

# Review of the Implementation of the 2002 ASEAN-China DOC and COC and Challenges

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A three thousand meter runway being constructed on Fiery Cross Reef as a result of Chinese land reclamation. Photo: Airbus Defence and Space, March 23, 2015.

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## Review of the Implementation of the 2002 ASEAN-China DOC and COC and Challenges

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### Abstract

This paper presents a review of the implementation of the ASEAN-China Declaration on Conduct of Parties in the South China Sea (DOC-SCS) over the period 2002 to the present. The paper is divided into four parts. Part 1 reviews the legal and political obligations that states have agreed to undertake as signatories to the United Nations Convention on the Law of the Sea and the DOC-SCS. This section also includes ASEAN's definition of its maritime boundaries as stipulated in the 1995 South East Asian Nuclear Weapons Free Zone Treaty. Part 2 present a broad overview of progress in implementing the DOC-SCS including the adoption of Terms of Reference, Guidelines to Implement the DOC-SCS and major outcomes of the meetings of the ASEAN-China Joint Working Group to Implement the DOC-SCS. Part 3 identifies eight challenges to the effective implementation of the DOC-SCS resulting from unilateral state actions to assert sovereignty claims, confrontation between the major powers, massive land reclamation by China, and the competitive regional arms buildup. Part 4 addresses the way forward and presents recommendations on how the wording of paragraphs 4-6 in the DOC-SCS might be applied to address challenges in effectively implementing the DOC-SCS. The paper suggests that ASEAN pursue a dual track approach in implementing the DOC-SCS and managing the security environment in the South China Sea.

KEYWORDS: ASEAN, China, Code of Conduct, cooperative confidence building measures, Declaration on Conduct of Parties, dual track, South China Sea, United Nations Convention on Law of the Sea

### Introduction

This presentation considers the challenges to the implementation of the Declaration on Conduct of Parties in the South China Sea (DOC-SCS) from 2002 to the present. This presentation comprises four parts. Part 1 provides a brief general background. Part 2 discusses the positive developments in implementing the DOC-SCS. Part 3 discusses the challenges to implementing the DOC-SCS. Part 4 offers some modest proposals on the way forward.

### Part 1 Background

This section presents legal obligations that states have agreed to undertake as signatories to the United Nations Convention on Law of the Sea (UNCLOS) and political obligations states have agreed to undertake as signatories to the Declaration on Conduct of Parties in the South China Sea (November 4, 2002). This section also includes ASEAN's statement of the extent of its land and maritime area.

States that are signatory to UNCLOS<sup>2</sup> and that have maritime jurisdictional disputes with other states, *inter alia*, have the following obligations:

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<sup>2</sup> United Nations Convention on the Law of the Sea;  
[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

- pending agreement on the delimitation of overlapping Exclusive Economic Zones (EEZs) to enter into provisional arrangements of a practical nature (Article 74([3])<sup>3</sup>;
- to settle their disputes peacefully (Article 279);
- to exchange views through dialogue and consultations (Article 283);
- to invite other states in which there is a dispute concerning the interpretation or application of UNCLOS to submit the dispute to conciliation (Article 284.1); and
- cooperate in semi-enclosed seas (UNCLOS Part IX).

Article 123 of Part IX states:

States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. 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.<sup>4</sup>

Under the 2002 DOC-SCS signatories agreed:

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

5. The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them, including:

- a. holding dialogues and exchange of views as appropriate between their defense and military officials;
- b. ensuring just and humane treatment of all persons who are either in danger or in distress;
- c. notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise; and
- d. exchanging, on a voluntary basis, relevant information.

6. Pending a comprehensive and durable settlement of the disputes, the Parties concerned may

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<sup>3</sup> Article 74(3) continues, “and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

<sup>4</sup> UNCLOS, op. cit., 63-64.

explore or undertake cooperative activities. These may include the following:

- a. marine environmental protection;<sup>2</sup>
- b. marine scientific research;<sup>2</sup>
- c. safety of navigation and communication at sea;<sup>2</sup>
- d. search and rescue operation; and<sup>2</sup>
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation.<sup>5</sup>

In December 1995, ASEAN adopted the Treaty on the South East Asia Nuclear Weapons Free Zone (SEANWFZ).<sup>6</sup> The 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].

All ten ASEAN member states subscribed to the SEANWFZ Treaty. China was the first nuclear power to offer to accede to the SEANWFZ Treaty.

In summary, international law (UNCLOS), the non-binding political Declaration on Conduct of Parties in the South China Sea, and the SEANWFZ Treaty set the legal, normative and geographic framework for the peaceful settlement of disputes in the South China Sea. There are, of course, other legal and normative instruments that may also contribute to the peaceful settlement of disputes in the South China Sea, including the Charter of the United Nations.

## Part 2 Implementing the DOC-SCS – The Pluses

It has been twelve years and five months since the ASEAN and China agreed on the DOC-SCS. 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.<sup>7</sup>

<sup>5</sup> Declaration on the Conduct of Parties in the South China Sea (November 4, 2002), <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

<sup>6</sup> Treaty on the Southeast Asia Nuclear Weapon-Free Zone, <http://www.asean.org/news/item/treaty-on-the-southeast-asia-nuclear-weapon-free-zone>.

<sup>7</sup> "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>.

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."<sup>8</sup>

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."<sup>9</sup> China rejected the Philippines's claim.<sup>10</sup> On December 11, 2014 Vietnam announced that it had filed a Statement of Interest with the Permanent Court of Arbitration asking that Vietnam's interests be taken into account by the Arbitral Tribunal.<sup>11</sup> 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 9<sup>th</sup> 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-SCS). 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

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<sup>8</sup> *Ibid.*

<sup>9</sup> 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](http://www.pca-cpa.org/showpage.asp?pag_id=1529).

<sup>10</sup> 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](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>11</sup> 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.

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.<sup>12</sup>

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.<sup>13</sup>

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 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.<sup>14</sup>

With respect to ASEAN-China consultations on the COC-SCS, 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.<sup>15</sup>

Seventh, the 12th ASEAN-China Joint Working Group on the DOC-SCS met in Thailand in late October 2014. According to the Chairman's Statement of the 17<sup>th</sup> 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

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<sup>12</sup> 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](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1079289.shtml).

<sup>13</sup> *Ibid.*

<sup>14</sup> Ministry of Foreign Affairs of The Kingdom of Thailand, "The 10<sup>th</sup> 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-lm.html>.

<sup>15</sup> *Ibid.*

2014. We will continue to maintain the momentum of regular official consultations and work towards the early conclusion of the COC.<sup>16</sup>

Premier Li Keqiang in remarks to the East Asia Summit in Nay Pyi Taw noted that with respect to the COC-SCS an “early harvest has been achieved.”<sup>17</sup>

The 26<sup>th</sup> ASEAN Summit is the most recent venue at which progress on South China Sea and DOC-SCS and COC-SCS 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].

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 twelve meetings to date. Progress has been recorded in general terms on how to implement the DOC and initial consultations on a COC-SCS 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-SCS – The Minuses

Regional analysts have noted that since the signing of the 2002 DOC-SCS 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-SCS process has contributed positively to the maintenance of peace and security in the South China Sea. But a review

<sup>16</sup> Ministry of Foreign Affairs of the People’s Republic of China, “Chairman’s Statement of the 17<sup>th</sup> ASEAN-China Summit,” November 13, 2014; [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1215668.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1215668.shtml).

<sup>17</sup> 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/lkqzlcxdyhzlrdxlybmdmdjxzsfw/t1211375.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/lkqzlcxdyhzlrdxlybmdmdjxzsfw/t1211375.shtml).

of developments “on the ground,” or literally on the sea, reveal a marked increase in unilateral actions by parties to the DOC-SCS and a rise in tensions affecting “peace and stability” in the South China Sea.

Over the period from 2002 to the present there have been at least eight sources of unilateral action by state actors that have undermined the spirit if not letter of the 2002 DOC-SCS 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 20 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.
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 virtual annexation of Scarborough Shoal in 2012 and investment of Second Thomas Shoal are cases in point.<sup>18</sup> In addition, Chinese maritime enforcement vessels have been implicated in the electronic

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<sup>18</sup> “Investment” is used in the military sense of surrounding a place by a hostile force in order to besiege or blockade it.



- jamming of an Indonesian maritime enforcement vessel in order to secure the release of fishermen arrested for poaching.<sup>19</sup> Chinese maritime enforcement vessels have removed territorial markers from Erica Reef (*Terumbu Siput*) and Luconia Shoals in Malaysian waters in recent years.
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 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.<sup>20</sup>

6. Since 2014 satellite imagery has revealed extensive Chinese land reclamation efforts on seven features in the South China Sea including two air strips, one more than 3,000 metres in length. China reserves the right to unilaterally declare an Air Defense

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<sup>19</sup> 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>.

<sup>20</sup> "Joint Communique 47<sup>th</sup> ASEAN Foreign Ministers' Meeting," August 9, 2014. <http://www.asean.org/news/asean-statement-communiques/item/joint-communique-47th-asean-foreign-ministers-meeting>.

Identification Zone over the South China Sea.<sup>21</sup> In the past three months, Chinese authorities have reportedly warned Philippines Navy and Air Force planes to leave international airspace above disputed areas in the South China Sea.<sup>22</sup> China has counter-charged that it is just catching up with its neighbors, whom China alleges have also reclaimed land, engaged in construction, and even placed “missiles” on their maritime possessions. More recent satellite imagery has revealed Vietnamese land reclamation on Sand Cay and West London Reef. The scope, scale and intensity of Chinese reclamation activities has aroused regional concern, not least because of its lack of transparency. Vietnamese land reclamation represents 0.2% of the total area reclaimed by China as of March 2015.

7. The major powers, principally China and the United States, but 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-SCS discussions. The United States’ Cooperation Afloat Readiness And Training (CARAT) exercises commenced in 1995. Recent news reporting suggests that Japan and the United States may mount joint air patrols over 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 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.

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<sup>21</sup> 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>.

<sup>22</sup> Manuel Mogato, “China warns Philippine military planes away from disputed sea area: Manila,” Reuters, May 7, 2015.

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 – The Way Forward

The 2002 DOC-SCS represents the collective commitment by ASEAN members and China to promote peace, stability and mutual trust and ensure resolution of disputes in the South China Sea. This section provides a number of modest proposals that the ASEAN-China Joint Working Group might consider as a means to operationalize the DOC-SCS to address the challenges to its effective implementation.

As a matter of urgency, ASEAN-China discussions on the DOC-SCS 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 in Part 3 above. Specifically, ASEAN and China need to clarify and operationalize key terms in paragraphs 4, 5 and 6 of the DOC-SCS.

Paragraph four of the DOC-SCS 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-SCS. 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-SCS 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-SCS 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 unilateral massive 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.

The purpose of the DOC-SCS 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 states should be called upon to provide an account of land reclamation and construction activities undertaken since the 2002 DOC-SCS 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.<sup>23</sup>

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-SCS 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 land reclamations 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.<sup>24</sup>

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 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.”<sup>25</sup> In other words cooperation should be viewed as a confidence building measure in itself and not as a prerequisite for cooperation.

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<sup>23</sup> 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>.

<sup>24</sup> 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 will hold a CUES naval exercise on May 12, 2015.

<sup>25</sup> 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

Cooperation is an essential confidence building measure. The ASEAN and China JWG should adopt a hard-headed 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 prolonged consultations over implementing the DOC-SCS have led to divisions with ASEAN. For example, not only did Cambodia's Foreign Minister Hor Namhong, as ASEAN Chair, prevent ASEAN Foreign Ministers from issuing their customary joint statement in 2012,<sup>26</sup> but Cambodia's Prime Minister Hun Sen after a period of silence, recently argued that disputes in the South China Sea can only be settled bilaterally by the countries directly concerned.<sup>27</sup> Cambodia's Foreign Affairs Secretary of State convened a meeting of twenty-eight diplomats in Phnom Penh to announce that, "ASEAN can't settle this dispute. We are not a legal institution, it's the court that settles who's right and wrong."<sup>28</sup> The Secretary's assertion is undermined by the ASEAN Charter that gave ASEAN a legal personality; and China point blank refuses to take part in arbitral proceedings.

Chinese Premier Li Keqiang recently endorsed ASEAN's role in upholding stability in the South China Sea jointly with China. Premier Li, in discussing China's dual track approach, also stated that specific disputes should be settled directly by negotiations and consultations by the countries directly concerned.<sup>29</sup>

The process of implementing the 2002 DOC-SCS 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

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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].

<sup>26</sup> Carlyle A. Thayer, "ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?," *The Asia-Pacific Journal*, Vol. 10, Issue 34, No. 4, August 20, 2012, 1-23. This article is based on leaked notes taken at the ASEAN Foreign Ministers' Retreat.

<sup>27</sup> Kyodo News, "Hun Sen urges ASEAN states to settle dispute directly with China," *Today* (Singapore), Ma9, 2015. <http://www.todayonline.com/world/asia/hun-sen-urges-asean-states-settle-disputes-directly-china>.

<sup>28</sup> Prak Chan Thul, "Cambodia says ASEAN should stay out of South China Sea fracas," Reuters, May 8, 2015; <http://news.thaivisa.com/cambodia/cambodia-says-asean-should-stay-out-of-south-china-sea-fracas/59842/>.

<sup>29</sup> Xinhua, "China, ASEAN identify dual-track approach for dealing with South China Sea issue: Li," November 13, 2014; [http://news.xinhuanet.com/english/china/2014-11/13/c\\_133787079.htm](http://news.xinhuanet.com/english/china/2014-11/13/c_133787079.htm).

ASEAN and Chinese upbeat declarations of progress and commitment to an early conclusion of a COC-SCS that too appears over the horizon. As I have written elsewhere

China's assertive and aggressive actions, combined especially with recent land reclamation activities, represent nothing less than the slow and deliberate excision of ASEAN's maritime heart from the Southeast Asian region. China's actions threaten to undermine ASEAN's 48-year endeavor to bolster Southeast Asia's autonomy from external intervention through altering "facts on the ground" by annexing the South China Sea and placing it under Chinese administrative and military control.

China also aims at undermining U.S. alliances and security guarantees by using civilian maritime enforcement ships and fishing fleets to conduct carefully orchestrated acts of intimidation and coercion against the Philippines and Vietnam, advancing China's physical control over the South China Sea – a stratagem to which the United States has yet to work out an effective response. Finally, China seeks to exploit differences among ASEAN members and draw ASEAN into East Asian exclusivist security arrangements, thus undermining ASEAN's centrality in regional security affairs.<sup>30</sup>

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-SCS.

ASEAN should consider its own dual track approach; it should continue its consultations within the ASEAN-China JWG framework and at the same time ASEAN should consider adopting a Code of Conduct for Southeast Asia's maritime domain as a step towards resolving maritime disputes among its members.<sup>31</sup>

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),<sup>32</sup> ASEAN Defense Minister's Meeting Plus and to the East Asia Summit for endorsement.

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<sup>30</sup> 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, 7. <http://www.cnas.org/sites/default/files/publications-pdf/CNAS%20Maritime%208%20Thayer.pdf>.

<sup>31</sup> For a fuller discussion see: Thayer, *Indirect Cost Imposition Strategies in the South China Sea: U.S. Leadership and ASEAN Centrality*, op. cit.

<sup>32</sup> 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," 3<sup>rd</sup> ASEAN Expanded Maritime Forum, Furama Resort Hotel, Da Nang, Vietnam, August 28, 2014.

The two policy tracks suggested above are designed to reinforce ASEAN's unity, ASEAN's centrality in the region's security architecture, and Southeast Asia's regional autonomy from undue influence by outside powers.