need to be reconsidered in these critical times.

A necessary but not sufficient condition for resolution of the disputes is for all claimants, particularly China, to clarify their claims in terms consistent with the 1982 Convention on the Law of the Sea (UNCLOS). By attaching a map to its official communication to the UN protesting Vietnam and Malaysia’s claim to an extended continental shelf, China further confused the situation. The map depicted a nine-dotted U-shaped line that some think is China’s official claim to both the islands and surrounding sea. China could make a claim consistent with UNCLOS by claiming sovereignty over the islands and their 12-nautical-mile territorial seas, plus an exclusive economic zone and continental shelf from those features conceivably capable of sustaining human habitation or economic life of their own, and re-confirm its willingness to enter into joint development without prejudice to the final determination of sovereignty claims and maritime boundaries. This would greatly enhance the legitimacy of its claims.

Unfortunately, China is highly unlikely to give up its historic claim without some quid pro quo. Why should it when others’ claims are also legally spurious? However, Malaysia and Vietnam now seem to be suggesting in their extended continental shelf claim that the islands should not generate shelves or exclusive economic zones. This is helpful. And China’s written statement accompanying its objection to their claim could be interpreted as being in line with UNCLOS. Maybe the
claimants can agree at least to make their claims consistent with UNCLOS.

But this option would still have serious limitations. UNCLOS is of little help in resolving sovereignty disputes. The only role it might play is to use its dispute resolution provisions and/or the International Tribunal for the Law of the Sea (ITLOS) to decide which land features are legal islands — and which are not — assuming that the question is brought before it. The sovereignty issue cannot be referred to any international court or tribunal without China’s consent. Moreover, China has exercised its right under Article 298 of UNCLOS to not be subject to the compulsory binding dispute settlement procedures regarding the delimitation of maritime boundaries. And the boundaries are unlikely to be negotiated before the sovereignty of the islands is resolved. As for joint development, China has consistently offered this as soon as the other claimants acknowledge its sovereignty in the area to be jointly developed. And in the joint exploration agreement China has entered into — with the Philippines and Vietnam — the Philippines allowed joint exploration in areas on its shelf and in its exclusive economic zone that China did not even claim! So much for that way out of the imbroglio.

Nevertheless, all may not be lost, at least between the US and China. There is a sense among some analysts that the latest row is relatively minor compared to the 1995 Taiwan Strait crisis, the 1999 NATO bombing of the Chinese Embassy in Belgrade and the 2001 US EP-3 surveillance plane incident. The two countries have agreed to a resumption of military exchanges and dialogue and two senior US officials were in China in early September trying to soothe US-China relations. Indeed, recent months have seen a sequence of opportunities to improve relations, assuming that this is what both parties desire. Chinese Premier Wen Jiabao attended the UN General Assembly in New York in late September and met with President Obama. The ASEAN defense ministers conference in Hanoi in October facilitated meetings between the US and Chinese defense ministers. Although the South China Sea was not on the agenda, nor mentioned in the meeting’s joint declaration, the US, China and others expressed differing opinions on the disputes and how to resolve them. A working group on maritime security was formed, to be headed by Australia and Malaysia. In November, Presidents Hu Jintao and Obama met at the APEC Leaders Meeting in Yokohama and at the G-20 meeting in South Korea. And China has invited US Defense Secretary Gates to visit, possibly in early 2011. Perhaps most important, the US postponed its planned naval exercise in the Yellow Sea after strong objections from China. So the recent differences between the two may be just blips on the radar. Perhaps Beijing and Washington will finally edge towards a formal Incidents at Sea mechanism or guidelines for military activities in exclusive economic zones. Some even think that a fundamental bargain may be in the offing: if the US refrains from selling arms to Taiwan, particularly F-16 fighter jets, China will co-operate on economic matters. However, others such as Singapore’s Minister Mentor Lee Kuan Yew, foresee a decades-long struggle between China and the US for supremacy in Asia. In this regard, US officials believe that calling China out has made it “clearly move back to a more collaborative approach.” Whether this is true or not, Washington and Asian capitals have obviously indicated to Beijing
Some think a bargain may be in the offing: if the US refrains from selling arms to Taiwan, China will co-operate on economic matters. But others foresee a decades-long struggle between China and the US for supremacy in Asia.

that its behavior in the South China Sea will influence their policy toward it.

This brings us back to the present — and the future. The best that can be expected under the current political circumstances — including US pressure and Indonesian leadership of ASEAN beginning in 2011 — is to formalize a code of conduct for the South China Sea. However, some say China is dragging its feet and an agreement on a formal code is unlikely. Nevertheless, China and ASEAN at least have started talks on such a code, with a focus on sanctions for non-compliance. Sanctions will be the most difficult hurdle. Such a code would most importantly ban “the use or threat of force by any claimant attempting to enforce disputed claims in the South China Sea.” But the “prisoner’s dilemma” of disarmament and demobilization of the Spratly Islands may be the next stumbling block; who will be the first to remove their troops from the islands or to generally stand down in the South China Sea?

The somewhat softened US-ASEAN summit statement “reaffirmed the importance of regional peace and stability, maritime security, unimpeded commerce, and freedom of navigation, in accordance with relevant universally agreed principles of international law, including the United Nations Convention on the Law of the Sea and other international maritime law, and the peaceful settlement of disputes.” But it excluded language from the US draft that some ASEAN members thought would be objectionable to China, including “opposing the use or threat of force,” as well as the words “South China Sea.” This compromise was agreed so that it would not appear that ASEAN was doing the bidding of the US. This was an important gesture and manifestation of Southeast Asian conciliatory concerns. Most important, China has been assured that Clinton’s remarks in Hanoi applied to all claimant countries, and that all the US wants is “a more stable, predictable environment.” The US should demonstrate this in a more even-handed manner. For example, it should ratify the 1982 UNCLOS and press other claimants — not just China — to abide by it and other international laws. And ASEAN claimants should try to settle their own differences. They should also stop blatantly conspiring against China on this issue lest it provoke a worst-case scenario.

For different reasons, ASEAN, China and the US all desire a peaceful future for the South China Sea. But this will take genuine good will, considerable self restraint and probably a grand formal or informal compromise — as well as ambitious and clever diplomacy — to achieve and maintain.

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An Uncertain World: Key Asian Maritime Territory Disputes, Boundary Clashes & The Pirate Menace

Northern Bay of Bengal
Bangladesh has had recent maritime border disputes with India (over oil and gas rights, now mediated) and with Burma (over boundary lines, now sent for arbitration to the International Tribunal for the Law of the Sea).

West Indian Ocean Piracy
The sea off the east coast of Somalia and Kenya and the Arabian Sea to the north have become the world’s biggest pirate hotspot since 2008, mainly due to the collapse of the rule of law in Somalia. There have been over 450 incidents since the start of 2008.

South China Sea Piracy
Pirate activity has moved in recent years from the Malacca Strait west of Malaysia to the east coast or around the Indonesian islands of Mangkai, Anambas and Natuna. There are typically over 70 incidents a year in Southeast Asia.
Indonesia and Malaysia dispute their border in the Celebes Sea. The International Court of Justice awarded Malaysia two disputed islands in 2002, but both countries still have overlapping claims over the continental shelf and thus mineral rights in the area Indonesia calls Ambalat.

Paracel Islands
Midway between Hainan and Vietnam in the South China Sea, and disputed since the mid-1900s by China and Vietnam, based on centuries-old inhabitation. Controlled mostly by China since the 1940s and fully since Battle of the paracel Islands in 1974.

Senkaku/Diaoyu Islands
Islands in the East China Sea between Taiwan and Okinawa. Controlled by Japan, but claimed by China (as the Diaoyu Islands) since 1971 as its historical territory pre-1895. Taiwan also claims the islands.

Kuril Islands
All 56 islands in the chain northwest of Japan are under Russian jurisdiction, but Japan claims the four southernmost as part of its territory. Dispute dates to treaty conditions imposed on Japan after World War II.

Tokdo Islands
Two islets plus other rocks in the East Sea (Sea of Japan). Administered by South Korea but claimed by Japan. The islets lie in rich fishing grounds also thought to contain large gas deposits.

Korean Demarcation Zone
Dispute dating to the end of the Korean War on where the maritime demarcation line on the Yellow Sea between North and South Korea should be. The North has often provokingly crossed the border, known as the ‘Northern Limit Line.’

Spratly Islands
More than 750 widely spread reefs in the South China Sea, variously claimed by Brunei, Malaysia, China, Taiwan, Philippines and Vietnam. All except Brunei occupy some of the islands. China and Vietnam stake long historical claims, but the key modern dispute is about extending continental shelf and establishing fishing and oil and gas rights.

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