

# **Planting Flags on the Tide: Sovereignty, Containment, and Conflict Resolution in the East and South China Seas**

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## **Abstract**

The rise of China's economic and military power is transforming global politics while U.S. strategic interests are re-balancing toward Asia. Meanwhile, tensions over maritime boundaries and island claims within the region are punctuated by police and military stand-offs in the East and South China Seas. This paper considers the discourse surrounding the dispute over sovereignty in the South China Sea. It also examines the roles international law, multilateralism, and traditional diplomacy play in the conflict, and how it serves as a test case for China's future diplomacy and traditional norms of non-interference and a peaceful rise. Finally, the paper suggests pathways toward conflict resolution of the immediate disputes, including de-territorialized and de-nationalized ideas of possession when it applies to contested yet uninhabited maritime frontiers.

**Key Words:** China, South China Sea, island claims, law of the sea, East Asian multilateralism

## **Gelgite Bayrak Dikmek:**

### **Dođu ve Güney Çin Denizi'nde Egemenlik, Çevreleme ve Çatışma Çözümü**

## **Öz**

Amerika Birleşik Devletleri'nin stratejik çıkarları Asya'ya yönelirken, Çin'in ekonomik ve askeri gücü küresel politikayı dönüştürmektedir. Bu arada, Dođu ve Güney Çin Denizlerindeki sınırlar ve adalar üzerindeki ihtilaflar, bölgedeki polis ve orduları karşı karşıya getirmektedir. Bu makale, Güney Çin Denizi'ndeki egemenlik meseleleri üzerine olan söylemleri konu etmektedir. Makale uluslararası hukuk, çoktarafılık ve geleneksel diplomasinin ihtilaf çerçevesinde oynadıkları rollere değinmekte ve ihtilafın gerek Çin'in gelecekteki diplomasisi gerekse geleneksel normları olan müdahale etmeme ve barışçıl yükseliş için nasıl

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bir test vakası olduğuna işaret etmemtedir. Çalışma son olarak çatışmaların çözümü için öneriler getirerek, ihtilafli ancak üzerinde yerleşim olmayan deniz sınırları için teritoryal ve ulusal olmayan aidiyet fikirleri üzerinde duracaktır.

**Anahtar Kelimeler:** Çin, Güney Çin Denizi, adalar üzerinde hak iddiaları deniz hukuku, Doğu Asya çoktarafılığı

## Introduction

Resolving disputes over rocks, reefs, and waterways that hold no intrinsic meaning for a society would seem easy to achieve. In the case of the disputed islands in the East and South China Seas, few if any ordinary citizens of countries that lay claim to ownership will actually see or visit these remote places themselves. These are neither holy lands central to national identity nor mythical places intrinsic to powerful narratives of history. Yet island disputes can be particularly intractable and difficult to situate in traditional international relations discourse. In the Peloponnesian War, the islanders of Melos were given an ultimatum to join Athens rather than trust their allegiance to the Lacedaemonians; but no inhabitants exist to speak in the South China Sea<sup>1</sup>. As William Callahan has observed, the South China Sea “does not contain the guiding referents for sovereignty: territory, population, and authority.”<sup>2</sup> In fact, China’s de facto control over the area following its naval ascendancy from 1403-33 during the early Ming dynasty, was loosely based on suzerainty, trade, and scientific investigation not formal incorporation, and was mostly characterized by subsequent disinterest from 1433 until the 1980s.<sup>3</sup> Moreover, as Prasenjit Duara has traced, under the Sino-centric tribute system, frontiers were zone of negotiation, they could be controlled through power but possession was fluid. By contrast, the introduction of the nation-state system meant that lines were demarcated and militaries must be deployed to defend claims.<sup>4</sup> The fixed definition of modern sovereignty is essentially non-negotiable, while its significance to the

<sup>1</sup> Thucydides, **The Peloponnesian War**, Chicago, IL, University of Chicago Press 1989, p. 369.

<sup>2</sup> William Callahan, **Contingent States: Greater China and Transnational Relations**, Minneapolis, MN, University of Minnesota Press 2004, p. xxxi.

<sup>3</sup> Shee Poon Kim, “The South China Sea in China’s Strategic Thinking,” **Contemporary Southeast Asia** 19, no. 4 (March 1998), p. 370.

<sup>4</sup> Prasenjit Duara, “De-Constructing the Chinese Nation”, in Jonathan Unger, ed., **Chinese Nationalism**, Armonk, NY: M.E. Sharpe, 1996, p. 36.

national polity is sacrosanct. These disputes themselves are more material, a competition for resources; more specifically, control over islands that afford an ever larger exclusive economic zone (EEZ). They also represent economic and military advantage in a shifting regional balance of power and implicate the ideational elements of nationalism and run the risk of instigating war between states in the region.

This paper first recounts the background to maritime disputes in these bodies of water. Next, it explores the background to the island disputes and geostrategic dynamics both in the region and globally that complicates the competing positions. Finally, it describes potential conflict resolution methods that could help to alleviate the current impasse, specifically focusing on the East and South China Seas, before offering some concluding remarks.

### **Understanding the Island Disputes**

Great power politics, historical animosity, and legal disputes are widespread in the maritime frontiers and island claims in the Asia Pacific region. The overriding motivation in nearly all cases is to have access to the largely untapped natural resources that lie beneath the islands and waters of this trough: energy reserves, mineral deposits, and fishing rights. In part, control of the seaways and outposts that have the capacity for lasting military purposes and provide a security buffer implicate strategic competition. Teh-yi Huang outlines the scope of importance to include establishing fishing rights, preparing for exploration of off-shore oil and natural gas deposits, and planning for strategic air and naval operations in vital sea lanes between the Indian and Pacific Oceans, as well as reducing the threat of piracy.<sup>5</sup> By extension, affirmative ownership and possession of these locations, or frustration over the lack thereof, fuels national unity and become contemporary symbols of political strength and pride. With each step toward greater economic conflict, a compromise solution becomes more difficult.

For the past two decades, private citizens with or without guidance from official governments have been planting flags on the tide, laying claim to these mostly uninhabited islands. Rarely are confrontations directly between official naval or coast guard vessels as incidents usually arise due to private expeditions by activists or commercial fishing vessels. Countries

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<sup>5</sup> Huang, "State Preferences and International Institutions", p. 230.

may provocatively organize such unofficial excursions but more often illegal or contested commerce by private fishing boats entering into disputed waters initiates a new round of hostilities. In some cases, scientific, meteorological, and other rudimentary installations give semblance to statehood, to the viability of a settlement that could host a permanent population. This has led to the growing possibility of direct military confrontation between regional actors.

Some disputes are functionally dormant, though unresolved, like the 1945 Soviet seizure of the northern Japanese Chishima islands and their ongoing incorporation into Russia as the Kuris. Others are static as when newfound ideological allies and current American strategic partners such as Japan and South Korea maintain fierce rival claims to the Dokdo/Takeshima islands. Yet most are dynamic, impacted by China's resurgent claims, thus settling title is complicated by the shifting regional balance of power and geopolitical dynamics in the bilateral Sino-American strategic dialogue. China and Taiwan both assert the same possession over the Diaoyu/Senkaku islands in the East China Sea, in counterpoint to Japan's current control. In the South China Sea, China and Taiwan have similar claims to the Spratly and Paracel islands as well as other unconnected reefs and islets outside of those chains. Across this zone, both face contesting claims from Vietnam and the Philippines, along with Brunei and Malaysia. From China's perspective, its four traditional seas each have different priorities. Bohai is ostensibly internal waters, though the mouth of this sea from Dalian to Shandong is too wide to be legally recognized as a bay, it is nonetheless peaceful.<sup>6</sup> Huanghai, or the Yellow Sea, has been the site of some tensions over fishing between China and both Koreas, yet is also relatively tranquil. Donghai, the East Sea has been increasingly tense since the mid-1990s over the Diaoyu/Senkaku islands stand-off. Nanhai, or the South Sea, is replete with complex claims involving water and islands among multiple countries. In fact, aside from China's recent emphasis to recover 'lost territories' based on ancient claims dating to Han dynasty maps, artefacts left by fishermen, and incorporation of the Spratlys and Paracels into Guangdong province in 1947 under the Nationalist government with its nine-dashed line engulfing notion of maritime sovereignty, all those with claims in the South China Sea have precipitated their occupations since 1951. The Philippines' primary claims over the Spratly islands originated in 1956 and are based on geographical proximity

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<sup>6</sup> Bohai has been claimed as a historical bay by China since 1958.

and the concept of *res nullius* ('empty property'), and Vietnam's basis is also relatively new as it formerly accepted China's sovereignty over both the Paracels and Spratlys as socialist comrades in 1958.<sup>7</sup>

Already in some cases shots have been fired and people have died, particularly in hostilities between China and Vietnam and China and the Philippines respectively.<sup>8</sup> The most serious incidents occurred following skirmishes when China forcibly took possession of the Paracel islands (Xisha in Chinese, Hoang Sa in Vietnamese) from Vietnam in 1974 and Johnson Reef of the Spratly islands in 1988; in both cases dozens of Vietnamese troops were killed. In 1995, China built rudimentary structures on Mischief Reef (Panganiban Reef in the Philippines) in the Spratlys which was also claimed by the Philippines, and in 2012 the two countries had a protracted stand-off at Scarborough Shoal (Huangyan island in China and Panatag shoal in the Philippines). The growing military tensions between Japan and China in the East Sea are equally threatening. Nationalist sentiment in each of the principal players in the region is rising commensurately, though national media rarely explain competing claims, thus each public is left to swallow an unexamined narrative wholeheartedly.

The literature on the South China Sea generally follows momentary outbreaks of hostilities among primary claimants and proliferated in the late 1990s and has resumed in the early 2010s. Most works focus on the strategic competition among littoral states that lay claims to the various rocks and islands in the sea, along with the global and regional geopolitical landscape that shapes the importance of the disputes when introducing the removal of Soviet naval power, the presence of America's Seventh fleet, the growth of China's blue-water capabilities, and the resulting choices for Japan's self-defense forces. Here, some divergence exists between those

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<sup>7</sup> Zhao Hong, "Sino-Philippines Relations: Moving Beyond South China Sea Dispute?" **The Journal of East Asian Affairs** 26, no. 2 (Fall/Winter 2012), p. 60; Leszek BUSZYNSKI and Iskandar Sazlan, "Maritime Claims and Energy Cooperation in the South China Sea", **Contemporary Southeast Asia** 29, No. 1 (April 2007), p. 146.

<sup>8</sup> Perhaps the worst recent incident was North Korea's 2010 shelling of Yeonpyong island killing several South Korean soldiers and civilians, but the two Koreas are always on high alert and those attacks were not directly related to island claims. Chinese fishermen and South Korean coast guard personnel have been killed since 2010 in skirmishes in one of the less hot flashpoints, though little public protest occurred in China in these incidents. Sangwan Yoon, "Chinese Fisherman Dies After South Korean Coast Guard Raid", **Bloomberg**, 17 October 2012.

who emphasize economic (specifically energy) competition<sup>9</sup> and those who prioritize the strategic dynamics,<sup>10</sup> though most see both forces at play.<sup>11</sup> Thus, most observers describe the motives and demands among states in the region and analyze their foreign policy motivations employing a realist approach from international relations theory that emphasizes balance of power or balance of threat politics, power transition theory, and security competition, depending on a stable or declining hegemon. Rarely do scholars consider neoliberal institutional models promoting multilateral processes, problem solving, and conflict resolution. Among those few, most describe the role of international law in potentially demarcating boundaries<sup>12</sup> or the benefits of informal workshops and track two diplomacy that foster trust.<sup>13</sup>

Most agree that China's rise has enormously impacted the local security context, labeling it's behavior either assertive<sup>14</sup> or expansionist.<sup>15</sup> China's foreign policy remains greatly influenced by Deng Xiaoping's eight principles on international strategic thinking which prescribe a measured and accommodative approach to both territorial ambitions and relations with neighbors, though China's 1992 law clarifies its claims to the South China Sea islands and reveals greater nationalist and irredentist attitudes among policymakers.<sup>16</sup> The law essentially transforms most of the South China Sea into China's internal waters where naval vessels must gain permission to pass, submarines should surface to display their flags, and aircraft have to request permission for overflight rights.<sup>17</sup> Leszek Busyzinski categorizes two periods in China's orientation, from 1987-98 when China focused on the recovery of 'lost territories' and exclusive

<sup>9</sup> Zhao, "Sino-Philippines Relations: Moving Beyond South China Sea Dispute?"

<sup>10</sup> Joshua P. Rowan, "The U.S.-Japan Security Alliance, ASEAN, and the South China Sea Dispute", *Asian Survey* 45, no. 3 (May/June 2005), p. 414-436.

<sup>11</sup> Leszek Busyzinski, "ASEAN, the Declaration on Conduct, and the South China Sea", *Contemporary Southeast Asia* 25, no. 3 (December 2003), p. 343-362.

<sup>12</sup> Jon Van Dyke and Mark Valencia, "How Valid are the South China Sea Claims under the Law of the Sea Convention?" *Southeast Asian Affairs* (2000), p. 47-63.

<sup>13</sup> Ian Townsend-Gault, "Preventive Diplomacy and Pro-Activity in the South China Sea", *Contemporary Southeast Asia* 20, no. 2 (August 1998), p. 171-190.

<sup>14</sup> Ian James Storey, "Creeping Assertiveness: China, the Philippines and the South China Sea Dispute", *Contemporary Southeast Asia* 21, no. 1 (April 1999), p. 99.

<sup>15</sup> Teh-yi Huang, "State Preferences and International Institutions: Boolean Analysis of China's Use of Force and South China Sea Territorial Disputes," *Journal of East Asian Studies* 4, no. 2 (May-August 2004), p. 227-262.

<sup>16</sup> Kim, "The South China Sea in China's Strategic Thinking," p. 380, 383.

<sup>17</sup> Busyzinski, "ASEAN, the Declaration on Conduct, and the South China Sea", p. 348.

sovereignty over the area and a more recent phase since 1999 with greater interest in negotiating norms of behavior with ASEAN.<sup>18</sup> Since 2012, China appears to be adopting a more forceful posture again following the ascendance of Xi Jinping and the American 'great recession'.

### **The Rise of China and the Return of America**

The period of American weakness after its 2008 financial crisis and later policies of reducing military spending was an opportune moment to test U.S. resolve and commitment to the Asia Pacific region as many countries in the area rely on American defense for their external security but increasingly depend on China for investment and as a recipient of their exports. This pattern does not reflect power transition theory's suggestion that when the decline of a great power meets the rise of an emerging power, great wars occur. First, the U.S.-China relationship is built on economic interdependence, cultural exchange, frequent diplomatic contact, and ever greater burden sharing in international organizations, and the potential for more. Sino-American joint patrols in the Gulf of Aden to promote anti-piracy operations are but one example of a shared outlook and mutual cooperation on maritime security matters. Second, American military supremacy remains far superior to any potential geostrategic challenge, including that of China. China does not even have absolute security and formal agreed mapping of parts of its own territorial boundaries. Though demarcations with Russia have been successful, tensions over land or maritime border disagreements with others like India, Japan, the Philippines, and Vietnam remain. In material terms the gap in naval capabilities is even starker; for instance less than ten countries (including India, Russia, and Thailand in the region) have fully functioning aircraft carriers capable of projecting power in distant theaters and China's *Liaoning* (formerly the Ukrainian-built *Varyag*) aircraft carrier maneuverability is still limited. The United States operates nearly a dozen *Nimitz* class nuclear-powered superclass carriers in its dominant naval arsenal, more than the rest of the world combined. Half of American naval forces patrol these waters and provide security and stability in the region.

Of course, since World War II, the United States has never left its hegemonic perch; but the recent diplomatic and strategic offensive is a shift from the Bush era pre-occupation with the Middle East. The pivot has fortified relations with traditional allies such as Indonesia, Japan, and

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<sup>18</sup> Ibid., p. 344.

Korea, initiated ties to new partners like India, Myanmar, and Vietnam, and solidified links with small Pacific island states in Melanesia and Micronesia such as Palau, East Timor, Solomon islands, Cook islands, and others. Yet this American offensive has raised the questions of whether the United States is trying to contain China. The United States is not seeking to contain China within the context of the Truman Doctrine that sought to actively block Soviet expansion into new territories during the Cold War using direct military force when provoked nor is China a revisionist power attempting to destabilize the international system and promoting communist insurgencies in developing countries. Consequently, no containment policy is necessary and a transition is not apparent in any case, though the United States has adopted a policy to *constrain* China's strategic engagement globally and within the region.

Through its military alliances, naval supremacy, and diplomatic offensives, the United States has greatly limited China's geostrategic options. Surrounded by American allies like South Korea, Japan, and the Philippines to the east, American forces fighting its war on terror from the western frontier states of Afghanistan and Kyrgyzstan, and a steady partner in Mongolia (a participant in America's wars in Afghanistan and Iraq) to the north, along with new friends India, Myanmar, and Vietnam to the south and old ones such as Pakistan, Singapore, and Thailand, China rightly feels encircled. Not only has the Obama administration signaled support for India's bid to become a permanent member of the UN Security Council, but the United States has been providing civilian nuclear reactors since the second Bush administration and encouraging New Delhi to move from a 'Looking East' foreign policy to going east, perhaps all the way to the South China Sea. American rebuilding of relations with Vietnam is ongoing and has led to American (non-combat) usage of Cam Ranh Bay naval base as a service station and the potential for greater access. Even more striking has been the visits to Myanmar by President Obama and Secretary of State Hillary Clinton in 2012 and President Thein Sein's visit to Washington in 2013. President Obama's reaffirmation of the United States as a Pacific power and commitment of a larger Marine Corps presence in Australia and shifting of more naval forces (from 40 percent to 50 percent of the global force) to the Asia Pacific from the Mediterranean gave credence to administration claims of a return to Asia.

Under the 1982 United Nations Law of the Sea Convention (UNCLOS), warships maintain innocent passage rights within a coastal



state's territorial sea, only twelve nautical miles beyond the low tide mark of the mainland. The United States does not formally take sides regarding these islands disputes, but some suspect that they are erupting at its behest, as Washington tests Beijing's resolve, attempts to stymie its military rise, and perhaps even to contain its economic growth generally. Ultimately, the United States seeks to curb the trajectory of China's ascent, delay the speed at which China's influence grows, and limit China's diplomatic and strategic options. Officially, American interests in the South China Sea are simply to maintain freedom of navigation through these international waters, which also greatly serves the mutual needs of Korea and Japan which heavily rely on these sea lanes of communication for an enormous share of their energy imports and commercial exchanges. If China possessed sovereignty over the broad scope of the South China Sea, it could interdict private commercial traffic and restrain the surveillance performed by American aircraft and naval vessels near to China's coastline. In 2013, China declared an air defense identification zone over the East China Sea for aerial vehicles to report their entrance into this area similar to what the United States announced for Japan and Korea in the 1950s. The United States, Japan, and South Korea each responded by flying military patrols into the zone without reporting to Chinese aviation authorities and no military response has yet occurred.

Thus, one may wonder how China can become a global power if it cannot even establish supremacy in its own sphere of influence, such as the East and South China Seas and among the states of Southeast Asia. Certainly, China has cordial relations with most of its neighbors, close ties to some like Myanmar and Pakistan, strategic partnerships through its own nascent regional organization, the Shanghai Cooperation Organization (SCO) that includes Russia and Central Asian states, and close economic ties to nearly all the rest of its neighbors. China's successful emphasis on non-interference and respect for sovereignty has won many friends in Africa, Asia and Latin America, buffeted by heavy investment in infrastructure and raw materials. It also wants to continue building its economic relationships with other countries around the world, including in Southeast Asia. Since the century of humiliations, China is clearly on a rise, and following the reforms and modernization programs of Deng Xiaoping, developing faster than any country in world history. Rising may be a misnomer, as China is returning to its historic status as the middle kingdom and the primary power in East Asia. One aspect of Deng's modernization drive included national defense, and more specifically since the 1990s, building a blue

water navy capable of worldwide activities in deep and vast oceans instead of a more defensive green water navy that only patrols the more shallow coastline. China needs a modern navy to protect its commercial access and trade routes and ensure its own national security. One fault line appears to be influence with the states of Southeast Asia and strategic parity out to the 'first island chain' that traces from Japan to the Philippines. While the island disputes are not proxy battles between these two powerful countries, the U.S.-China relationship informs and complicates any effort at conflict resolution.

### **Confrontation and Conflict Resolution**

The worst case scenario would be a military confrontation between any of the contesting states, particularly the use of force between major powers like China and Japan. Even a skirmish with conventional forces between two such strong states could easily spin out of control owing to the legacy of unresolved historical animosity and would likely draw in the United States, which has a mutual defense treaty with Japan (and the Philippines) and has stated that the Senkaku/Diaoyu islands fall within the scope of the treaty. Already, China and Vietnam have fought significant battles between their armed forces in two different decades. Aggrieved parties are more assertive by nature and the reality of the security dilemma was never more apparent than in the arms race that these island disputes have engendered across the Asia Pacific.

The likelihood of such a course of action is very remote, and in fact when the crisis peaks, the principal players generally resort to diplomacy to moderate the tension. Nevertheless, while the stand-off remains on high alert, the actions of private citizens (especially fishermen) who may violate legal or diplomatic agreements could lead to a series of events that compel a country to follow a military route. One country may send its official naval vehicles to interdict such activities and a reprisal could launch a chain of events leading to military engagement. Likewise, one state's attempt to overthrow the status quo would instigate a series of escalatory or retaliatory measures causing public sentiment to rally around the flag and demand greater assertiveness. Public sentiment often considers the actions of their own state to be too weak in the face of affronts to national pride.<sup>19</sup>

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<sup>19</sup> Lawrence Chung, "Manila to Apologise to Taipei over Fisherman's Shooting", **South China Morning Post** 15 May 2013. A Taiwanese national was killed by Philippines coastguard in disputed waters.

Every time an airplane flies over a disputed island or a patrol boat arrests foreign nationals, the threat of war is palpable. A shot across the bow could be like striking a match, and in the fog of war, one cannot guarantee a commanding officer on a vessel in a contested zone may not take his own liberty to act even without the consent of the defense ministries back home.

No country has a primary interest in war over these seas, but when nationalist sentiments are heightened, historical wartime memories are reactivated, the fundamental idea of national sovereignty is threatened, personal and public animosities fester, and military forces peer at each other from a direct line of sight, a great risk of spillover into armed conflict grows. The ongoing nature of the dispute serves the interests of those who gain allegiance for their confrontational stance, be they governments or aspirants to power. In Japan, former Tokyo Mayor Shintaro Ishihara's advanced his political agenda and new more nationalist political party Restoration by escalating the Diaoyu/Senkaku dispute with calls to develop the islands. Correspondingly in China, aggressive public opinion compelled a more forceful response from a government focused on a peaceful rise. A desire in Korea to assert national strength against a former colonizer (Japan) saw President Lee Myung-bak visit the Dokdo/Takeshima islands, and an attempt to maintain a narrative of facing up to a historical oppressor by Vietnam witnessed its return to islands from which it was expelled. Moreover, the Philippines tests the support of its former American benefactor by interdicting fishermen, while the United States buttresses those confronted by anxiety over China. In this sense, analysts cannot assume a game theoretical model of expected rational behavior over material resources when ideational factors of culture and history as well as internal nationalism animate so much of the state behavior.

These island disputes raise the stakes so significantly that solutions must be urgently found and supported. A multitude of options exist, though each has their inherent advantages and disadvantages. At least four pathways to peace have been introduced in some capacity and could be reasserted to forge a final comprehensive agreement to the variety of disputes arising in the waters of the East and South China Seas: (1) negotiation and mediation, (2) arbitration and adjudication, (3) informal track-two diplomacy, or (4) private commercial joint ventures.

Negotiation is the traditional domain of official foreign ministry diplomacy and usually represents the firm commitment of the governments to implement a compromise solution. Yet the stakes are high

when such a visible gathering takes place and public commentary may often suggest a zero-sum outcome where one side gained more than the other even when a mutually acceptable solution is achieved by the two principal parties, perhaps even losing face. The Diaoyu/Senkaku dispute would clearly lend itself to such a pathway since primarily two claimants are in play, while several actors hold claim to the Spratly islands for instance and thus multilateral negotiations seem more logical. Of course, multilateral negotiations are usually time consuming and often fail to achieve commitment and execution even if an agreement is reached. The United States has suggested multilateral negotiations may be more fruitful, though China has resisted this 'internationalization' of a regional conflict and prefers to handle the island disputes in the South China Sea through bilateral negotiation where it is clearly a stronger party, eschewing the complexity of overlapping claims from multiple parties. China prefers not to speak against the combined voices of Southeast Asian stakeholders in such a formula that may amplify the voice of the Association of Southeast Asian Nations (ASEAN) and it certainly opposes the suggested inclusion of countries like India or Japan as complicating affairs since they do not have claims on the islands.

Almost certainly, direct negotiations are unlikely to resolve these disputes, so some third party role would be essential in any pathway toward resolution. Mediation is another avenue to facilitate a solution, though may be challenging due to the power of the countries involved, their desire to operate unhindered, and the sensitivity of the choice for a mediator. A strong country like the United States may be able to offer inducements, but would not be seen as a neutral player. Another country like Norway or Thailand, or an individual of some standing, may be more amenable, but may lack the clout or incentives to push forward a deal. Borrowing from William Zartman, these maritime disputes are not ripe for resolution as no mutually hurting stalemate exists to compel all parties to come to the bargaining table and could only be attained by a more firm commitment from the United States to pressure China more directly.<sup>20</sup>

The parties could agree to adjudicate their dispute by submitting the case to a pre-existing court procedure such as the International Court of Justice (ICJ) or International Tribunal of the Law of the Sea (ITLOS), which could issue a binding judgment or advisory opinion on the legal merits of

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<sup>20</sup> I. William Zartman, **Ripe for Resolution: Conflict Resolution in Africa**, New York, NY: Oxford University Press, 1989.

each side's claim. Aside from Taiwan, all claimants are parties to the UN Convention on the Law of the Sea (UNCLOS). The ICJ has proven to be a competent, professional, and neutral body for precisely such disputes, with cultural, geographic, and ideological diversity among its judges. Discovery and effective occupation are established by legal precedents for island claims, while proximity (or contiguity) is not a legal standard but offers "persistent practical appeal."<sup>21</sup> China's claims over Diaoyu/Senkaku may be significantly stronger in a judicial forum, and much of its argument revolves around legal ownership at the end of the 19<sup>th</sup> century and in the aftermath of World War II. Japan pressed Korea to take the Dokdo/Takeshima island dispute to the ICJ but Korea has thus far refused. Likewise, the parties could choose the decision-makers and the rules that they will follow and agree to be bound by the decision of an arbitrator. In 2013, the Philippines brought a case to the Permanent Court of Arbitration questioning the legality of China's nine-dashed line claim to vast waters in the South China Sea and a five-judge panel was selected to hear the case, though China has rejected to participate. Rarely do countries submit to the compulsory jurisdiction of the ICJ or any other tribunal or arbitral on matters which are political or core to national identity, as it requires a leap of faith that the decision will turn out in one's favor.<sup>22</sup> Precisely for such reasons, countries are pragmatic, calling for tribunals where their claims are strongest, opposing where they are weak; thus legal instruments are likely to be ignored despite their merits. In fact, "all the claims are weak, because the claimants are not able to demonstrate continuous and effective occupation, administration, and control, as well as acquiescence by other claimants."<sup>23</sup>

Informal dialogue offers a more accommodating pathway toward at least the framework of a solution. Track-Two diplomacy, processes outside the official foreign ministry pathway, offer time and sometimes secrecy in

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<sup>21</sup> Van Dyke and Valencia, "How Valid are the South China Sea Claims under the Law of the Sea Convention?", p. 50.

<sup>22</sup> See James Turner Johnson, "International Law and the Peaceful Resolution of Interstate Conflicts", in John A. Vasquez, James Turner Johnson, Sanford Jaffe, and Linda Stamato, **Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era**, Ann Arbor, MI: University of Michigan Press, 1995, p. 155-177, and Richard A. Bilder, Adjudication: International Arbitral Tribunals and Courts", in I. William Zartman and J. Lewis Rasmussen, eds, **Peacemaking in International Conflict: Methods and Techniques**, Washington, DC: United States Institute of Peace Press, 1997, p. 155-189.

<sup>23</sup> Van Dyke and Valencia, "How Valid are the South China Sea Claims under the Law of the Sea Convention?", p. 50.

building trust and examining the details of a comprehensive agreement.<sup>24</sup> Dialogue bodies sponsored by non-governmental organizations (NGOs) or international organizations like ASEAN are a hopeful step toward a comprehensive settlement.<sup>25</sup> Academics, businessmen, professional lawyers, or other eminent persons can outline the shape or scope of such a dialogue. Indeed, they may act as informal agents of the government while avoiding the spotlight of media and scrutinizing publics and providing political space for an agreement acceptable to all sides that is not obstructed because of some leaked information regarding the parameters of an acceptable framework. The Indonesian-led workshop helped to build confidence and led to the code of conduct and the ASEAN Regional Forum (ARF) provides a forum for dialogue on sensitive issues, yet any final solution still requires the ultimate endorsement of the national governments, and may require some delimitation of maritime boundaries which raises the same challenges mentioned above. The hard choices to implement an agreement may not become any easier by the confidence-building measures suggested in this model when parties' ambitions are unrealized.

Joint ventures between private or state-owned enterprises that share in the exploration and development of all natural resources and wealth that may exist in the waters and seabed of these islands and their EEZs are another option that could set aside the sovereignty claims and national pride. These mutually beneficial structures could sponsor joint development and simply find a formula for sharing the profits but in ways that more easily escape the issues of collective memory and territorial-based identity issues, raising the hopes for a positive sum game where both or multiple sides can win. As Busyzinski and Zaslan suggest, "national oil companies would obtain access to oil and gas reserves without the need to enforce exclusive claims to sovereignty."<sup>26</sup> Countries in the region have made such past commitments; China and Japan agreed to set aside any

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<sup>24</sup> See John W. McDonald and D.B. Bendahmane, eds., **Conflict Resolution: Track Two Diplomacy**, Washington, DC: Foreign Service Institute, 1987.

<sup>25</sup> One longstanding example is an ASEAN-based workshop process. See Hasjim Djalal and Ian Townsend-Gault, "Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention", in Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, **Herding Cats: Multiparty Mediation in a Complex World**, Washington, DC: U.S. Institute of Peace Press, 1999, p. 107-134.

<sup>26</sup> Leszek Busyzinski and Zaslan Iskandar, "Maritime Claims and Energy Cooperation in the South China Sea", **Contemporary Southeast Asia** 29, No. 1 (April 2007), p. 157.

disputes until the future when they normalized relations in 1972 and as recently as the late 2000s, China and the Philippines agreed to ignore territorial claims and seek joint exploration for maritime resources.<sup>27</sup> Likewise, one could imagine joint sovereignty with ASEAN Plus Three (APT, ASEAN plus China, Japan, and Korea) as a malleable entity that could oversee management of the process. Such radical ideas were actually submitted when in 1995 Taiwan suggested that all twelve interested nations and territories forego their island claims and establish a South China Sea Development Company to develop the natural resources cooperatively.<sup>28</sup> This step could move all parties toward what ultimately may be required to resolve the burgeoning crises that are coming fast and furious. Indeed, joint exploration projects already exist and much of the exploitation of fossil fuels will be done by corporate entities with competitive bidding, not under national authority *per se*, though royalties and revenues are still owed to sovereign entities and possibly state-owned enterprises. Nevertheless, commercial bargaining can avoid much of the innate animosity that derives from historical rivalry and warfare.<sup>29</sup>

The oceans present an opportunity for creative solutions where possession does not have to imply victory; these are islands where nobody lives, few citizens of any claimant states will ever visit these rocks, and fossil fuels found there are finite. In fact, another suggestion has been to make the area a marine reserve.<sup>30</sup> ASEAN itself has greatly helped to reduce the territorial disputes that marred regional relations in Southeast Asia after World War II up until the founding of ASEAN in 1967, and by the end of the 1970s competing claims to physical territory with abundant populations that were integral to the nation were settled. ASEAN was able to integrate Cold War foes like Thailand and the Indochinese states of Cambodia, Laos, and Vietnam as well as an outlier state like Myanmar and emerge stronger in each instance. Now ASEAN is a very peaceful region with widespread commercial, cultural, and diplomatic exchanges, trade is

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<sup>27</sup> Zhao, "Sino-Philippines Relations: Moving Beyond South China Sea Dispute?", p. 69.

<sup>28</sup> Van Dyke and Valencia, "How Valid are the South China Sea Claims under the Law of the Sea Convention?", p. 59.

<sup>29</sup> See David A. Lax and James K. Sebenius, "The Power of Alternatives or the Limits to Negotiation", in J. William Breslin and Jeffrey Z. Rubin, eds., **Negotiation Theory and Practice**, Cambridge, Mass: Program on Conflict Resolution at Harvard University, 1991, 97-113.

<sup>30</sup> Diaojong Zha, "Security in the South China Sea," **Alternatives: Global, Local, Political** 26, no. 1 (January-March 2001), p. 46.

growing and may result in a free trade area. The ASEAN way is a softer approach that respects principles like non-interference but also seeks pragmatic solutions without using pressure by employing informal decision-making to build consensus toward a settlement.<sup>31</sup> An ASEAN-led Code of Conduct for the South China Sea could help pacify the stormy waters such as the Manila Declaration promulgated on 4 November 2002 that sought to resolve disputes peacefully, though China and ASEAN have yet been unable to conclude such a new agreement.

### **East China Sea**

The Diaoyu/Senkaku islands dispute is ostensibly about resources but has become intractable due to its status as an outstanding territorial issue between China and Japan and thus is artificially a symbol of national identity as part of the historical animosity that has persisted since the end of World War II. Unlike Japanese textbooks or visits to Yasakuni Shrine in Tokyo, China can take more direct action on the disputed islands and Japan can more forcefully initiate provocations or more powerfully respond to Chinese assertions. Including these uninhabited islands in the concept of nationhood thus foments more aggressive posturing, statements, and behavior.

China's claims to the Diaoyu/Senkaku islands are based foremost on ancient possession and historical records dating back to the Ming dynasty that document usage or reference their presence in the Chinese sphere. Secondly, China's argument is a legal review of the loss of possession following the 1895 Treaty of Shimonoseki that concluded the First Sino-Japanese War and their expectation of being returned under the 1943 Cairo declaration which required Japan to return all illegally obtained Chinese territory and the 1945 Potsdam conference which clarified Japan's territorial limits, though ambiguously referred to unnamed 'minor islands' as integral to its reconstituted state. China asserts that these islands should have been returned by the United States following its formal occupation of Japan, but was unfairly handed over to Japan in 1972 along with the former Ryukyu kingdom governed in Okinawa. More recently, China has looked to the Law of the Sea and a geologic claim that China's continental shelf reaches the disputed islands, and nevertheless sits on the Chinese side of the trough that extends southward from Japan's volcanic archipelago.

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<sup>31</sup> Michael Leifer, **The ASEAN Regional Forum: Extending ASEAN's Model of Regional Security**, Oxford, U.K.: Oxford University Press, 1996.



Japan's claim primarily derives from the aforementioned 1895 Treaty of Shimonoseki that ceded Taiwan and surrounding islands to Japan, and subsequently that the United States returned administrative rights to Japan along with Okinawa in 1972. Moreover, a median line division of the continental shelf claims would situate the islands closer to Japan's territory. China's historical argument is less salient for Japan since Ryukyu paid tribute to both China and Japan, but more to the latter.<sup>32</sup> Moreover, Japan has essentially maintained possession for over one century and under the legal concept of prescription could be seen as having gained effective control and tacit recognition of such.

After the most recent series of events following Ishihara's attempt to develop the islands under Tokyo prefecture and Prime Minister Yoshihiko Noda's subsequent decision in 2012 to 'nationalize' the islands from their private owners to prevent such actions, the Rubicon has been crossed. Although the islands remain under de facto Japanese control, the previously informal agreement to set aside the dispute has ended and tensions have spiked. Certainly other ruptures appeared dramatic at the time: Japan's eviction of Taiwanese protesters who raised a Republic of China flag in 1970 or Japanese nationalists building a lighthouse on one of the islands in 1996 and the Japanese foreign minister's claim that the islands were always Japanese territory. Yet in reaction to the most recent 'provocation,' Beijing has launched a new offensive to provide new maps, issue meteorological weather reports, offer new legal claims, reassert old historical entitlements, curtail some commercial ties, impose an economic boycott, cut off tourism to Japan, and send air and naval patrols. Japan responded in kind, revamping their naval forces with increased spending and scrambling fighter planes to protect its prerogatives.

Thus, since historical animosity between the two nations as exemplified in public demonstrations, nationalist rhetoric, and hostile social movements drives this conflict and the most recent spark was Japan's nationalization, the solution must be to de-nationalize the Diaoyu/Senkaku claims, setting aside sovereignty over the mutually claimed islands and thus rendering this small chain absent any ownership. After all, aside from some rudimentary attempts by Japanese commercial ventures to create a guano factory there, these islands remain uninhabited. Therefore, without people to protect or provide rights, the idea that these islands are integral to national identity and consciousness can be set aside

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<sup>32</sup> Duara, "De-Constructing the Chinese Nation", p. 41.

and any emphasis on negotiations can focus solely on an equitable division of potential energy resource near to the islands, but not on the territory itself. The lands can be made into bird sanctuary or marine habitat and both countries can commit to its preservation under the auspices of a newly formed APT management office while renouncing title and offering guarantees that they will serve no military purpose.

### **South China Sea**

The South China Sea is obviously more complicated since it is not a one to one dispute, but rather multiple states have assertions of ownership, the Spratly islands are claimed in their entirety by China, Taiwan, and Vietnam while the Paracel islands are possessed by China but claimed by Vietnam. Across the sea, EEZs are overlapping and raise challenging solutions, let alone the addition of islands, which have their own EEZs. Under UNCLOS, countries can claim twelve nautical miles of territorial sea which is de jure sovereign, and up to 200 nautical miles of EEZ which possesses neither full juridical authority nor sovereignty. For the United States, anything outside the territorial sea is international waters, which affords a greater role for American naval and air forces, including spying. The United States signed the Law of the Sea under President Bill Clinton but has not made significant efforts to introduce it to the U.S. Senate for ratification, until signals were made in 2011 by the Obama administration.

When EEZs are overlapping, an equitable solution must be found; yet islands receive little attention from UNCLOS leaving unanswered who has possession if territorial markers are not determined. China and Taiwan each share the claim of the nine-dashed line to nearly all of the water and islands in the South China Sea, a portrait of essentially sovereignty. Huangyan/Panatag Shoal lies 550 nautical miles southeast of Hainan, China and 125 nautical miles west of the Philippines. After the Philippines attempt to arrest Chinese fishermen illegally poaching rare aquatic species led to an armed stand-off, the Philippines renamed this body of water as the West Philippine Sea and China formed an administrative body to govern its South China Sea territory.<sup>33</sup> In 2012, China began to issue passports with these maritime boundaries included as a protrusion from the territorial map, leading to objections from Vietnam, the Philippines, and others. Further antagonizing the situation, the United States and Philippines have a mutual defense treaty that would oblige the United

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<sup>33</sup> China claims the island as part of the greater Zhongsha islands.

States to support its ally in the event of a military attack on its territory, though the Americans have de-emphasized its applicability in this particular case.

Since much of the South China Sea disputes revolve around security concerns and the latent Sino-U.S. rivalry over regional supremacy, along with an emphasis to align small and medium powers in the area to one side or another and their resistance to such an either/or choice, this set of disputes must be de-territorialized. Certainly, the solution to island claims and EEZ boundaries lies in a multilateral framework, building on informal dialogue, private and public economic relationships, and working within the parameters already offered by ASEAN and its spin-off entities such as the ASEAN Regional Forum, Asia Pacific Economic Cooperation, and ASEAN Plus Three. The latter would have the advantage of including all of the Asian principal actors but excluding the American presence that inherently politicizes the affair. U.S. influence could be a moderating factor through its allied states like Japan and South Korea, but the local tools of the 'ASEAN way' would be more on display in an Asian-led dialogue. An outcome that validates the freedom of navigation through the international waters of the South China Sea, emphasized in a code of conduct that also settles EEZ claims and provides the means to verify compliance will be of great utility. Again, an agreement to treat the uninhabited Spratly and Paracel island groups and other remote islands for what they are, proximate potential bases for EEZ claims and resource, mineral, and fishing wealth can be better resolved without the backdrop of strategic competition and militarizing the trade routes for all countries in the region. Delineations of EEZ lines would be helpful, as well as treating tiny islands not as territory to build sovereignty upon but rather protrusions subsumed to the vast sea and thus incapable of national possession.

### **Conclusion**

Realist notions of international relations appear to be on full display as self-interested atomistic states jockey for control over energy resources and seek to expand their territorial claims in a zero-sum competition. The status quo in the East and South China Seas is heightened insecurity, increasing budgets for military and particularly naval capabilities, regular stand-offs in air and at sea, occasional skirmishes and accidental or incidental deaths that interrupt the economic and diplomatic relations and tourist, educational, and cultural exchanges between countries. Reactions include popular demonstrations, stoning of embassies,

and the occasional act of violence against a foreign national or innocent bystander. The worst case scenario is armed conflict between two or more actors that spills into a greater regional war and compels U.S. intervention as part of a mutual defense treaty with a state party. Even if limited to the theatre of the sea itself as in the Malvinas/Falkland islands war between Britain and Argentina, irreparable harm to the enormous progress in regional ties since the end of the Cold War would be undone.

Yet the true maritime environment is less reflective of power transition theory than it is a post-colonial re-reading of Asian history and re-establishing a bygone regional order. Thus, a rational actor model employing game theory would underestimate China's reconstruction of its state and the strong desire to complete what began with Hong Kong and Macau and may ultimately end with Taiwan in recovering former territories. China has legitimate historical claims to the variety of islands off its coast both near and far, though its oceanic claims of sovereignty over vast waters distant from its shores does not comport with modern maritime law. Nevertheless, the Chinese cultural identity of resistance to foreign invasion, history of non-aggression, upholding of principles of non-interference, and sensitivity to the attitudes of small and developing countries from its socialist past and perception as a leader in the third world dramatically impact its foreign policy output. Moreover, it increasingly accepts more modern norms of multilateralism to solve problems. Thus, another future scenario involves cooperative joint ventures, harmonized policing of illegal fishing and poaching of rare aquatic species, and increased interdependence across the Asia Pacific region. The natural resources of the sea can be exploited, but all sides have a mutual interest to preserve the oceans, the common heritage of mankind, and to be good stewards of their environmental sustainability. Essential to this outcome is to de-territorialize and de-nationalize conceptions of international relations, at least when it comes to the shifting tides of maritime disputes. The fluid waterways of the ocean and uninhabited rocks that occasionally break the tide might best be resolved by de-territorializing these conflicts, de-nationalizing the claims, and indeed constructing new ideas of shared or pooled sovereignty, or perhaps avoiding the question of sovereignty altogether. To achieve such a transformation, decision-makers will have to think beyond nation-states and the strictures of formal cartographic equations to more innovative approaches to conflict resolution.

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## Özet

Asya Pasifik bölgesindeki deniz sınırları ihtilafları ve çeşitli adalar üzerindeki hak iddiaları, Büyük Güçler arasındaki yarış, tarihsel düşmanlıklar ve hukuki meselelerden beslenmektedir. Doğu ve Güney Çin Denizi bölgelerindeki bu tip sorunlar, toprak, nüfus ve otorite gibi egemenlik nosyonunun ana unsurları çerçevesinde ele alınmadığından, çözüm sürecinde sıkıntılar yaşanmaktadır. Bu meselelerin özü çoğunlukla maddi temelli olup, münhasır ekonomik bölgeler, enerji ve mineral kaynakları ile balıkçılık hakları üzerine bir yarış biçiminde özetlenebilmektedir. Değişen bölgesel dengeler bağlamında ekonomik ve askeri avantaj elde etmek isteyen Çin, Tayvan, Japonya, Brunei, Vietnam, Filipinler ve Malezya gibi aktörler arasındaki yarış, milliyetçilik ekseninde bölgesel devletler arasında bir savaşı da tetikleyebilecek mahiyettedir. Mevcut ihtilaflar içerisinde Rusya'yı da ilgilendiren bazı vakalar henüz çözümlenmemekle birlikte zamana bırakılmış olup, bir kısmı statik ama birçoğu da dinamik ihtilaflar şeklinde günümüze tezahür etmiştir. Dinamik olan sorunların temelinde, Sino-Amerikan stratejik diyalogu arka planında, Çin'in bölgede giderek artan görünürlüğü ve talepleri yer almaktadır.

Pek çok uzman bölgedeki devletlerin çıkar, motivasyon, talep ve politikalarını realist uluslararası ilişkiler perspektifi çerçevesinde incelemektedir. Bu bakış açısında güçler dengesi, ya da tehdit dengesi politikaları, güç dönüşümü ve hegemonik düşüş teorileri ile güvenlik yarışı gibi kavramlar öne çıkmaktadır. Ancak nadir olarak, bazı analistlerin konuyla ilgili çok taraflı süreçler, uluslararası hukuk, gayri resmî çalıştaylar, güven inşa edici hükümet-dışı diplomasi ve ihtilafların barışçıl çözümü gibi alt başlıkları kapsayan neoliberal kurumsal modellere başvurduğu da görülmektedir.

Doğu ve Güney Çin Denizi coğrafyalarında hiçbir devlet, ciddi olarak savaşı bir nihai çözüm olarak değerlendirmemektedir. Çin gerçek anlamda bir revizyonist aktör olmayıp, çoktarafılık ilkesinin modern normlarını giderek içselleştirmekte olan bir aktördür. Amerika Birleşik Devletleri ise, her ne kadar Çin'in bir bölgesel dev olmasını arzu etmese de, bu ülkeyi Soğuk Savaş döneminde Sovyetler Birliği'ne uyguladığı biçimde çevrelemeyi düşünmemektedir. Fakat sorunların aniden çığ gibi büyüyerek sıcak çatışmaya dönme ihtimali karşısında acil olarak çözüm üretilmesi ve bunların desteklenmesi şarttır. Bu bağlamda kendi içlerinde hem avantaj hem de dezavantajlar barındıran en az dört seçenekten bahsedilebilir: (1) Müzakere ve arabuluculuk (2) Tahkim ve yargı (3) gayri resmî hükümet-dışı

*diplomasi (hükümet-dışı organizasyonlar veya ASEAN gibi uluslararası örgütler tarafından desteklenen politikalar) (4) özel ticari ortak girişimler.*

*Ortak payda ve ortak çözümler üretilmesini hedefleyen bu dört öneri, Asya Pasifik bölgesinde karşılıklı bağımlılık yaratılmasını sağlayabilir. ASEAN'ın da süregelen çabaları ile bu yolda bazı aşamalar kaydedilmiştir. Ancak, örneğin, insanlığın ortak mirası olan okyanusların korunması, balıkçılık alanlarının güvenliğinde yasadışı uygulamalara karşı çabaların uyumlaştırılması veya sürdürülebilir çevre yaratabilme konularında ortak platformların yaratılabilmesi için atılması gereken temel adım, uluslararası ilişkilere hâkim olan -başta egemenlik olmak üzere- bazı terimleri teritoryal ve milliyetçi niteliklerinden soyutlamaktır. Bölgedeki sınırlar, alanlar ve kaynakların nitelik, nicelik, aidiyet ve hukuki mahiyetleri konularındaki muğlaklık, böylesi bir yeni yaklaşımı zaruri kılmaktadır. Ortak veya havuzlaştırılmış egemenlik kavramının benimsenmesi yahut deniz meselelerinde egemenlik kavramının denklem dışı bırakıldığı yeni fikirler ve politikaların üretilmesi, çatışmaların kökten çözümü için uygun bir metot olabilir. Bu dönüşümün gerçekleşebilmesi için karar alıcıların ulus-devlet nosyonunun ötesinde düşünmeleri ve şekli kartografik denklemlerin dışında daha yenilikçi çözüm politikalarına yönelmeleri gerekmektedir.*