

ASEAN and the South China Sea: A Dual Track Approach?

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Introduction

The South China Sea's seascape and landscape have been changed irrevocably by construction of artificial islands in the maritime heart of Southeast Asia. All Southeast Asian states and the Association of Southeast East Asian Nations (ASEAN) now confront a fait accompli. China claims its construction activities are legal under international law and that China is only doing what other claimants have done in previous years. In fact, China is acting with great restraint according to its officials.¹

At the very least China's artificial islands will serve as bases for search and rescue and better weather forecasting. They are also likely to serve as forward operating bases for China's fishing fleet, oil exploration and survey vessels and maritime law enforcement ships. Chia has also put down a marker that these bases will serve "defence needs" and holds in reserve the right to establish as Air Defence Identification Zone.

ASEAN has four options: (1) continue on its present course of hedging and consulting with China over the implementation of the Declaration on Conduct of Parties in the South China Sea (DOC) and discuss on the basis of consensus a Code of Conduct in the South China Sea (COC); (2) bandwagoning with China in the expectation China will be munificent and reward ASEAN and its member states for their compliant behavior; (3) balancing with the United States to constrain China; and (4) pursue a proactive dual track approach (outlined below).

The first option carries great risks that dialogue on the DOC and consultations on the COC will drag on indefinitely and become superfluous as China's alters "facts on the ground" and further consolidates its presence in the South China Sea. The first option also carries grave risks that ASEAN centrality will be marginalized in the wake of great power rivalry.

The second and third options – bandwagoning and balancing – both pose risks to ASEAN centrality in managing the security environment. Aligning with either China or the United States does not prevent great power rivalry from dominating regional affairs.

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¹On June 16, 2015. China's Foreign Ministry announced that its "land reclamation" on some islands and reefs "will be completed in upcoming days." Nonetheless, Chinese construction activities on Mischief and Subi reefs is continuing at a frenetic pace. Filipino observers claim it will take China months before construction is completed. See: Jim Gomez, "China island-building in full swing: Manila," *Jakarta Post*, June 27, 2015.

ASEAN and its member could become entrapped in their relations with one or the other of the two great powers. Bandwagoning with China would almost certainly derogate the sovereign jurisdiction of littoral states in waters that overlap China's nine-dash line ambit claim to the South China Sea.

This paper is divided into four parts. Part one discusses the geographic scope of Southeast Asia. Parts two and three discuss, respectively, the pluses and minuses in implementing the DOC, respectively. Part four proposes that ASEAN craft a new proactive dual track approach to maritime disputes in the South China Sea.

Part 1 Southeast Asia's Geographic Scope

Ever since ASEAN was founded in 1967 its leaders imagined the geographic scope of Southeast Asia. These aspirations were outlined in the 1967 Bangkok Declaration; the 1971 Declaration on a Southeast Asia Zone of Peace, Freedom and Neutrality; the 1976 ASEAN Treaty of Amity and Concord.

In December 1995 ASEAN adopted the Treaty on the South East Asia Nuclear Weapons Free Zone (SEANWFZ). This treaty for the first time defined the geographical limits of Southeast Asia as follows:

- (a) "Southeast Asia Nuclear Weapon-Free Zone", hereinafter referred to as the "Zone", means the area comprising the territories of all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, *and their respective continental shelves and Exclusive Economic Zones (EEZ)* [emphasis added];
- (b) "*territory*" means the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them [emphasis added].²

When SEANWFZ is coupled with the ASEAN Charter and ASEAN Political-Security Council it appears inescapable that ASEAN as a regional multilateral institution has the legal personality to act on behalf of its member states in managing territorial disputes in the South China Sea. ASEAN does not have to take sides over sovereignty disputes but it has an obligation to support its members in the peaceful resolution of maritime disputes on the basis of international law including the United Nations Convention on the Law of the Sea. At the same time ASEAN (ASEAN Community and ASEAN Political-Security Community) has a responsibility to politically and diplomatically protect its individual members from intimidation, coercion, and threats and the use of force by external powers.

Part 2 Implementing the DOC – The Pluses

China's construction of artificial islands and China's consolidation on these artificial islands has put maritime disputes at the top of ASEAN's agenda. It should be recalled

² "Treaty on the Southeast Asia Nuclear Weapon-Free Zone," <http://www.asean.org/news/iter/treaty-on-the-southeast-asia-nuclear-weapon-free-zone>.

that in 2005 ASEAN and China set up a Joint Working Group to draft the Guidelines to Implement the DOC. There was only one major sticking point, the wording of one article that called for ASEAN consultations prior to meeting with China. China stood its ground and six years later ASEAN dropped this article.

It has been twelve and seven months since the ASEAN and China agreed on the DOC, and four years since the Guidelines to Implement the DOC were adopted. What have been the positive developments?

First, ASEAN and China adopted the Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea.³

Second, in December 2004 the ASEAN-China Senior Officials' Meeting on the implementation of the DOC agreed to establish the ASEAN-China Joint Working Group on the Implementation of the DOC (ASEAN-China JWG). According to the Terms of Reference "The ASEAN-China JWG shall meet regularly at least twice a year and submit a report and recommendations to the ASEAN-China SOM at the end of each meeting."⁴

Third, ASEAN and China adopted the Guidelines for the Implementation of the DOC in 2011. These Guidelines stated that, "progress of the implementation of the agreed activities and projects under the DOC shall be reported annually to the ASEAN-China Ministerial Meeting (PMC)." Thereafter, the ASEAN-China JWG began adopting annual work plans. Reportedly, four working groups have been set up tasked with exploring confidence building projects on marine environmental protection, marine scientific research, search and rescue and combatting transnational crime, respectively.

Fourth, on January 22, 2013, the Republic of the Philippines declared that virtually all dialogue and consultations with China on their disputes in the South China Sea had been exhausted and instituted arbitral proceedings against the People's Republic of China under UNCLOS Annex VII "with respect to the dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea."⁵ China rejected the Philippines's claim.⁶ On December 11, 2014 Vietnam announced that it had filed a Statement of Interest with the Permanent Court of Arbitration asking that Vietnam's

³ "Terms of Reference on the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea," <http://www.asean.org/asean/external-relations/china/item/terms-of-reference-of-the-asean-china-joint-working-group-on-the-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

⁴ *Ibid.*

⁵ Permanent Court of Arbitration, "The Republic of the Philippines v. The People's Republic of China," http://www.pca-cpa.org/showpage.asp?pag_id=1529.

⁶ See: Ministry of Foreign Affairs, People's Republic of China, *Position Paper of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines*, December 7, 2014; http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

interests be taken into account by the Arbitral Tribunal.⁷ The matter is now before the Arbitral Tribunal. Although China outright rejects international arbitration, the Philippines' actions should be viewed as a positive contribution to regional peace and stability because they appeal to international law as a means to settle its disputes with China without recourse to force.

Fifth, the 9th ASEAN-China JWG met in Suzhou, Jiangsu province, China in mid-September 2013; in an important development, China agreed to begin consultations with ASEAN on a Code of Conduct in the South China Sea (COC). China's Foreign Ministry reported:

In the consultations on the COC, the participating parties had healthy discussions on how to promote the COC process. The parties agreed to follow the "step by step and to reach consensus through consultation" approach and start from identifying the consensus to gradually expand consensus and narrow differences. The parties agreed to continue to steadily push forward the COC process during the full and effective implementation of DOC. The meeting decided to authorize the Joint Working Group to conduct concrete consultations on the COC and agreed to take steps to establish a celebrity expert group.⁸

According to China's Ministry of Foreign Affairs, the JWG:

fully affirmed the positive progress on the implementation of the DOC since 2012. The meeting noted that the parties held three senior officials meetings and three joint working group meetings on the implementation of the DOC, formulated and effectively executed the 2012 work plan, carried out cooperation in disaster prevention and mitigation, marine ecology and other fields, and maintained good momentum in implementing the DOC through dialogue and cooperation... The meeting approved the 2013-2014 work plan for the implementation of the DOC.⁹

Sixth, according to Thailand's Ministry of Foreign Affairs, the 10th ASEAN-China JWG that met on March 18, 2014

reviewed the Work Plan on the Implementation of the DOC for 2013-2014 and welcomed new cooperation initiatives to promote the full and effective

⁷ Carlyle A. Thayer, "Vietnam Files Statement of Interest with the Permanent Court of Arbitration," *cogitAsia*, December 15, 2014. <http://cogitasia.com/vietnam-files-statement-of-interest-with-the-permanent-court-of-arbitration/>. Earlier, the United States Department of States, Bureau of Oceans and International Environmental and Scientific Affairs issued, "China: Maritime Claims in the South China Seas," *Limits in the Seas*, No. 143, December 5, 2014 that offered a legal critique of China's nine-dash line ambit claim to the South China Sea.

⁸ Ministry of Foreign Affairs of the People's Republic of China, "The Sixth Senior Officials Meeting and the Ninth Joint Working Group Meeting on the Implementation of the "Declaration on Conduct of Parties in the South China Sea" Are Held in Suzhou," September 15, 2013;

http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1079289.shtml.

⁹ *Ibid.*

implementation of the DOC such as conducting seminars on establishment of hotline communications channel, exploring the possibility of conducting search and rescue exercises, organising workshop on conservation of marine environment, and holding a photo exhibition under the theme “Maritime Cooperation” in view of promoting the ASEAN-China Cultural Exchange Year in 2014.¹⁰

With respect to ASEAN-China consultations on the COC, Thailand’s Ministry of Foreign Affairs, reported that the JWG

discussed about areas of convergence in order to come up with commonalities in developing the COC as well as programme of its work in the year 2014. It also exchanged preliminary views on preparing Terms of Reference of the Eminent Persons and Experts Group (EPEG) or other mechanisms to support the official consultations.¹¹

Seventh, the 12th ASEAN-China Joint Working Group on the DOC met in Thailand in late October 2014. According to the Chairman’s Statement of the 17th ASEAN-China Summit held in Nay Pyi Taw, Myanmar on 13 November 13, 2014:

12. We welcomed the positive outcomes from the 8th ASEAN-China SOM on DOC and the 12th Joint Working Group (JWG) on the Implementation of the DOC in Bangkok, Thailand, from 26 to 29 October 2014. We will continue to maintain the momentum of regular official consultations and work towards the early conclusion of the COC.¹²

Premier Li Keqiang in remarks to the East Asia Summit in Nay Pyi Taw noted that with respect to the COC an “early harvest has been achieved.”¹³

The 26th ASEAN Summit is the most recent venue at which progress on South China Sea and DOC and COC issues were discussed. According to the Chairman’s Statement, the following view was offered on the South China Sea:

59. We share the serious concerns expressed by some Leaders on the *land reclamation being undertaken in the South China Sea, which has eroded trust and confidence and may undermine peace, security and stability in the South China Sea* [emphasis added].

¹⁰ Ministry of Foreign Affairs of The Kingdom of Thailand, “The 10th ASEAN-China Joint Working Group on the Implementation of the Declaration of Conduct of Parties in the South China Sea (JWG of DOC),” May 19, 2014; <http://www.mfa.go.th/main/en/media-center/14/44171-The-10th-ASEAN-China-Joint-Working-Group-on-the-Im.html>.

¹¹ *Ibid.*

¹² Ministry of Foreign Affairs of the People’s Republic of China, “Chairman’s Statement of the 17th ASEAN-China Summit,” November 13, 2014; http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1215668.shtml.

¹³ Ministry of Foreign Affairs, People’s Republic of China, “Li Keqiang Expounds on China’s Principled Position on South China Sea in East Asia Summit,” November 13, 2014, http://www.fmprc.gov.cn/mfa_eng/topics_665678/lkqzlcxdyhzldrxlhybdmdjxzsfw/t1211375.shtml.

60. In this regard, we instructed our Foreign Ministers 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.

61. We reaffirmed the importance of maintaining peace, stability, security and freedom of navigation in and over-flight over the South China Sea. We emphasised the need for all parties to ensure the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea in its entirety: to build, maintain and enhance mutual trust and confidence; exercising self-restraint in the conduct of activities; to not to resort to threat or use of force; and for the parties concerned to resolve their differences and disputes through peaceful means, in accordance with international law including the 1982 United Nations Convention on the Law of the Sea.

62. While noting the progress made in the consultations on the Code of Conduct in the South China Sea (COC), we urged that consultations be intensified, to ensure the expeditious establishment of an effective COC.

Since 2002, ASEAN and China have reached agreement on the Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea. ASEAN and China also have adopted the Guidelines to Implement the DOC in 2011. The ASEAN-China JWG was formed and has held fourteen meetings to date. Progress has been recorded in general terms on how to implement the DOC and initial consultations on a COC have commenced. There has been agreement on a limited number of activities at the margins of the DOC. Progress appears to be continuing on “expeditious establishment of an effective COC,” but no time frame has been disclosed.

Part 3 Implementing the DOC – The Minuses

Regional analysts have noted that since the signing of the 2002 DOC no armed conflict has taken place in the South China Sea between states that have territorial disputes. This reasoning appears to suggest that the DOC process has contributed positively to the maintenance of peace and security in the South China Sea. But a review of developments “on the ground,” or literally on the sea, reveal a marked increase in unilateral actions by parties to the DOC and a rise in tensions affecting “peace and stability” in the South China Sea. Chinese scholars, on the other hand, argue that the past twelve years have been peaceful.

Over the period from 2002 to the present there have been at least eight sources of unilateral action by China that has undermined the spirit if not letter of the 2002 DOC and contributed to rising tensions:

1. China has employed People’s Liberation Army Navy (PLAN) warships to back up civil maritime law enforcement agencies in so-called “sovereignty enforcement patrols.” On at least one occasion, a PLAN frigate fired warning shots with live ammunition at unarmed Filipino fishermen operating in their home waters. There have been other reported incidents involving Chinese vessels firing at

Vietnamese fishermen leading to fatalities. Chinese flares set fire to one Vietnamese fishing boat in another incident. Twice in recent years a PLAN flotilla has dropped sovereignty markers into the waters above James Shoal in Malaysia's EEZ claiming that this shoal marks the southernmost Chinese land feature (the shoal is at least 22 metres under water).

2. Chinese national fishing fleets have continually entered the EEZs of neighboring states to carry out commercial fishing operations with the encouragement of Hainan provincial government authorities. There are reports that Chinese fishermen have even sailed up the estuaries of remote Indonesian islands. Chinese fishing fleets operate with impunity. They have engaged in harassment and physical confrontation with fishermen from neighboring states that has led to confiscation of goods, physical damage to property, physical injury to individuals and in some cases fatalities. Chinese commercial fishing fleets are being encouraged by provincial authorities to go further south because of pollution and depletion of fish stocks in Chinese home waters. On occasion, these fleets have been marshaled in groups and accompanied by a 30,000 tonne mother ship. China's fishing boats carry a satellite uplink to summon Chinese Coast Guard ships when they are confronted by maritime law enforcement vessels of neighboring states. Chinese fishing fleets form part of China's militia.
3. Oil exploration ships conducting surveys within the EEZs of the Philippines and Vietnam have been harassed by Chinese maritime law enforcement vessels/Chinese fishing boats, and in notable cases have had cables attached to seismic sensors deliberately cut. Chinese hydrographic continue to conduct surveys within the EEZs of Vietnam and the Philippines.
4. The Chinese Coast Guard and other national maritime enforcement agencies have been used to forcibly assert national sovereignty claims in the EEZs of Southeast Asian claimant states. China's annexation of Scarborough Shoal in 2012 and investment of Second Thomas Shoal are cases in point.¹⁴ In addition, Chinese maritime enforcement vessels have been implicated in the electronic jamming of an Indonesian maritime enforcement vessel in order to secure the release of fishermen arrested for poaching.¹⁵ Chinese maritime enforcement vessels have removed territorial markers from Erica Reef (*Terumbu Siput*) and Luconia Shoals in Malaysian waters in recent years, while a Chinese Coast Guard ship has taken up permanent deployment in the area.
5. In May-July 2014, China placed a mega-oil drilling platform, Haiyang Shiyou (HYSY) 981 in Vietnam's EEZ. The HYSY 981 was accompanied by over 100 PLAN warships, Coast Guard vessels, tugboats, civil fishing craft and military aircraft. Chinese action resulted in a confrontation with Vietnamese maritime law

¹⁴ "Investment" is used in the military sense of surrounding a place by a hostile force in order to besiege or blockade it.

¹⁵ Scott Bentley, "The Next South China Sea Crisis: China vs. Indonesia?," *The National Interest*, September 24, 2014' <http://nationalinterest.org/blog/the-buzz/the-next-south-china-sea-crisis-china-vs-indonesia-11342>.

enforcement agencies (Coast Guard and Fisheries Surveillance Force). During the confrontation China expanded the safety or exclusion zone around the oilrig to distances well in excess of international norms and took determined steps to prevent Vietnamese vessels from entering this area. Chinese ships and tugboats deliberately rammed Vietnamese law enforcement vessels. These incidents led to structural damage and injury to Vietnamese crewmembers. Chinese Coast Guard vessels directed their high-pressure water cannons at the bridges of their Vietnamese counterparts in an effort to demast communications and navigational antennae. Chinese Coast Guard ships also unsheathed their deck guns, and Chinese crewmembers deliberately trained their weapons at the Vietnamese boats. The Vietnamese kept their deck weapons under canvass. China counter-charged that Vietnam engaged in more than 1,600 ramming incidents (or about 22 rams per Vietnamese boat, if Chinese figures can be believed).

The HYSY 981 incident led ASEAN Foreign Ministers to issue a Joint Communique after their annual meeting in August 2014 that stated:

149. We remained seriously concerned over recent developments which had increased tensions in the South China Sea and reaffirmed the importance of maintaining peace, stability, maritime security as well as freedom of navigation in and over-flight above the South China Sea...

151. We urged all parties concerned to exercise self-restraint and avoid actions which would complicate the situation and undermine peace, stability, and security in the South China Sea and to settle disputes through peaceful means, without resorting to the threat or use of force, including friendly dialogue, consultations and negotiations, in accordance with universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea.¹⁶

6. Since 2014 satellite imagery has revealed extensive Chinese land so-called “land reclamation” efforts on seven features in the South China Sea including an airfield measuring more than 3,100 metres in length.¹⁷ China reserves the right to unilaterally declare an Air Defense Identification Zone over the South China Sea.¹⁸ In the past three months, Chinese authorities have reportedly warned Philippines Navy and Air Force

¹⁶ “Joint Communique 47th ASEAN Foreign Ministers’ Meeting,” August 9, 2014. <http://www.asean.org/news/asean-statement-communiques/item/joint-communique-47th-asean-foreign-ministers-meeting>.

¹⁷ China is constructing artificial islands by dredging sand from the seabed and scraping coral reefs. It is building on low tide elevations and rocks. See: Carlyle A. Thayer, “No, China is Not Reclaiming Land in the South China Sea,” *The Diplomat*, June 7, 2015. <http://thediplomat.com/2015/06/no-china-is-not-reclaiming-land-in-the-south-china-sea/>.

¹⁸ David Tweed and Chris Blake, “China Reserves Right to Create Air Zone Over South China Sea,” Bloomberg Business News, May 8, 2015; <http://www.bloomberg.com/news/articles/2015-05-08/china-reserves-right-to-declare-air-zone-over-south-china-sea>.

planes and a U.S. Navy Poseidon P8 reconnaissance aircraft to leave airspace above disputed features in the South China Sea.¹⁹ More recent satellite imagery has revealed Vietnamese “land reclamation” on Sand Cay and West London Reef. The scope, scale and intensity of Chinese construction of artificial islands have aroused regional concern, not least because of the lack of transparency. Vietnamese “land reclamation” represents 1.9% of the total area reclaimed by China as of March 2015.

7. The major powers, principally China and the United States, but also including Japan and India as well, have been drawn into the South China Sea disputes. The PLAN has continually harassed US Navy and USNS Military Sealift Command ships conducting military activities in China’s EEZ. Other incidents, such as the *USS Cowpens* and Poseidon-8 incidents, have occurred on the high seas and in international airspace, respectively. China has also challenged Indian Navy ships transiting the coast of Vietnam, Petronas vessels operating in Malaysia’s EEZ, and more recently Philippine military aircraft.

China conducts annual naval exercises in the South China Sea that have increased in size with each passing year. These exercises often include amphibious assault serials. These demonstrations of military power must be viewed as an effort to exert influence over political consultations on the DOC discussions. Currently the United States, Japan and the Philippines are conducting military exercises in the South China Sea.

8. South China Sea disputes have contributed to force modernization and a competitive arms build up in response to China’s increasingly assertive naval power.

In summary, the strategic environment in the South China Sea has deteriorated since 2002. China increasingly has used the PLAN, Coast Guard and other maritime law enforcement agencies and civilian fishermen/stare militia to advance its claims to “indisputable sovereignty” over the South China Sea. The tactics used by China’s three maritime forces (regular navy, maritime law enforcement and militia-fishing fleets) has involved coercion, threats to use force and the occasional use of force (firing live ammunition and flares, ramming, high-pressure water hoses) that fall short of the normally accepted definition of armed force. Nevertheless there have been fatalities as a result of Chinese tactics.

Disputes in the South China Sea have resulted in the increased presence of naval and air forces of the major powers with occasional confrontations on the high seas and international airspace. These developments risk polarizing Southeast Asia.

Part 4 ASEAN: Dual Track Approach to the South China Sea

This section argues that ASEAN should address tensions arising from maritime disputes in the Southeast China Sea through a proactive dual track approach. The first track involves ASEAN acting as a corporate body to manage territorial disputes between its

¹⁹Manuel Mogato, “China warns Philippine military planes away from disputed sea area: Manila,” Reuters, May 7, 2015.

members and China in the South China Sea. The second track involves ASEAN cooperation among its members and with its dialogue partners.

Track 1 – ASEAN and its Members

The 2002 DOC represents the collective commitment by ASEAN members to promote peace, stability and mutual trust and ensure resolution of disputes in the South China Sea. Specifically, ASEAN and its members should consult in advance of meetings of the ASEAN-China JWG and reach consensus on key agenda items. For example, ASEAN should reach consensus on the meaning of key terms in paragraphs 4, 5 and 6 of the DOC (discussed below). All ASEAN members should support the ASEAN consensus and refrain from public comments that might undermine ASEAN's position. The ASEAN Chair should take the lead perhaps supported by ASEAN's country coordinator for China.

As a matter of urgency, ASEAN-China discussions on the DOC must shift from their narrow focus on procedure and format and address how ASEAN and China can collectively manage if not ameliorate the sources of tensions and instability highlighted above. ASEAN should press China to assist in clarifying and operationalizing key terms used in the DOC through the ASEAN-China JWG process.

Paragraph four of the DOC refers specifically to the "threat or use of force." In light of physical confrontations described above, especially involving fishermen and maritime law enforcement agencies, ASEAN and China need to consider whether a spectrum of activities that falls short of the threat or use of *armed* force constitute in fact "the use of force" within the meaning of the DOC. Such activities could include: dangerous naval maneuvers, threatening to ram, ramming, directing flares at fishing boats, use of high-powered water canons, unsheathing and aiming deck guns during a confrontation, firing live ammunition warning shots at unarmed fishermen, and other tactics. ASEAN and China also need to determine the legal status of fishermen and the crew of state-owned tugboats who act either as state militia or state proxies in territorial disputes in the South China Sea.

Paragraph 5 of the DOC calls on the signatories "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability." Due to the changes in the strategic environment since the DOC was signed, consideration should be given by ASEAN and China to specifying in detail what types of activities should also be included in the phrase "including, among others." One obvious candidate for consideration is so-called "land reclamation" that significantly extends the area of features in the South China Sea, alters the marine environment and potentially could serve "defense purposes" by the forward deployment of naval and air platforms and offensive weapons.²⁰

²⁰ For a recent report on the impact of China's construction activities on coral reefs and the marine environment see: Greg Torode, "Scientists alarmed over China building in Spratlys," *Jakarta Post*, June 26, 2015.

The purpose of the DOC is to build confidence and trust. The intention and purpose behind “land reclamation” activities should be made transparent. Paragraph 5(d) calls for the voluntary exchange of relevant information. ASEAN and China should agree that all claimant states should be called upon to provide an account of “land reclamation” and construction activities undertaken since the 2002 DOC was adopted. Following in parallel the procedures in the SEANWFZ Treaty, states should be entitled to ask questions about and receive a timely reply to their concerns over “land reclamation” and construction activities. States should be encouraged to invite observers to inspect their “land reclamation” and construction activities.²¹

Paragraph 5(c) calls for “notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise.” ASEAN and China should reinforce this clause by operationalizing a notification process. In addition, in order to build confidence and trust, military observers from neighboring states should be invited to attend these exercises.

Paragraph 6 (a and b) of the DOC makes provision for the protection of the marine environment and marine scientific research. In light of China’s claims that it conducted an environmental impact study prior to embarking on its present “land reclamation,” and Philippine allegations that China’s “land reclamation” has damaged the marine environment (coral reefs), ASEAN and China should assign high priority for its first joint scientific study of the impact of all so-called “land reclamation” efforts in the South China Sea on the marine environment.

Paragraph 6(c) makes provision for confidence building in the area of safety of navigation and communication at sea. The ASEAN-China JWG should immediately set up a working group on safety of navigation and communication at sea to address how to manage and prevent dangerous actions by naval and maritime law enforcement agencies operating in the South China Sea. In particular, ASEAN and China should commit themselves to the effective implementation of the Code for Unplanned Encounters at Sea (CUES) and the International Convention for the Safety of Life at Sea (SOLAS), among other international conventions and norms.²²

Paragraph 6 sets out six general cooperative activities. These cooperative activities should be read within obligations states assume as signatories to UNCLOS. Part IX, for

²¹ The SEANWFZ Treaty makes provision for report and exchange of information (Article 11), request for clarification (Article 12), request for fact finding mission (Article 13) and remedial measures (Article 14); <http://www.asean.org/news/item/treaty-on-the-southeast-asia-nuclear-weapon-free-zone>.

²² CUES was adopted on a voluntary basis by the Western Pacific Naval Symposium in April 2014; see: Jeremy Page, “Pacific Navies Agree to Code of Conduct for Unplanned Encounters,” *The Wall Street Journal*, April 22, 2014, <http://www.wsj.com/articles/SB10001424052702304049904579517342779110078>; and International Convention for the Safety of Life at Sea (SOLAS), <https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf>. The U.S. and Vietnamese navies recently conducted a CUES exercise in waters off central Vietnam. Japan and the Philippines held a CUES naval exercise on May 12, 2015.

example, states with respect to enclosed and semi-enclosed seas that state parties “should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.”²³ In other words cooperation should be viewed as a confidence building measure in itself and not as a prerequisite for cooperation.

Cooperation is an essential confidence building measure. The ASEAN and China JWG should adopt a realistic approach to cooperative confidence building measures. They should not be adopted for form’s sake; they should be specifically linked to addressing the most pressing sources of friction and tensions.

The process of implementing the 2002 DOC has been a protracted and arduous one. To an outsider looking in there appears to be little prospect that the ASEAN-China JWG process will reach a timely consensus to implement cooperative measures and confidence and trust building measures that will address effectively the current sources of tension and deteriorating security environment in the South China Sea. Despite ASEAN and Chinese upbeat declarations of progress and commitment to an early conclusion of a COC that too appears over the horizon.

In addition to the specific issues addressed above, there are other strategic issues that need to be addressed to manage and reduce tensions in the South China Sea that result from unilateral actions by states to assert sovereignty over disputed territory and sovereign jurisdiction over disputed maritime zones. These strategic issues are beyond the remit of the ASEAN-China JWG that is narrowly focused on the implementation of the DOC.

Track 2 ASEAN and Its Dialogue Partners

ASEAN’s present diplomatic course, if unaltered, runs the risk of marginalizing ASEAN’s centrality in the political-security affairs of Southeast Asia. ASEAN should continue its consultations within the ASEAN-China JWG framework and at the same time ASEAN should consider adopting a a binding code of conduct for Southeast Asia’s maritime domain as a step towards managing maritime disputes among its members.²⁴

²³ Part IX continues: To this end they shall endeavour, directly or through an appropriate regional organization:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article [emphasis added].

²⁴ For a fuller discussion see: Carlyle A. Thayer, *Indirect Cost Imposition Strategies in the South China Sea: U.S. Leadership and ASEAN Centrality*, Maritime Strategy Series, Washington, D.C.: Center for New American Security, April 2015. 1-13. <http://www.cnas.org/sites/default/files/publications->

ASEAN should pursue a dual track approach involving two components.

First, ASEAN must be more proactive in shaping consensus among its member as part of the ASEAN Political-Security Community-building process.

ASEAN should hold its members who are claimant states to the highest standards of transparency with respect to three areas:

1. bringing their maritime zones into conformity with international law including UNCLOS;
2. provide a statement clarifying their claims to features and maritime zones in the South China Sea;²⁵ and
3. provide a detailed account of the chronology of when features in the South China Sea were occupied and report on the extent and purpose of all infrastructure developments, including so-called “land reclamation,” undertaken particularly since November 2002 when the DOC was adopted. The provisions of the DOC regarding “self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability” in the South China Sea.

Second, ASEAN must be more proactive in using legal, diplomatic and political means that would reinforce Southeast Asia’s autonomy and ASEAN centrality in the region’s security architecture. ASEAN’s dogged pursuit of promoting confidence-building measures under the DOC and a binding COC with China, while an important goal, is fundamentally flawed for five reasons:

First, this approach reinforces divisions in ASEAN between (a) front line claimant states the Philippines and Vietnam and the other claimant states, Brunei and Malaysia, and (b) claimant and non-claimant states, thus undermining ASEAN unity.

Second, China will not agree to a binding COC that has treaty status; this will result in a compromise COC that falls short of meeting the security and other concerns of Southeast Asia’s claimant states.

Third, because ASEAN and China have agreed to proceed with consultations on the drafting of a COC on the basis of consensus, China can delay these proceedings indefinitely.

Fourth, because there is no agreed road map and time limit on this process, China can continue to consolidate its presence in the South China Sea and extend its de facto control over waters that overlap with the EEZs of littoral states.

Fifth, the geographical area of ASEAN’s proposed COC cannot be defined until China either clarifies or withdraws its nine-dash line claim to the South China Sea.

[pdf/CNAS%20Maritime%20%20Thayer.pdf](#).

²⁵ See the discussion in Robert Beckman, “The UN Convention on the Law of the Sea and Maritime Disputes in the South China Sea,” *The American Journal of International Law*, 107(1), January 2013, 142-163.

ASEAN should promote an ASEAN Treaty of Amity and Cooperation in Southeast Asia's Maritime Domain (hereafter the Treaty) among its members.²⁶ And ASEAN should enlist the support of its dialogue partners to support this initiative. The Treaty should set out the geographical boundaries of Southeast Asia's maritime domain; following SEANWFZ these should include the respective continental shelves and EEZs of all ASEAN members (and future members).²⁷ This Treaty should have a protocol of accession inviting all ASEAN dialogue partners to sign.

Why should ASEAN adopt a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain? There are five reasons:

First, security of Southeast Asia's maritime domain is indivisible for all ASEAN members, whether coastal or landlocked states.

ASEAN's proposed COC, because it is focused solely on the South China Sea, does not cover maritime approaches to the Malacca Straits on the western seaboard of Myanmar, Thailand and Indonesia, the Gulf of Thailand, the waters surrounding the Indonesian archipelago and waters to the north, east and south of the Philippines archipelago.

Second, international law, including the United Nations Convention on Law of the Sea, applies equally throughout Southeast Asia's maritime domain and not just the South China Sea. It is applicable to all states.

Third, the treaty would incorporate the norms and legal obligations that are unlikely to be included in the COC.

Fourth, China would be put under pressure to join other dialogue partners in acceding to the treaty or bear the political costs of remaining outside its provisions.

Fifth, the treaty would reinforce ASEAN unity and Southeast Asia's autonomy by placing ASEAN at the centre of relations with outside maritime powers. The Treaty would overcome differences between claimant and non-claimant states by making all ASEAN members stakeholders, including Cambodia, Myanmar and landlocked Laos.²⁸ The

²⁶ This proposal is a modification of an idea first presented by the author to "Maritime Security: Towards a Regional Code of Conduct," 8th CSCAP General Conference, Dangers and Dilemmas: Will the New Regional Security Architecture Help?, sponsored by the Council for Security Cooperation in the Asia-Pacific, Hanoi, November 21-22, 2011. This proposal was refined in two subsequent presentations: Thayer, "Positioning ASEAN between Global Powers," Presentation to the 14th Regional Outlook Forum, Institute of Southeast Asian Studies, Singapore, January 5, 2012 and Thayer, "Beyond Territoriality: Managing the Maritime Commons in the South China Sea," Paper delivered to the 28th Asia-Pacific Roundtable, International Institute of Strategic Studies, Kuala Lumpur, June 2-4, 2014.

²⁷ Such as Timor-Leste.

²⁸ Cambodia and Myanmar were the only two members of ASEAN to remain silent when maritime security/South China Sea issues were first raised at the November 2011 East Asia Summit Leaders' Retreat. Cambodia played a spoiling role when it was ASEAN Chair in 2012 by preventing any mention of South China Sea issues in the customary joint statement; none was issued. Cambodia and Laos both demurred when ASEAN foreign ministers held a retreat in early 2015 to discuss China's "land reclamation" activities in the South China Sea. On Cambodia's role in 2012 see: Carlyle A. Thayer, "ASEAN'S Code of Conduct in

Treaty would also reinforce ASEAN's corporate and legal identity and enhance its ability to deal with external powers.

What should be included in a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain?

The Treaty's Preamble should include pledges by all ASEAN members to bring their maritime boundaries and claims into accord with international law, including UNCLOS with particular attention to eliminating excessive baselines and clearly distinguishing islands from rocks for purposes of maritime delimitation.

The Treaty should include provision for setting up an independent panel of technical and legal experts who could be called on to assist in determining base lines and the classification of islands and rocks.

The Treaty should commit all signatories to renounce the threat of and use of force to settle their disputes over sovereignty and sovereign rights and disruption of good order at sea including safety of navigation and over flight.

The Treaty should include a pledge to resolve all outstanding disputes regarding land features in Southeast Asian waters, overlapping EEZs and delimitation of continental shelves between and among ASEAN members.²⁹

The Treaty should incorporate references to previous ASEAN treaties such as the TAC and SEANWFZ and international maritime conventions such UNCLOS, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Code for Unplanned Encounters at Sea, and other relevant conventions.

The Treaty should include a binding commitment to resolve all disputes through peaceful mean including political-diplomatic, third party mediation or international legal arbitration.

The Treaty should include a provision for the demilitarization of islands and rocks and prohibit the deployment of specified types of weapon systems, such as land based anti-ship missiles. However, for purposes of general security, including protection against piracy and armed criminals, the Treaty should permit the stationing of Coast Guard and police personnel on occupied features.

The Treaty should contain a provision requiring all signatories to cooperate in marine scientific research, marine pollution, fisheries management, search and rescue, anti-piracy and other agreed areas.

the South China Sea: A Litmus Test for Community-Building?," *The Asia-Pacific Journal*, 10(34), No. 4, August 20, 2012, 1-23.

²⁹ Note the recurrent tensions between Indonesia and Malaysia over the waters around Ambalat; "Jet fighters, war boats ready to launch attack," *Jakarta Post*, June 26, 2011.

Finally, the Treaty should make provision for setting up a mechanism to handle complaints and disputes that may arise. Such a mechanism should be included under the ASEAN Political-Security Community Council.

In addition, ASEAN's Political-Security Community Council needs to develop a whole-of-ASEAN approach to South China Sea issues by directing its subordinate agencies (ASEAN Defense Ministers, ASEAN Navy Chiefs, ASEAN Coast Guards, etc.) to develop effective policies to address security challenges arising from South China Sea disputes. Once ASEAN has established a common position, ASEAN officials should take its policy proposals to ASEAN-centric multilateral institutions such as the ASEAN Regional Forum, Expanded ASEAN Maritime Forum (EAMF),³⁰ ASEAN Defense Minister's Meeting Plus and to the East Asia Summit for endorsement.

A key priority for ASEAN is to play a more proactive role in managing territorial disputes in the South China Sea and preventing their militarization, and dampening great power rivalry by asserting to a greater extent that heretofore Southeast Asia's regional autonomy and ASEAN's centrality in the region's security architecture.

³⁰ See the author's suggestions to the EAMF: Carlyle A. Thayer, "Navigating Uncharted Waters: Maritime Confidence Building Measures and the Expanded ASEAN Maritime Forum," Presentation to "Enhancing Regional Maritime Security, Freedom of Safety of Navigation through Practical Implementation of Confidence Building Measures as well as Regional Instruments to Prevent and Manage Incidents at Sea," 3rd ASEAN Expanded Maritime Forum, Furama Resort Hotel, Da Nang, Vietnam, August 28, 2014.