




# Overcoming the Impasse in the South China Sea

Jointly Defining EEZ Claims

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# Executive Summary

The dispute involving China, Taiwan, and four Southeast Asian countries over territorial sovereignty and maritime rights in the South China Sea has been described as one of the world's most complex and intractable international relations problems. Despite its regional and international ramifications, there is no clear roadmap for how it should be managed or resolved. The Philippines brought an arbitration claim against China, but the limited nature of the issues before the tribunal means that even if it decides that it has jurisdiction to hear the case, the award will not resolve issues of sovereignty or delimitation of any maritime boundaries. Other attempts to manage potential conflicts, namely, seeking a binding Code of Conduct, a moratorium or “freeze” on provocative activities, as well as greater cooperation between claimants, including joint development, have all foundered. Despite China's recent indication that it is willing to reconsider the Code of Conduct and push for greater cooperation, significant hurdles lie ahead.

This paper argues that claimants should *jointly* define exclusive economic zone (EEZ) claims from the largest islands in the South China Sea on a “without prejudice” basis as a means to get around the current political and diplomatic impasse. It builds on an earlier proposal by Robert Beck-

man and Clive Schofield for China to define EEZ claims from the largest islands so that *undisputed areas*, which ASEAN claimants can develop unencumbered, as well as *areas of overlapping claims*, where joint development can take place, are clearly identified.

Defining EEZ claims from the largest islands is complementary to the other plans for conflict management since they all require agreement on the area over which they are to apply. The process required to jointly define claims could also foster the trust necessary for other cooperative arrangements and encourage claimants to limit provocative activities that are heightening tensions.

Adopting this proposal would require compromise and political will on the part of all claimants, where rising nationalism complicates matters. Yet, rolling back nationalism or at least *reinterpreting what such sentiment should mean in the context of the South China Sea* is possible. ASEAN claimants have a strong interest in accepting the proposal since they are increasingly losing leverage to China, particularly in light of recent reports of its large-scale land reclamation works in the Spratly Islands. Adopting the proposal is also in China's interests not least because it helps the country achieve its strategic objectives in the region.

A joint initiative to clarify claims would involve the following broad steps:

1. Claimants explicitly stating that defining EEZ claims from the largest islands and any subsequent delimitation between overlapping EEZs is a “provisional arrangement of a practical nature” that will have no effect on the final determination of sovereignty claims or the delimitation of maritime boundaries.
2. Claimants together appointing a group of independent experts and agreeing on their terms of reference.
3. Independent experts coming to agreement on broad criteria for what constitutes an island capable of sustaining human habitation or economic life.
4. Experts agreeing on how to approach a land feature on which works have been carried out.
5. Independent experts determining the status of land features, their baselines and their maritime entitlements.
6. Claimants agreeing on whether delimitation in the case of overlapping EEZs should be the equidistance line or something that gives islands only partial effect.

# Overcoming the Impasse in the South China Sea

## Jointly Defining EEZ Claims

The dispute involving China, Taiwan, and four Southeast Asian countries—the Philippines, Vietnam, Malaysia and Brunei—over territorial sovereignty and maritime rights in the South China Sea has been described as “probably the world’s single most complex, and intractable, international relations problem.”<sup>1</sup> Recent Taiwanese reports of Beijing’s plans to expand at least two reefs in the Spratly Islands, which would allow the Mainland to dominate the air and sea in the area and pave the way for a declaration of an air defense identification zone (ADIZ) over the South China Sea,<sup>2</sup> are heightening concerns and tensions in a region that has already seen skirmishes between claimants, land grabbing, and a steady climb in military spending.<sup>3</sup> Even non-claimants are

eyeing the dispute warily: Indonesia has been careful to stay out of the fray, but in September 2014 its agency for coordinating sea security warned that an encroaching Chinese presence posed a “real threat” to Indonesia.<sup>4</sup>

The dispute has ramifications beyond the region. Although the United States is not a claimant and takes no position on competing claims to sovereignty or maritime rights, it insists that the dispute be resolved in accordance with international law and without coercion or the use of force.<sup>5</sup> As one of the sticking points in U.S.-China relations, the South China Sea dispute has a clear impact on the bilateral relationship that is most likely to determine international peace, security and prosperity in the

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<sup>1</sup> “The South China Sea and Australia’s regional security environment,” launch by Professor the Hon. Gareth Evans AC QC, Chancellor of The Australian National University, of National Security College Occasional Paper N° 5, Crawford School of Public Policy, ANU, Canberra, October 2, 2013. <http://nsc.anu.edu.au/research-and-publications/south-china-sea-project.php>.

<sup>2</sup> “Mainland Launches Land Reclamation Project in the South China Sea,” Kuomintang Official Website, October 21, 2014. <http://www.kmt.org.tw/english/page.aspx?type=article&mnum=112&anum=15286>.

<sup>3</sup> Military spending in Southeast Asia increased by 10 percent between 2012 and 2013 alone. For an overview of the increase in military spending in Southeast Asia, see Zachary Abuza, “Fear us: Military expenditures in Southeast Asia,” *The Indo Pacific Review*, September 11, 2014. <http://www.indopacificreview.com/military-expenditures-southeast-asia/#sthash.2BILVr1Z.G5MoFvhK.dpbs>.

<sup>4</sup> Fadli, “South China Sea conflict: A real threat to Indonesia,” *The Jakarta Post*, September 20, 2014. <http://www.thejakartapost.com/news/2014/09/20/south-china-sea-conflict-a-real-threat-indonesia.html>.

<sup>5</sup> Ronald O’Rourke, *Maritime territorial and exclusive economic zone (EEZ) disputes involving China: Issues for Congress*, Congressional Research Service R42784, September 26, 2014, p 21. <http://fas.org/sgp/crs/row/R42784.pdf>.

decades to come. Some interpret the U.S.-Philippines Mutual Defense Treaty (1951) as obliging the United States to come to the defense of the Philippines if China attempts to take maritime territories in the South China Sea by force.<sup>6</sup> Those taking this interpretation would no doubt have felt vindicated by President Barack Obama's statement during his April 2014 visit to the Philippines that "our commitment to defend the Philippines is ironclad,"<sup>7</sup> even though the president had earlier stopped short of saying that the Mutual Defense Treaty would apply to Philippine-claimed land features in the South China Sea.<sup>8</sup> The armed forces of the United States and China have had near-miss incidents.<sup>9</sup> Even if the United States is not drawn into open conflict with China, what happens in the South China Sea could impact the balance of power in the Asia-Pacific and beyond.

Despite its significant potential repercussions, there is no clear roadmap for how to manage or resolve the conflict. The United States' proposed "freeze" and the Philippines' "Triple Action Plan," both requiring a moratorium on activities that "would complicate or escalate disputes," have to

varying degrees fallen flat. Little hope is held out for the early conclusion of a Code of Conduct to put meat on the bones of the Declaration on the Conduct of Parties in the South China Sea concluded in 2002, even if China has come out to say that it is willing to discuss it.

This paper argues that a recent proposal for China to define exclusive economic zone (EEZ) claims from the largest islands in the Spratly Islands and Paracel Islands merits greater attention as a means to move the dispute forward. Acceptance of the proposal, put forward by Robert Beckman and Clive Schofield,<sup>10</sup> an international lawyer and geographer respectively, will require compromise and political will on the part of all claimants. Crucially, however, it does not require the Chinese government to formally disavow the nine-dash line, a crude, U-shaped line in official Chinese documents by which China appears to lay claim to much of the South China Sea. Nor does it require Beijing to retreat from its two fundamental principles on the disputes, namely, that it has sovereignty over the islands and that the maritime boundaries can only be delimited by agreement.<sup>11</sup>

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<sup>6</sup> Article IV of the Treaty states: "Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes." Article V details that an "armed attack" for the purposes of Article IV: "is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific." A second interpretation of the Mutual Defense Treaty is that it does not obligate the United States to come to the defense of the Philippines over maritime areas that are disputed by the Philippines and other nations. For a discussion of this issue, see Thomas Lum and Ben Dolven, *The Republic of the Philippines and U.S. Interests—2014*, Congressional Research Service R43498, May 15, 2014. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCCEQFjAA&url=http%3A%2Ffas.org%2Fsgp%2Fcrs%2Frow%2FR43498.pdf&ei=wjg5VJv1CqTmsATNsICgBQ&usq=AFOjCNHewp5D6Qsmq6pHtB-BoEPiVB2cSQ&bv=77161500,d.cWc>.

<sup>7</sup> Quoted in Mark Felsenthal and Matt Spetalnick, "Obama says U.S. commitment to defend Philippines 'ironclad,'" *Reuters*, April 29, 2014. <http://www.reuters.com/article/2014/04/29/us-philippines-usa-obama-idUSBREA3S02T20140429>.

<sup>8</sup> Lum and Dolven, *supra* n 6, p 13.

<sup>9</sup> In August 2014, a Chinese fighter jet intercepted a U.S. Navy P-8A Poseidon aircraft over the South China Sea about 135 miles east of the Chinese island of Hainan. The Chinese jet allegedly made "several dangerous passes" past the Poseidon, coming within 20 feet at one point: Rear Admiral John Kirby, "China Intercept with Navy P-8," Defense Department Briefing, C-Span, August 22, 2014.

<sup>10</sup> Robert Beckman and Clive Schofield, "Defining EEZ claims from islands: A potential South China Sea change," *The International Journal of Marine and Coastal Law*, 29(2014), 193-243, 209. [http://booksandjournals.brillonline.com/deliver/journals/15718085/29/2/15718085\\_029\\_02\\_s001\\_text.pdf?jsessionid=orrvznmb7ryv.x-brill-live-02?itemId=http://brill.metastore.ingenta.com/content/journals/10.1163/15718085-12341321&mimeType=pdf&isFastTrackArticle](http://booksandjournals.brillonline.com/deliver/journals/15718085/29/2/15718085_029_02_s001_text.pdf?jsessionid=orrvznmb7ryv.x-brill-live-02?itemId=http://brill.metastore.ingenta.com/content/journals/10.1163/15718085-12341321&mimeType=pdf&isFastTrackArticle). For a shorter version targeted at a non-legal audience, see Beckman and Schofield, "The South China Sea disputes: Formula for a paradigm shift?" N° 035/2014, February 19, 2014. <http://cil.nus.edu.sg/wp-content/uploads/2010/12/Beckman-Schofield-RSIS-The-South-China-Sea-Disputes-19-Feb-2014.pdf>.

<sup>11</sup> Zhang Hua, "China's Position on the Territorial Disputes in the South China Sea between China and the Philippines," Embassy of the People's Republic of China in the Republic of the Philippines, April, 3, 2014. <http://ph.china-embassy.org/eng/xwfb/t1143881.htm>.

This paper is structured as follows. First, it looks at the main proposals for managing the South China Sea dispute and why these are incomplete answers or have foundered on the rocks. Second, it examines the Beckman-Schofield proposal, likely objections, and possible responses thereto. Third, it considers rising nationalism in claimant states, which complicates management and resolution of the issue. The paper concludes by looking into how the Beckman-Schofield proposal can be made more palatable to parties and detailing steps that they can take in this direction. ASEAN claimants have a strong interest in accepting the proposal or a variant of it since they are increasingly losing leverage to China. It is also in China's interests not only because complying with international law is important and helps to improve China's image, but also because it helps China achieve its strategic objectives in the region.

## The Philippines Arbitration Case

In January 2013, the Philippines brought an arbitration claim against China under the United Nations Convention on the Law of the Sea (UNCLOS), after 17 years of bilateral meetings and exchanges of diplomatic correspondence reaped no fruit.<sup>12</sup> This was met with muted dismay by some ASEAN member states who felt that this might undermine ASEAN as a regional conflict-management framework.<sup>13</sup>

Since bringing its claim against China, the Philippines has publicly urged Vietnam to “make an assessment as to whether resorting to legal means is promotive of their national interest.”<sup>14</sup> Some within legal and policy circles in the United States also publicly or privately support Vietnam commencing legal action against China to facilitate resolution of the dispute in the South China Sea and (in their view) cool tensions.<sup>15</sup>

Such responses have incensed China, which considers arbitration to be against the Declaration on the Conduct of Parties in the South China Sea signed by all ten ASEAN member states and China—the Declaration's fourth principle stipulates that parties should resolve 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.”<sup>16</sup>

China also charges that the five-member tribunal, constituted under Annex VII of UNCLOS, lacks jurisdiction and has declined to take part in proceedings. A tribunal only has jurisdiction over a dispute concerning interpretation or application of UNCLOS, which governs maritime rights and responsibilities.<sup>17</sup> Territorial disputes are not determined by UNCLOS, but by customary international law governing the acquisition and loss of territory. Further, in 2006, China availed itself

<sup>12</sup> Republic of the Philippines Department of Foreign Affairs, *Notification and Statement of Claim*, Manila, January 23, 2013, paragraphs 25 and 26. [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.dfa.gov.ph%2Findex.php%2Fcomponent%2Fdocman%2Fdoc\\_download%2F56-notification-and-statement-of-claim-on-west-philippine-sea%3FItemid%3D546&ei=yINRVMPJBoieyQTZw4KwDw&usq=AFOjCNHII04H6rZcxRQcXNdbxoaA2SYQXQ&bvm=bv.78597519.d.aWw](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.dfa.gov.ph%2Findex.php%2Fcomponent%2Fdocman%2Fdoc_download%2F56-notification-and-statement-of-claim-on-west-philippine-sea%3FItemid%3D546&ei=yINRVMPJBoieyQTZw4KwDw&usq=AFOjCNHII04H6rZcxRQcXNdbxoaA2SYQXQ&bvm=bv.78597519.d.aWw).

<sup>13</sup> Yee Kuang Heng, “ASEAN and the South China Sea disputes” in Huang Jing (eds), *The South China Sea: Central to Asia-Pacific peace and security*, Palgrave, forthcoming 2015.

<sup>14</sup> Quoted in Jim Gomez, “Vietnam threatens legal action against China,” May 21, 2014. <http://bigstory.ap.org/article/vietnam-asks-world-condemn-china-amid-sea-rift>.

<sup>15</sup> See, for example, Jerome Cohen, “Lawfare or warfare? Let impartial tribunals cool Asia's maritime disputes,” *The Diplomat*, May 29, 2014. <http://thediplomat.com/2014/05/lawfare-or-warfare-let-impartial-tribunals-cool-asias-maritime-disputes/>.

<sup>16</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>17</sup> Article 288 UNCLOS.

of a provision allowing a state to opt-out of dispute resolution procedures for the delimitation of overlapping EEZ boundaries and overlapping continental shelves.<sup>18</sup>

The Philippines, however, argues that the issues over which it seeks determination fall squarely within UNCLOS. These include whether China's asserted rights over the sea are those established by UNCLOS; whether the nine-dash line is contrary to UNCLOS and invalid; whether China's occupation of and construction activities on Mischief Reef, McKenna Reef, Gaven Reefs and Subi Reef are unlawful given that they are submerged features that are not located on China's continental shelf; and the status of Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef—the Philippines maintains that these are at most “rocks” generating a territorial sea of 12 nm.<sup>19</sup> None of these issues, the Philippines contends, deal with sovereignty over land features or delimitation in the event of overlapping entitlement.

The limited nature of the issues before the tribunal means that while an award is likely to give clarity over the validity of China's (and Taiwan's) nine-dash line, it will not resolve issues of sovereignty or delimitation of any EEZ boundaries. Thus, even if China adhered to the tribunal's award, the dispute between claimants will persist and managing tensions will continue to be necessary.

## Conflict Management Proposals

Various proposals to manage conflict between claimants have been put on the table over the years, including negotiating and concluding a binding **Code of Conduct**. Under the 2002 Declaration on the Conduct of Parties in the South China Sea, parties had agreed to work, “on the basis of consensus, towards the eventual attainment of a COC.” More than a decade later, this goal remains elusive.

The Chinese foreign minister's statement at the China-ASEAN Foreign Ministers' Meeting in August 2014 that China is willing to “push for the early conclusion of a code of conduct of the parties in the South China Sea (COC) through consensus” has held out hope that new life can be breathed into the Code of Conduct.<sup>20</sup> Indonesia's then Foreign Minister Marty Natalegawa welcomed the statement and highlights how it is “in stark contrast to the recent past when they [the Chinese] were not even willing to talk about it.”<sup>21</sup> This sentiment is echoed by other ASEAN officials who consider the mere willingness of the Chinese to discuss a Code to be “by itself quite an achievement.” At the end of October 2014, senior officials from ASEAN and China met in Bangkok, Thailand to discuss how the Declaration could be implemented. At the meeting, which was co-chaired by the Thai permanent secretary for foreign affairs and China's vice foreign minister, officials agreed to intensify consultations at the senior officers and

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<sup>18</sup> Article 298 allows a State when signing, ratifying or acceding to the Convention to opt out of disputes concerning the interpretation or application of Article 74 and 83, which governs the delimitation of the EEZ and continental shelf between states with opposite or adjacent coasts. For China's declaration under Article 298, see [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm) - China Upon ratification.

<sup>19</sup> Republic of the Philippines Department of Foreign Affairs, *Notification and Statement of Claim*, *supra* n 12.

<sup>20</sup> “Foreign Minister Wang Yi: Build an even closer China-ASEAN Community of common destiny,” Ministry of Foreign Affairs of the People's Republic of China, August 9, 2014. [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1181521.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1181521.shtml).

<sup>21</sup> Quoted in Clint Richards, “Code of Conduct for South China Sea unlikely, yet ASEAN made progress,” *The Diplomat*, August 11, 2014. <http://thediplomat.com/2014/08/code-of-conduct-for-south-china-sea-unlikely-yet-asean-made-progress/>.



working levels and welcomed a 2014 to 2015 work plan on implementing the Declaration.<sup>22</sup>

These positive developments aside, Chinese officials have cautioned that it will take time to work out the details of the Code of Conduct. More fundamentally, an acceptable Code is likely to mean different things to different parties. A bone of contention in the past was whether it should include dispute settlement procedures based on UNCLOS.<sup>23</sup> Given China's objections to the Philippines arbitration case, it is likely that Beijing will continue to object to any such term. As an ASEAN official pointed out, "a big power does not want to tie its hands." Yet, without a binding dispute mechanism to resolve disputes and enforce compliance with the Code of Conduct, it will be no more than a more detailed version of the non-binding Declaration, which parties have seen fit to flout.

Part of the problem with achieving consensus on the Code is the difficulty of achieving consensus *within* ASEAN so that it speaks with one voice. Given that the interests of claimant states, non-claimant states, and the organization itself are not necessarily aligned,<sup>24</sup> or even if aligned are not felt with the same intensity, internal agreement is almost certain to be difficult. There is also the additional hurdle of the type of regional response to prioritize. As one author points out, "The Philippines' and Vietnam's positions and concerns

may grab the headlines, but Malaysia and Brunei have been notably quiet thus far."<sup>25</sup> Indeed, at the Asia-Pacific Economic Cooperation (APEC) Economic Leaders' Meeting in Beijing in November 2014, Malaysia's prime minister told the press that Chinese President Xi Jinping had praised Malaysia's "quiet diplomacy approach" in tackling maritime territorial disputes in the South China Sea,<sup>26</sup> thereby signaling Malaysia's likely continued preference for such an approach.

Another proposal that has been put forward is a **moratorium** on activities that escalate tensions in the South China Sea. At the ASEAN Regional Forum in August 2014, the United States proposed that claimants should voluntarily and jointly "freeze" activities that would "complicate or escalate disputes."<sup>27</sup> The Philippines separately put forward its Triple Action Plan (TAP), which involved as the first step a moratorium on "specific activities that escalate tension in the South China Sea."<sup>28</sup> Both the United States and the Philippines highlighted how this would be in line with the Declaration's fifth principle, namely, to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability."

A moratorium makes eminent sense in principle given that such actions provoke counter-reactions and the situation could easily spiral out of control.

<sup>22</sup> "ASEAN-China cooperation moves forward at the 8th ASEAN-China SOM," Ministry of Foreign Affairs of the Kingdom of Thailand, October 29, 2014. <http://www.mfa.go.th/main/en/media-center/28/50886-ASEAN-China-cooperation-moves-forward-at-the-8th-A.html>.

<sup>23</sup> Sanae Suzuki, "Conflict among ASEAN members over the South China Sea issue," September 2012. [http://www.ide.go.jp/English/Research/Region/Asia/201209\\_suzuki.html](http://www.ide.go.jp/English/Research/Region/Asia/201209_suzuki.html).

<sup>24</sup> Heng, *supra* n 13.

<sup>25</sup> Alice Ba, "Managing the South China Sea disputes: What can ASEAN do?" in Murray Hiebert, Phuong Nguyen, Gregory Poling (eds), *Perspectives on the South China Sea: Diplomatic, legal, and security dimensions of the dispute*, a report of the CSIS Sumitro Chair for Southeast Asia Studies, September 2014, p 2. [https://www.google.com/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0C-CUQFjAB&url=http%3A%2F%2Ffiles.org%2Fpublication%2F140930\\_Hiebert\\_PerspectivesSouthChinaSea\\_Web.pdf&ei=Wcx-oVMrSlbjbsATG84LQAw&usq=AFQjCNGoQ-WLThwAspgDQPZ9RE8Arqf8wQ&bvm=bv.79142246.d.cWc](https://www.google.com/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0C-CUQFjAB&url=http%3A%2F%2Ffiles.org%2Fpublication%2F140930_Hiebert_PerspectivesSouthChinaSea_Web.pdf&ei=Wcx-oVMrSlbjbsATG84LQAw&usq=AFQjCNGoQ-WLThwAspgDQPZ9RE8Arqf8wQ&bvm=bv.79142246.d.cWc).

<sup>26</sup> "Chinese President praises Malaysia's quiet diplomacy on South China Sea issues," *Bernama*, November 11, 2014. <http://www.bernama.com/bernama/v7/ge/newsgeneral.php?id=1084002>.

<sup>27</sup> "Remarks at the East Asia Summit Ministerial Intervention," John Kerry, Secretary of State, Naypyitaw, Burma, August 10, 2014. <http://www.state.gov/secretary/remarks/2014/08/230471.htm>.

<sup>28</sup> "DFA statement on the Philippine proposal 'Triple Action Plan,'" Republic of the Philippines, Department of Foreign Affairs, August 1, 2014. <http://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/3729-dfa-statement-on-the-philippine-proposal-triple-action-plan>.

Yet, the U.S. proposal received a cool response from China and even some ASEAN states.<sup>29</sup> Privately, officials revealed that some member states took umbrage at not being consulted; U.S. officials say in defense that the proposal was merely being put on the table for consideration, not as a fait accompli. Be that as it may, the experience suggests a need for the United States to balance transparency with working behind the scenes to achieve ASEAN buy-in to proposals prior to making them public. Given that the experience also highlights how sensitive China is to U.S. involvement, which it sees as a breach of principle 4 of the Declaration,<sup>30</sup> the United States also needs to prepare the ground with China before taking suggestions public. (China's objection to U.S. involvement is without merit since all countries with an interest in peaceful resolution of the dispute should be entitled to make suggestions for achieving this end.)

The Philippines TAP, which also included as its "intermediate" and "final" steps "urgently working" for the full and effective implementation of the Declaration and the expeditious conclusion of the Code of Conduct, and "final and enduring" resolution of the dispute through arbitration, fared a little better amongst ASEAN members. It appeared to win "muted support" from some Southeast Asian neighbors. According to the Philippines, Vietnam,

Indonesia and Brunei supported the plan.<sup>31</sup> ASEAN as an organization, however, merely "noted" it in its joint communiqué.<sup>32</sup>

China, as was to be expected, voiced strong objections to the Philippines TAP on the basis that it interrupted ongoing conflict resolution talks. The Chinese foreign minister instead pushed for adopting a "dual-track approach," namely, disputes being addressed by "countries directly concerned" through friendly negotiations in a peaceful way, and China and ASEAN jointly maintaining peace and stability in the South China Sea.<sup>33</sup> Privately, officials point to problems with the specifics of a moratorium: agreeing on the activities over which a moratorium would apply, as well as its geographic reach. More fundamentally, China regards a moratorium as unfair, especially now that it is in a relative position of strength: it would stop China from engaging in activities in the South China Sea when other countries had and continue to engage in such activities.<sup>34</sup>

Yet, even if the other claimants halt activities, China is unlikely to do the same. Thus the Philippines' recent announcement that it was suspending planned improvements on a military airstrip on Thitu Island (the largest island it controls and the second largest island in the Spratlys) was targeted,

<sup>29</sup> Paul Mooney and Lesley Wroughton, "U.S. call for South China Sea 'freeze' gets cool response from China," *Reuters*, August 9, 2014. <http://www.reuters.com/article/2014/08/09/us-asean-southchinasea-idUSKBN0G904O20140809>.

<sup>30</sup> Principle 4 of the Declaration on the Conduct of the Parties in the South China Sea states: "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." [Emphasis added.]

<sup>31</sup> "Philippines says China sea action plan gaining support," *Channel NewsAsia*, August 4, 2014. <http://www.channelnewsasia.com/news/asiapacific/philippines-says-china/1295956.html>.

<sup>32</sup> "Joint Communiqué, 47<sup>th</sup> ASEAN Foreign Ministers' Meeting," Association of Southeast Asian Nations, Nay Pyi Taw, Myanmar, August 8, 2014, paragraph 155. <http://www.asean.org/news/asean-statement-communiques/item/joint-communicue-47th-asean-foreign-ministers-meeting>.

<sup>33</sup> "Foreign minister encourages a 'dual-track' approach to sea issue," *China Daily*, August 11, 2014. [http://www.chinadaily.com.cn/china/2014-08/11/content\\_18282602.htm](http://www.chinadaily.com.cn/china/2014-08/11/content_18282602.htm). See also "Maintain peace and stability in the South China Sea with 'two-track thinking,'" *People's Daily*, November 4, 2014. <http://english.peopledaily.com.cn/n/2014/1104/c98649-8804171.html>.

<sup>34</sup> For a brief historical overview of the activities of other claimants, see Andrew Erickson and Austin Strange, "Pandora's sandbox: China's island-building strategy in the South China Sea," *Foreign Affairs*, July 13, 2013. <http://www.foreignaffairs.com/articles/141632/andrew-s-erickson-and-austin-strange/pandoras-sandbox>. For Vietnam's mid-September 2014 agreement to expand cooperation with India in oil and gas exploration and production in waters off its coast, see Vu Trong Khanh and Nguyen Anh Thu, "Vietnam, India to expand oil exploration in contested South China Sea," *The Wall Street Journal*, August 15, 2014. <http://online.wsj.com/articles/vietnam-india-to-expand-oil-exploration-in-contested-south-china-sea-141077168>.

by its own admission, at achieving the moral high ground in its arbitral case against China, rather than encouraging China to halt its own activities.<sup>35</sup> Given the scope of reclamation that China is currently engaged in, its goal seems to be to put itself in a dominant position to defend sovereignty over the islands in the South China Sea. As a contact told me recently, “We won’t change our position [on sovereignty]. So we are making our position stronger, our presence more matched to our position.”

China’s current approach appears to be to encourage greater **cooperation** between claimants on the sorts of activities outlined in principle 6 of the Declaration, namely, marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crime. This is in line with the second track of its “dual-track” approach. While some cooperation is already underway within a regional framework, officials argue that it needs to be intensified between claimant states, though whether this would include the Philippines—and if so under what conditions—is unclear.

Cooperation is essential to rebuild trust that has been badly frayed. It will have a limited effect, however, in an environment where parties continue to engage in activities that escalate tensions. A combination of all the above proposals will be needed to manage tensions and avoid open conflict moving forward. Recognizing this, colleagues at Brookings have recommended that the United States support negotiations for a Code

of Conduct, encourage claimants to freeze or restrain the construction of military facilities on disputed islands or low-tide elevations, and voice support for the principle of joint projects.<sup>36</sup>

These measures, however, all require agreement on the locale over which they are to apply. The Declaration acknowledges this by underscoring, in respect of cooperation between parties that “[t]he modalities, scope and *locations*, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation” [emphasis added], but it is equally true of the Code of Conduct and a moratorium.

In this respect, the proposal by Beckman and Schofield warrants attention as it will result in clearly identified *undisputed areas*, which ASEAN claimants can develop unencumbered, as well as *areas of overlapping claims*, to which a Code of Conduct, a moratorium on provocative activities, as well as cooperation, including joint development, can take place. Development occurring as a result of the Beckman-Schofield proposal will also incentivize acceptance of and adherence to these other conflict management measures or at the very least limit activities that might heighten tensions given that conflict will impose greater economic costs. While claimants may make various objections to the Beckman-Schofield proposal (these are examined below), and compromise and political resolve will be required for its adoption, it represents an important step towards managing rocky relations in the South China Sea.

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<sup>35</sup> “Philippines suspends work on South China Sea military airstrip,” *Agence France-Presse*, October 4, 2014. <http://globalnation.inquirer.net/112042/philippines-suspends-work-on-south-china-sea-military-airstrip/>.

<sup>36</sup> Jeffrey Bader, Kenneth Lieberthal and Michael McDevitt, “Keeping the South China Sea in perspective,” *The Foreign Policy Brief*, Brookings, August 2014. <https://www.google.com/url?sa=t&rc=t&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0C-CcQFjAB&url=http%3A%2F%2Fwww.brookings.edu%2F~%2Fmedia%2Fresearch%2Ffiles%2Fpapers%2F2014%2F08%2F-south-china-sea-perspective-bader-lieberthal-mcdevitt%2Fsouth-china-sea-perspective-bader-lieberthal-mcdevitt.pdf&ei=ENTPVO7JE4rLsATB8ICwBg&usq=AFOjCNHsIxWAUEUIXvmnN32g85CpvDjX8Q&bvm=bv.77880786,d.cWc>.

## Defining EEZ Claims from the Largest Islands

China has been roundly criticized for its nine-dash line, which encompasses more than 80 percent of the South China Sea. There have been appeals for the country to clarify or adjust its claims and their legal basis to accord with the international law of the sea. In this vein, Beckman and Schofield call for China to trigger a “paradigm shift” in the disputes by defining EEZ claims from the largest islands in the Spratly Islands and Paracel Islands.<sup>37</sup> Under UNCLOS, “islands” that can sustain human habitation or economic life of their own are entitled to a territorial sea, contiguous zone, EEZ and continental shelf. In contrast, islands that cannot sustain human habitation or economic life, namely, “rocks,” are only entitled to a territorial sea and contiguous sea.<sup>38</sup> Beckman and Schofield argue that the largest islands could be given full effect, that is, the maximum EEZ limit of 200 nm.<sup>39</sup>

In the authors’ view, the overlap between the EEZ of these islands and that of the ASEAN claimant states can be resolved by China limiting its claim from the islands to the theoretical “equidistance line” between the islands and the mainland coast or main archipelago of the other claimants. UNCLOS provides that the delimitation of the EEZ between states with opposite or adjacent coasts is to be effected by agreement on the basis of

international law in order to achieve “an equitable solution.”<sup>40</sup> Although the jurisprudence of the international courts and tribunals provides that islands might be given partial effect compared to the opposing mainland, Beckman and Schofield highlight that the starting point for an equitable solution is “almost always” the equidistance line.<sup>41</sup>

The authors also underscore that cooperative arrangements—and this should apply to both agreement on areas of overlapping claims as well as any joint development—would be *interim* arrangements of a practical nature and would be *without prejudice* to sovereignty disputes and final agreement on maritime boundaries. Beckman and Schofield, in other words, are not proposing a final solution, but a starting point for negotiations and conflict management.

## Objections and Responses

China and the ASEAN claimants could raise several possible objections to the Beckman-Schofield proposal, which eats into their respective claims. The Taiwanese position is less clear. Its official claim is the same as China’s, but there are signs that Taiwan may be limiting itself to islands and the maritime zones that can be generated from them under UNCLOS. An *Economist* article goes so far as to maintain that Taiwan President Ma Ying-jeou’s September remarks<sup>42</sup> at an exhibition

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<sup>37</sup> Beckman and Schofield point out that any “loss” of potential maritime areas to China from using the larger disputed islands to generate an EEZ claim would in fact be minimal because of the way in which the islands are grouped in close proximity to each other, allowing a broad sweep of EEZ claims. See their RSIS Commentary, *supra* n 10, p 2.

<sup>38</sup> Article 121 UNCLOS.

<sup>39</sup> Article 57 UNCLOS.

<sup>40</sup> Article 74 UNCLOS.

<sup>41</sup> Beckman and Schofield, “Defining EEZ claims from islands,” *supra* n 10, p 211, citing ICJ: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment of June 3 (1985) I.C.J. Reports 13; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of March 16 (2001) I.C.J. Reports 40; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of November 19 (2012) I.C.J. Reports 624.

<sup>42</sup> The press release from President Ma Ying-jeou’s office reports that, “President Ma added that when the ROC issued the Location Map of the South China Sea Islands in 1947, aside from the concept of territorial waters, *no other concepts regarding maritime zones existed nor had any claims been made*” [Emphasis added.] See “President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China,” Office of the President, Republic of China (Taiwan), September 1, 2014. <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355>.

of historical archives on the southern territories of the Republic of China made “clear” that Taiwan’s claim was “limited to islands and 3 to 12 nautical miles of their adjacent waters.”<sup>43</sup> A Kuomintang spokesperson sought soon after, however, to “clarify” that Taiwan’s official stance remains unchanged.<sup>44</sup> Yet, just three weeks later, President Ma stressed in an interview that “marine claims begin with land,”<sup>45</sup> thereby implying that Taiwan may not be making claims based on historic rights within the nine-dash line.

A 200 nm EEZ would be well within the outer limits of China’s nine-dash line. The details of China’s current claim are unclear. If it is only claiming sovereign rights and jurisdiction over the natural resources in maritime zones measured from the islands over which it claims sovereignty within the nine-dash line, its claim is consistent with UNCLOS. However, the country’s rhetoric and actions sometimes imply that it enjoys historic rights to and jurisdiction over the resources anywhere within the line.<sup>46</sup> Insofar as China is claiming rights to and jurisdiction over resources anywhere within the line, the Beckman-Schofield proposal would reduce China’s claim by the difference between the area enclosed within the nine-dash line and the area enclosed within the equidistance line between the overlapping EEZs of the largest islands and the baselines of the ASEAN claimants. Requiring China to clarify its claim in respect of the Paracel Islands, moreover, would mean a concession that there is in fact a sovereignty dispute over the Paracels, something that China currently denies. When China refers to the

“South China Sea dispute,” it refers merely to 南沙群島 (nan sha qun dao) or the Spratlys, and not to 西沙群島 (xi sha qun dao) or the Paracels.

ASEAN claimants, on their part, could have five main concerns about accepting the proposal. *First*, they might worry about being seen to concede that China has sovereignty over the land features in the South China Sea. (However, they would not be conceding this if they make clear negotiations on the area of cooperation are “without prejudice” to the sovereignty disputes.)

*Second*, it could be regarded as admitting that the land features are islands entitled to an EEZ. ASEAN claimants have thus far only made EEZ claims from their mainland territory, thereby suggesting that they take the position that all of the features in the Spratly Islands are at most “rocks” entitled only to a 12 nm territorial sea. The Philippines Notification and Statement of Claim makes clear that its position is that none of the features occupied by China (and from where they may be expected to base their maritime claims) can generate maritime entitlements of more than 12 nm.<sup>47</sup>

*Third*, ASEAN claimants might worry that acceptance of the proposal means agreeing that delimitation on the basis of “equidistance” is equitable. Instead, their position is likely to be that even if the relevant land features are islands *prima facie* entitled to an EEZ of 200 nm, they should be given substantially reduced or partial effect in the direction of their mainland territory or main archipelago. In other words, the position of ASEAN

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<sup>43</sup> “Joining the dashes: The South China Sea’s littoral states will fight in the museums, in the archives and on the maps,” *The Economist*, October 4, 2014. <http://www.economist.com/news/asia/21621844-south-china-seas-littoral-states-will-fight-museums-archives-and?frsc=dg%7Ca>.

<sup>44</sup> Charles I-hsin Chen, “Ma’s Peace initiative in South China Sea is feasible,” TWN, October 10, 2014. <http://m.chinapost.com.tw/commentary/2014/10/10/419077/Mas-Peace.htm>.

<sup>45</sup> “Transcript of *New York Times* interview with President Ma Ying-jeou of Taiwan,” Taipei, October 31, 2014. <http://www.nytimes.com/2014/11/01/world/asia/transcript-of-new-york-times-interview-with-president-ma-ying-jeou-of-taiwan.html?smid=tw-share&r=1>.

<sup>46</sup> Bader, Lieberthal and McDevitt, *supra* n 36, p 5.

<sup>47</sup> Republic of the Philippines Department of Foreign Affairs, *Notification and Statement of Claim*, *supra* n 12.

claimants is likely to be that an overlap between the EEZ of a mainland territory or main archipelago, on the one hand, and that of an island, on the other, should be resolved in favor of the former by reducing the EEZ entitlement of the island. Such a position would have International Court of Justice support.<sup>48</sup>

Stating explicitly that acceptance of an EEZ from the largest islands and any subsequent delimitation between overlapping EEZs is a “provisional arrangement[] of a practical nature”<sup>49</sup> and should not be deemed as acceptance of sovereignty or maritime boundaries would address the preceding three concerns. This can also be made explicit in respect of any joint development agreement. Although officials are often wary about negatively affecting their position in the South China Sea, an arrangement that is undertaken “without prejudice” will mean that *parties’ claims under international law would neither be augmented nor diminished by the arrangement or any actions flowing therefrom.*

A *fourth* possible objection ASEAN claimants might make is that they would only be “gaining” what they are already entitled to: it is already their prerogative under UNCLOS to develop resources in the EEZ within 200 nm from their coast.<sup>50</sup> This would appear to be behind Vietnam Deputy Prime Minister’s response when asked for his thoughts on the Beckman-Schofield proposal, which was briefly outlined to him: “Under international law, the EEZ is not disputed. Any operation without the consent of the country is a violation of international law. Same with the oil rig that China parked [off Vietnam’s coast]. In disputed

areas, there should be cooperation. But the EEZ is not a disputed area.”<sup>51</sup>

UNCLOS, however, provides that a state could be entitled to an EEZ of less than 200 nm in a situation of overlapping EEZs.<sup>52</sup> A successful implementation of the proposal would bring certainty to the table and ASEAN claimants would benefit from being able to develop areas clearly identified as beyond contestation. It will not mean that ASEAN claimants’ rightful claims are confined to these areas. Rather, this would be the *bare minimum* of their entitlement.

*Finally*, ASEAN claimants might object to the proposal because it allows China, who they insist has no sovereignty claims over the islands in the South China Sea, to benefit irreversibly from maritime rights which can only derive from land territories. Yet, the same could also be said of benefits gained by ASEAN claimants if a court or tribunal subsequently found that they had no valid sovereignty claims to the islands. In other words, a subsequent finding that ASEAN claimants do not have a basis under international law for their claims to the islands would not change the fact that they would already have benefited from joint development under the provisional arrangements up to this point.

## Nationalism and China’s National Interests

Irrespective of the objective validity of responses to objections, rising nationalism in claimant states poses a significant obstacle to acceptance

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<sup>48</sup> Beckman and Schofield, *supra* n 10, citing ICJ: *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

<sup>49</sup> This is in the vein of Article 74(3) UNCLOS on the delimitation of the EEZ between States with opposite or adjacent coasts.

<sup>50</sup> Article 56 read with Article 57 UNCLOS.

<sup>51</sup> Pham Binh Minh, Deputy Prime Minister and Foreign Minister, Socialist Republic of Vietnam, Speech, Center for Strategic and International Studies, October, 1, 2014.

<sup>52</sup> Article 74 UNCLOS.

of the proposal. “The Chinese people will never agree to it,” an official from one of the claimant states told me after hearing its outline. Similarly, a high-ranking civil servant from a non-claimant ASEAN state highlighted how rising nationalism in China, which is in turn linked to the Communist Party of China’s (CPC) move to promote its own legitimacy, would prevent Beijing from adopting it: “In the past, few people in China would have known about the nine-dash line; now, it is printed on maps and passports. Giving up their claims in respect of the nine-dash line would be like giving up what their ancestors had handed down.” A former Chinese diplomatic spokesman highlights the difficulties of *any* compromise with China’s neighbors: “You would be a ‘traitor.’”<sup>53</sup>

Nationalism in China extends across society and is deeply rooted in history, which helps make sense of how the Chinese view the world. Historical encounters have left the Chinese with a sense of humiliation and resentment, and inflamed their sense of justice and Chinese centrality in world affairs. What the rest of the world sees as aggression, the Chinese see as standing up for their rights.<sup>54</sup>

The danger of course is that nationalist sentiments are difficult to control once inflamed and could be counter-productive to China’s national interests. The Chinese government needs to keep nationalism in check lest it severely limits its foreign policy options, including Beijing’s ability to step back from outright conflict. This would not be in the best interests of the country or the CPC, which

needs to tread the thin line between rallying the country behind it against an external foe(s) and dangerous conflict that risks undermining its legitimacy if economic performance takes a hit or war is long-drawn and messy.

The rise of nationalism in respect of the South China Sea in China has largely been of Beijing’s own making. It can thus, arguably, reverse the trend. This is not to make light of the difficult task before it. Nationalism is harder to roll back than to roll out, and domestic politics and considerations in China have meant that nationalism has taken on a life of its own. For example, powerful elements within the Chinese party-state—the navy, the coast guard, its southern provinces particularly Hainan, and oil companies—have learned how to play the “sovereignty card” to set an agenda that favors their own interests.<sup>55</sup> However, given President Xi Jinping’s domestic political strength<sup>56</sup> and the relatively high degree of central control over information and its dissemination that continues in China, rolling back nationalism or at least *reinterpreting what such sentiment should mean in the context of the South China Sea* is possible. Whether the political capital needed to do so will be expended depends on a host of interacting factors, including how party politics and Xi’s consolidation of power pan out; how secure the CPC feels vis-à-vis Chinese citizens;<sup>57</sup> and how individual ASEAN countries, ASEAN as an organization, and the international community, particularly the United States, respond to conciliatory gestures on China’s part.

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<sup>53</sup> Wu Jianmin, quoted in Howard French, “China’s dangerous game,” *The Atlantic*, October 13, 2014. [http://www.theatlantic.com/magazine/archive/2014/11/chinas-dangerous-game/380789/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2014/11/chinas-dangerous-game/380789/?single_page=true).

<sup>54</sup> Odd Westad, *Restless empire: China and the world since 1750* (2012) (New York: Basic Books).

<sup>55</sup> Bill Hayton, “Forget the Greeks! The myth of inevitable conflict in the South China Sea,” paper presented at the Fourth East Asia Peace Program Conference, Beijing, October, 30 – November 1, 2014.

<sup>56</sup> Christopher Johnson et al, *Decoding China’s emerging “Great Power” strategy in Asia*, Center for Strategic and International Studies, June 2014, p 7–8.

<sup>57</sup> Bill Hayton, *The South China Sea: The struggle for power in Asia* (2014) (New Haven: Yale University Press), p 178, observes how the legitimacy of the ruling elite is increasingly tied to their performance over the South China Sea.

There are good reasons for China to define EEZ claims from the largest islands. First, it will allow China to bring its claims into line with international law. A system of rules benefits small and large countries alike. The importance of the rule of law both at home and internationally was defended in the strongest terms (though not without worrying caveats) in an op-ed<sup>58</sup> penned by China's foreign minister after the Fourth Plenary Session of the 18th CPC Central Committee, in October 2014, took the rule of law as its central theme for the first time.<sup>59</sup>

Second, defining EEZ claims from the largest islands may preclude ASEAN claimants from invoking the compulsory dispute resolution procedures entailing binding decisions in UNCLOS against China given the country's 2006 opt-out for delimitation disputes.<sup>60</sup>

Third, it would pave the way for joint development, which would be in keeping with Deng Xiaoping's advice to shelve sovereignty disputes and pursue joint development of the South China Sea.<sup>61</sup>

Quite apart from legal and economic reasons for defining EEZ claims from the largest islands, there are also good strategic reasons for China to do so. Countries in the region (and elsewhere) are carefully watching to determine the type of power

China will be. If China's goal is regional hegemony, this can be more easily achieved if it shows a respect for international law and a rules-based international order. Bill Hayton, veteran South-east Asia watcher and author of a recent book on the South China Sea, notes that China seemed on track in 2009 to achieve its "strategic aim of rising as effortlessly as possible to a position of regional dominance," but the single act of attaching the nine-dash line map to its submission to the UN Secretary-General (in response to a joint Malaysia-Vietnam submission for an extended continental shelf) changed that.<sup>62</sup>

Given how economically dependent countries in the region are on China, China's rise in the region can still be achieved at relatively low cost if it plays its cards right. Continuing to take actions perceived as threatening, on the other hand, pushes the smaller ASEAN countries into formal or informal alliances with larger countries like the United States, India and Japan. For instance, China's deployment of an oil rig in disputed waters off Vietnam in May led to massive anti-China protests and Vietnam and India agreeing to closer defense and economic ties. In short, while China's national interests, including sovereignty, are often juxtaposed against international law and its international reputation,<sup>63</sup> respect for international law in fact promotes its national interests.

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<sup>58</sup> "Full text of Chinese FM's signed article on int'l rule of law," *People's Daily*, October 24, 2014. <http://english.peopledaily.com.cn/n/2014/1024/c90883-8799769.html>. While the op-ed is an encouraging sign of China's desire to respect international law—or at least be seen to do so—the statement also contained worrying statements. For instance, it states (on p 2) that there are "difficulties and challenges" faced by promoting the international rule of law, including "new interventionism" (read: the United States) that challenges sovereignty and territorial integrity; it talks about China being a "strong defender" and "active builder" of international rule of law—the concern here is with China re-writing the rules and being a revisionist rather than status quo power. This last concern is underscored when China talks about the need for "democratic participation" in the making of international rules. For other reservations, see Julian Ku, "What does China mean when it celebrates the 'International Rule of Law?'" *Opinio Juris*, October 29, 2014. <http://opiniojuris.org/2014/10/29/china-mean-celebrates-international-rule-law/>.

<sup>59</sup> "CPC sets new blueprint for rule of law," *People's Daily*, October 24, 2014. <http://english.peopledaily.com.cn/n/2014/1024/c90785-8799130.html>.

<sup>60</sup> Article 298 UNCLOS.

<sup>61</sup> This is set out in "Set aside dispute and pursue joint development," Ministry of Foreign Affairs of the Republic of China, undated, [http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18023.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml).

<sup>62</sup> Hayton, "Forget the Greeks," *supra* n 55.

<sup>63</sup> Dingding Chen, "Does China Care About its International Image? China values its national interests, including sovereignty, over its international image," *The Diplomat*, June 12, 2014. <http://thediplomat.com/2014/06/does-china-care-about-its-international-image/>.



A final point to note is that if the arbitral tribunal in *Philippines v. China* decides it has jurisdiction to hear the case, it may declare the nine-dash line invalid. Bringing its claims in line with international law would put *China in no worse a position than it is likely to be in the first quarter of 2016, when an arbitration award is expected*. In fact, pre-emptively doing so will put China in better stead, since it is generally a better public relations strategy to comply with the law prior to being rapped on the knuckles.

Highlighting the national interests involved in bringing its claims in line with international law could help increase support in China for defining EEZ claims for the largest islands in the South China Sea. Beckman and Schofield detail how the nine-dash line can be interpreted in a way that is consistent with international law. In its *Notes Verbales* to the United Nations Secretary General of May 7, 2009 and April 11, 2011, China claims “sovereignty” over the islands in the four archipelagos in the South China Sea, as well as to the “waters adjacent to the islands”; it also claims “sovereign rights and jurisdiction” over the “relevant waters” as well as the seabed and subsoil thereof. If the reference to “adjacent waters” is read to refer to the territorial sea and the reference to “relevant waters” is read to refer to the EEZ, China’s claims would be consistent with UNCLOS and international law.<sup>64</sup>

If China does in fact take steps toward encouraging this interpretation of the nine-dash line, the international community can reciprocate by toning down or even ending its condemnation of the

line, which might then fade in terms of relevance. This outcome would be much like the fate of the rectangular box claimed by the Philippines under three international treaties,<sup>65</sup> allowing for territorial sea rights extending 285 nm from its coast. The United States, Australia and other states objected because the maritime claims based on the rectangular map were not consistent with UNCLOS. The Philippines eventually passed domestic laws that brought its claim into conformity with UNCLOS, even though it did not amend its Constitution or formally abandon its historic maritime claim.<sup>66</sup>

### Nationalism and the National Interests of ASEAN Claimant States

Thus far, discussion has focused on nationalism in China. Rising nationalism is also a problem in the Philippines and Vietnam where accepting China’s definition of EEZ claims from the largest islands might be objectionable for no other reason than China having initiated it, since this might be regarded as bowing to a more powerful neighbor. Given heightened nationalistic sentiment (as well as the possible objections described above), it is unclear whether ASEAN claimants will be able and willing to accept the proposal. Vietnam exercises a relatively high degree of central control so it would have less of a problem than the Philippines, where there is a pending arbitration case and more bad blood with China. That said, Philippines President Benigno Aquino could potentially leverage his popularity to persuade Filipinos that the country’s interests lie in more conciliatory steps towards China. Including the Paracels, over which China refuses to recognize a sovereignty

<sup>63</sup> Dingding Chen, “Does China Care About its International Image? China values its national interests, including sovereignty, over its international image,” *The Diplomat*, June 12, 2014. <http://thediplomat.com/2014/06/does-china-care-about-its-international-image/>.

<sup>64</sup> Beckman and Schofield, “Defining EEZ claims from islands,” *supra* n 10, p 209.

<sup>65</sup> The Treaty of Paris between Spain and the United States, signed at Paris, 10 December 1898, TS No. 343; The Treaty between Spain and the United States for the Cession of Outlying Islands for the Philippines, signed at Washington, 7 November 1900, TS No. 345; and the Convention between the United States and Great Britain Delimiting the Philippine Archipelago and the State of Borneo, signed at Washington, 2 January 1930, TS No. 856.

<sup>66</sup> Beckman and Schofield, “Defining EEZ claims from islands,” *supra* n 10, p 197.

dispute, could help to sweeten the deal for Vietnam.

ASEAN claimants have strong pragmatic reasons to make good with China, on whom the strength of their economies largely depends. They can ill-afford to come into direct confrontation with the behemoth that greatly outflanks them both militarily and economically. In an implicit recognition of this, a special envoy of the secretary general of the Vietnam Communist Party visited Beijing in late August 2014 and a 13-member high-level Vietnamese military delegation led by Vietnam's minister of national defense made a three-day visit to Beijing in mid-October. These visits (along with an earlier visit by a Chinese state councilor to Hanoi to attend an annual meeting regarding the China-Vietnam comprehensive strategic cooperative partnership) helped to smooth over badly frayed relations after the oil rig incident in May.<sup>67</sup>

China is almost certainly going to stand firm on its basic position that it has sovereignty over the land features in the Spratlys and sovereign rights and jurisdiction over “relevant” waters. Given that an international tribunal can only determine sovereignty if disputing parties agree—an unlikely scenario—might rather than right will increasingly dominate resolution of the dispute. This position will only harden as the country grows in strength.

Reports of China's large-scale reclamation works on reefs it occupies in the Spratly Islands reinforce the urgency of reaching some resolution of the dispute. Reclamation works cannot strengthen a party's sovereignty claims if it cannot show

international acquiescence. They also cannot convert a submerged reef into an “island” entitled to maritime zones or convert a “rock” to an “island” capable of sustaining human habitation or economic life of its own.”<sup>68</sup> The only conceivable situation where such work could *in fact* enhance a party's legal claims is where there is no evidence of a land feature's pre-reclamation state so that the party conducting reclamation works can credibly argue that the land feature was already an island entitled to maritime zones before works commenced. Given the slim chance of reclamation works strengthening China's legal claim over the Spratlys, the works are all the more worrying as they are likely targeted at force projection. This is corroborated by reports of China's “increasingly potent and active sub force,” which enhances China's ability to enforce territorial claims by force if necessary.<sup>69</sup>

In light of these developments, it makes sense for ASEAN claimants to seek resolution through negotiations on the basis of international law sooner rather than later, even if it does mean compromising with China. The Beckman-Schofield proposal could help create an environment in which China and other ASEAN claimants are less inclined to engage in activities that would heighten tensions.

## A Joint Initiative to Clarify Claims

There are various ways of strengthening the Beckman-Schofield proposal so that it is more palatable to claimants. Rather than being a China-led initiative, parties can work together to clarify claims. Making it a joint initiative would recognize that

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<sup>67</sup> Carl Thayer, “China-Vietnam defense hotline agreed: What next?” *The Diplomat*, October 20, 2014. <http://thediplomat.com/2014/10/china-vietnam-defense-hotline-agreed-what-next/>.

<sup>68</sup> Robert Beckman, “Large-scale reclamation projects in the South China Sea: China and international law,” RSIS Commentary N° 213, October 29, 2014. <http://www.rsis.edu.sg/wp-content/uploads/2014/10/CO14213.pdf>.

<sup>69</sup> Jeremy Page, “China's submarines add nuclear-strike capability, altering strategic balance,” *The Wall Street Journal*, October 24, 2014. <http://m.wsj.com/articles/chinas-submarine-fleet-adds-nuclear-strike-capability-altering-strategic-balance-undersea-1414164738?mobile=y&mod=e2tw>.

the obligation to clarify claims in keeping with international law applies to all claimants, not just China. China would also not have to take the step of defining EEZ claims from the largest islands without some assurance of a positive regional response. Further, a joint initiative will appeal more to claimants' respective domestic audiences by demonstrating that acceptance was not due to pressure exerted by another party. The clarification of claims should thus be left to claimant states. The United States plays a secondary, though not unimportant, role in encouraging joint efforts, which it should welcome in no uncertain terms.

The following are some broad steps outlining how a joint initiative to clarify claims can proceed:

- First, claimants should begin by explicitly stating that defining EEZ claims from the largest islands and any subsequent delimitation between overlapping EEZs is a “provisional arrangement of a practical nature” and should not be deemed as acceptance of sovereignty or maritime boundaries.
- Second, all claimants should together appoint a group of independent experts and agree on their terms of reference, including how disagreements should be handled—whether unanimity is required or simply two-thirds or a simple majority.
- Third, the independent experts should come to agreement on broad criteria for what constitutes an island capable of sustaining human habitation or economic life. Should the land feature, for example, have a natural source of water? This would presumably not be necessary to sustain economic life.
- Fourth, experts should agree on how to approach a land feature on which works have been carried out. Whether this constitutes an “island” entitled to maritime zones, or an “artificial island” entitled to no maritime zones of its own (a coastal state has sovereignty over the artificial island if within its territorial sea and jurisdiction and control if within its EEZ), but only a 500 m safety zone,<sup>70</sup> must depend on the *pre-works* state of the land feature. If it was already an “island” under UNCLOS, the works do not change this; if not, works do not enhance a claim to maritime zones. The difficulty lies in determining the nature of the land feature *prior* to the conduct of works. In this respect, the onus should be on *the country undertaking works and that is in control of the land feature* to offer evidence of its *pre-works* state.
- Fifth, based on the criteria and approach agreed upon, the independent experts should determine the status of land features, their baselines and their maritime entitlements.
- Sixth, claimants should agree on whether delimitation in the case of overlapping EEZs should be the equidistance line or something that gives islands partial effect. (Claimants could let the independent experts propose a non-binding solution, which claimants can then use as a starting point for negotiations.) Given China's interest in making friends in the region or at least not being perceived as threatening, it should demonstrate magnanimity and agree to give the islands partial effect. As

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<sup>70</sup> Article 60(5) and (8) UNCLOS.

noted above, this would also be in keeping with the jurisprudence of the International Court of Justice.

- As an *optional* final step, claimants can identify which land features in the South China Sea they are making sovereignty claims to as a means to clarify claims, or even shelve this until a later indeterminate date.

Decoupling agreement on criteria and facts from sovereignty and jurisdictional and maritime claims could help render some competing claims moot, say, if the experts regarded these land features as so insignificant that no one could in good faith regard it an “island.” Parties should also not worry that any agreement reached under this initiative, such as giving islands partial effect, will prejudice their actual legal claims since it would be undertaken “without prejudice.”

In conclusion, the advantage of defining EEZ claims from the largest islands—whether this is done unilaterally or, preferably, collectively—is that it ensures that the dispute amongst claimants

takes place on the basis of international law. Given the importance of the South China Sea and Asia more generally to regional and global stability, the importance of resolving disputes on the basis of international law cannot be overstated. Defining EEZ claims from the largest islands also helps to generate positive momentum, which could help in getting round the stalemate the other conflict management proposals face.

The party with the greatest ability to make or break this deal is China. The interests it has in doing so have already been dealt with above. Thus far, its leadership in respect of the South China Sea dispute has been disappointing, even when not judged from the perspective of the ASEAN claimants, but from its long-term interests in securing an international order governed by rules, allowing it to emerge as the region’s natural leader. China often seems genuinely aggrieved that its neighbors do not love it more. Given its actions pushing ASEAN claimants away, this can hardly be surprising. Reconsidering its strategy in the South China Sea can help to change matters.

# The Author

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