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HOW CHINESE IS THE SOUTH CHINA SEA?

Steve Tensmeyer

The past summer has seen a flare-up in the longstanding feud between China and the ASEAN nations over the South China Sea. Since that time, China has used more strident language in staking its claims, has authorized increased naval drills in the area, and has warned several countries, including the U.S., not to “interfere” with what it considers its central security interests. The most remarkable aspect of this most recent phase of the debate, however, is not China’s aggressiveness, but rather its desire to couch its claims in terms of universal norms. This has made China’s behavior somewhat more predictable than it has been in previous decades, but this predictability does not necessarily make China less of a threat to its neighbors; in fact, it may only give a cooperative veneer to a fundamentally aggressive foreign policy.

This increased aggressiveness certainly presents a problem for other countries with claims in the area, but China’s increased commitment to international norms also suggests a way to resolve these disputes. China has certainly not been shy about what it considers its sovereign rights, and the cooperation of other states may have done more harm than good by convincing China that it can act with impunity. With China becoming a greater threat by the day, the best choice for the other nations with claims in the South China Sea (all of which are members of ASEAN, the Association of Southeast Asian Nations) may be to seek some legitimation of their claims from an international body. In this paper, I will investigate one way in which

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ASEAN may be able to obtain an international ruling on at least part of its claims by proposing to the International Seabed Authority (ISA) a contract for exploration of seabed features and polymetallic nodules in the open ocean. Since this kind of mining is legally permitted only beyond all international boundaries, when considering ASEAN’s petition, the ISA may be compelled to determine whether the area targeted for exploration belongs to China.

China would of course interpret this move as aggressive, and the political, economic, and perhaps even military blowback would be significant. A final decision on whether to pursue this line would have to include a careful evaluation of the possible consequences in each of these areas. However, in this paper I intend to address only the legal consequences of such a decision—it may be that, even if this option would result in a legal victory for ASEAN, political or economic calculations would make it inadvisable. This essay is therefore limited in its scope and its conclusions should be interpreted with this limitation in mind.

I. Disputed Areas

The dispute over the South China Sea involves more than just China’s disagreements with other Southeast Asian countries. There are many disputes in the region that do not directly involve China. The Philippines and Vietnam, for example, have had long-standing disagreements and in 1995 issued a joint statement outlining principles for bilateral relations.3 However, the ASEAN-China dispute is by far the most important because China claims the entire South China Sea, contradicting every other country’s claim, and because ASEAN member states are generally willing to cooperate to counter China.

One of the major disagreements in the South China Sea area is over the Paracel Islands, which are claimed by both China and Vietnam. After Vietnam was divided in 1954, the Paracels were administered by South Vietnam. In 1974, when the Vietnamese Civil War

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was at its height, China invaded and took over the Paracels. At the time, because it was China’s ally and because it was involved in a war with the United States and South Vietnam, North Vietnam did not strongly object to China’s claim to sovereignty over the islands.\(^4\) However, after Vietnam had stabilized, and particularly after relations between the two countries deteriorated to the point of war in 1979, Vietnam began to call for the return of the Paracels and the renegotiation of maritime borders that had been established by treaties with France before Vietnam won its independence. China has consistently refused to consider returning the Paracels to Vietnam (or giving them to the ROC, which also claims them), and as recently as July of 2010, Communist Party officials asserted that “China will never waive its right to protect its core interest [including the Paracels] with military means.”\(^5\) China has backed up these statements with the construction of new military infrastructure in the archipelago, including a new airstrip on Woody Island, one of the larger islands in the group.\(^6\)

Another disputed chain of islands, the Spratly Islands, has been claimed by China since the end of World War II, when the ROC government took control from the defeated Japanese and established a small military outpost on the largest island. After relocating to Taiwan, the ROC has maintained control of the largest island to this day, though it does not control the entire archipelago. The Spratly Islands consist of mostly small, rocky, and uninhabitable outcrops controlled by small military contingents from China, Vietnam, Malaysia, Brunei, and the Philippines. The Spratly and Paracel groups are the most hotly contested islands, but there are other, smaller islands, reefs, and atolls whose statuses are still unsettled. The Pratas Islands, for example, are claimed by the PRC and the ROC, and both the Macclesfield Bank and the Scarborough Shoal are claimed by the PRC, etc.


\(^5\) Jacobs, supra note 1.

\(^6\) See Felix K. Chang, Beijing’s Reach into the South China Sea, ORBIS, Summer 1996, at 353, 361.
the ROC, and the Philippines. There are also maritime disputes that do not deal with islands, but most of these stem from varying interpretations of the 1982 Convention on the Law of the Sea, which will be dealt with in detail in the next section.

Military clashes over the islands are currently uncommon and unlikely, though not unprecedented (China’s 1974 invasion of the Paracels, for example, demonstrates its willingness to back up its rhetoric with action). However, displays of military strength, almost exclusively by China, have become commonplace. Among the most recent was Jiaolong 2010, a round of naval exercises featuring 1,800 soldiers and over 100 ships firing live ammunition. Beyond these displays of power, China has also found other ways to assert its rights to the area and to showcase its technical superiority; in 2010, for example, the Chinese Navy used a manned submarine to plant a PRC flag at the bottom of the South China Sea. While there is no legal significance to such an act, it is symbolically very important.

II. Framework for a Settlement

Several documents have laid the groundwork for future progress in resolving the South China Sea dispute, and each will need to be taken into account in any eventual settlement. The most important of these are the UN Charter, joint statements between the PRC and other countries regarding the area, the 2002 Declaration on the Conduct of Parties in the South China Sea between China and ASEAN, and the UN Convention on the Law of the Sea. I will consider each

7 See Richard E. Hull, The South China Sea: Future Source of Prosperity or Conflict in South East Asia?, STRATEGIC FORUM, Feb., 1996, at 1, 2.
of these in turn and determine both the process and terms of settlement to which they obligate signatory nations.

The UN Charter forms the foundation of modern international relations, and there are several provisions that relate to the South China Sea dispute. The most obvious is Chapter I, Article 2, which states that “all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All members shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state.” Of course, such a provision puts limits on China’s actions. It cannot simply stage a military takeover of the South China Sea without significant blows to its legitimacy and status in the world. Because of China’s desire to be seen as a responsible player on the world stage, it is unlikely to take any action that is not amenable to the rhetoric of international justice and security. But the requirement to protect peace, security, and justice gives significant latitude. Most countries have interpreted this provision quite liberally, and China is no exception. In fact, as we have seen, China explicitly maintains its right to defend its core interests with force.

The UN Convention on the Law of the Sea (which will be considered in detail in the next section) and the UN Charter are both legally binding treaties, and China and the ASEAN nations must be careful to follow at least a plausible interpretation of them. The next documents I will consider, the bilateral PRC-Philippines Joint Statement of 1995 and the 2002 Declaration on the Conduct of Parties, do not carry such explicit legal weight. Because both of these documents (and others that I will not consider here) contain similar statements, I will analyze both before evaluating their legal status and the disputant countries’ level of commitment to each of them.

The PRC-Philippines Joint Statement is a declaration of the policy of both parties. In it, both China and the Philippines express their intent to settle disputes “in a peaceful and friendly manner through consultations on the basis of equality and mutual respect,” to not use force or the threat of force, to increase cooperation, and to “settle

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10 U.N. Charter art. 2, paras. 3-4.
their bilateral disputes in accordance with the recognized principles of international law, including UNCLOS.”¹¹ The Declaration on the Conduct of Parties employs similar language, though this document applies to all members of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and China. Like the Joint Statement, the Declaration calls for equality, respect, renunciation of force or the threat of force, increased cooperation, and using international institutions and rules, including UNCLOS, to resolve disputes.¹² However, the Declaration also states the parties’ intention to work for conservation of wildlife, the reduction of piracy, the development of international regimes, and other issues of mutual concern even in the absence of a final resolution.¹³

The Joint Statements and 2002 Declaration have fewer legal provisions to explore, and instead mostly contain positive rhetoric and expressions of goodwill. Although most of the provisions are unambiguous, their legal status is not. Kittichaisaree, for example, argues that these declarations and statements have something akin to the force of law based on a precedent set by the International Court of Justice in cases involving nuclear testing.¹⁴ In making declarations, the court found that “when it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State thenceforth being legally required to follow a course of conduct consistent with the declaration.”¹⁵ This is a mostly convincing argument: each provision in the 2002 Declaration, for example,

¹¹ Chen, supra note 3, at 136.
¹³ See id. at 283.
¹⁴ Supra note 3, at 136
is prefaced with phrases such as “the parties are committed to” and “the parties undertake to.”

Despite this precedent, however, these statements cannot be considered legally binding in the same way that the aforementioned treaties are. Most of the language in these statements is ambiguous and rhetorical, and to the degree that the parties commit themselves anything, it is to mutual goals rather than particular courses of action. It is much easier to argue that any given course of action is consistent with vague goals of cooperation and respect than it is to argue that it is consistent with legally phrased restrictions on behavior.

Whatever their status, however, these agreements and joint statements offer a window into the priorities of China and the ASEAN nations. All parties are clearly worried about tensions spiraling out of control, and the ASEAN countries are understandably wary of provoking China. Militarily, China has the strength (assuming the U.S. does not intervene) to take over the entire South China Sea; economically, China also has weapons to deploy against Southeast Asia. If there were a war in the area, ASEAN would not only lose territory and prestige, but its economic livelihood would also be threatened. China, on the other hand, is also hesitant to go to war. The fear of a rising China, already high in the U.S., Europe, and elsewhere, would reach a fever pitch if it were to flex its muscle by imposing its will in the South China Sea. And just like ASEAN, China would be hurt by the loss of trade in the area and beyond, where it would likely be the subject of international sanctions. Perhaps most importantly, in the event of war, China would lose much of the rapport that it has developed in the international community through cooperative participation in international organizations and regimes.

The most important clues that these documents give us, however, is that they all emphasize working through the UN and other international organizations, particularly through the UN Law of the Sea. Because all parties have agreed to pursue a settlement that conforms to the principles and provisions of the Convention, understanding it is essential to predicting and influencing the future of the dispute.

16 Thao, supra note 11, at 283.
III. The UN Convention on the Law of the Sea

The UN Convention on the Law of the Sea (UNCLOS) is the most important document bearing on relations in the South China Sea: all parties have agreed that any final settlement will be based on its principles. The first round of this convention was held in 1956, but for our purposes, the most important document is UNCLOS III, which was adopted in 1982 and went into effect in 1994.\(^\text{17}\) Many of its provisions were merely codifications of common practices, but there were some innovations, and many issues that previously had been matters of tradition and convention were given the force of law. Most importantly, UNCLOS III defines territorial waters and rights to waterways, which neither of the previous rounds of treaties had done. States were given different rights in six different areas: internal waters, territorial waters, archipelagic waters, contiguous waters, exclusive economic zones, and continental shelves.\(^\text{18}\) In internal waters, such as rivers and lakes, states have full sovereignty, and no other states have rights of passage. In territorial waters, which extend 12 nautical miles from every shore, states have sovereignty, but all other states have the right of “innocent passage”; that is, any state can sail non-military ships (except in specific straits deemed necessary for military transport, in which case military presence is permitted), but these ships may not stop or engage in commercial activities without permission.\(^\text{19}\) Rights in archipelagic waters are especially important in the South China Sea. Archipelagic waters are basically the waters bounded by the outermost islands in an archipelago. Archipelagic waters are treated similarly to internal waters, but other states still have the right of innocent passage through them. The difference between archipelagic and territorial waters is that two islands may be over 24 nautical miles apart, but if

\(^{17}\) See Michael Wood, International Seabed Authority, the First Four Years, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 2007, at 52.


\(^{19}\) See id. art 17.
they are considered to be in one archipelago, the state will still have territorial rights between them. The contiguous zone extends 12 nautical miles beyond territorial waters, and in these areas, states can enforce their own laws regarding pollution, taxation, customs, and immigration. In a state’s exclusive economic zone, which extends 200 nautical miles from the shore, states have full economic rights, including fishing, mineral, and other resource rights. Finally, a state has exclusive mineral rights on the entire continental shelf (with some exceptions) extending from its shores, though fishing and other activities are not regulated. Most importantly, all of these rights, including those associated with archipelagic waters, apply to all and only habitable pieces of land.

These provisions clearly put a premium on occupying islands and making them habitable. This is one of the primary reasons that small military contingents from Taiwan, the PRC, the Philippines, and other countries are stationed on rocks that would naturally be underwater at high tide; having a qualifying piece of land extends a state’s economic and political rights that much farther into the open ocean. Unfortunately, UNCLOS does not give clear rules applying to situations in which these zones overlap. In the South China Sea, the problem of overlapping zones has been addressed only in the Malacca Strait, which has been designated a strategically important area in which all states have a right to military transport.

There are three primary reasons that China is likely to abide by and work within the framework of these provisions of UNCLOS. First, China has signed and ratified the treaty (as have all other countries with claims in the South China Sea. The U.S., another important actor in the region, has signed the treaty but not ratified it), and it has a good track record of keeping such treaties. Second, several other statements and agreements, such as the 2002 Code of Conduct and China’s joint statement with the Philippines in 1995, have mentioned the importance of working within the framework of UNCLOS to

20 See id. art 48.
21 See id. art 33.
22 See id. art 48.
resolve differences. Third, the Chinese government’s public rhetoric and actions emphasize that it considers the treaty advantageous for China. The provisions give China the right to military transport through the Malacca Strait and through any waters in the South China Sea except those that are within a non-overlapping portion of another country’s territorial waters. It has used these rights to protect its security interests in the Indian Ocean, to patrol the South China Sea, and to occasionally stage naval exercises in the area. Because of the advantages the Law of the Sea affords Beijing and its desire to seem supportive of international organizations, China can be expected to respect and support these rights as a necessary price to pay for the advantages it believes that UNCLOS provides.

Though all parties have expressed their commitment to resolve disputes under the framework of UNCLOS, the formal dispute resolution channels under the Convention have not been used. UNCLOS III establishes three mechanisms for the peaceful resolution of maritime disputes: the UN Tribunal on the Law of the Sea, the International Court of Justice, and ad hoc dispute resolution tribunals. All of these mechanisms, however, are venues of optional jurisdiction, meaning that they can only be used if both parties agree to be bound by their decisions. Unsurprisingly, China has steadfastly refused to be bound by the decisions of any of these chambers. This refusal makes its frequent avowals to resolve the South China Sea dispute within the framework of the Law of the Sea somewhat hollow and raises questions about its sincerity. By committing all parties to resolve the dispute through UNCLOS but then refusing to submit the dispute to any UNCLOS-approved channels, China is simply perpetuating the status quo, a course that is decidedly in Beijing’s favor.

In the following sections, however, I will show how ASEAN may be able to break this stalemate. Though it may be regarded by some as legal trickery, there is a mechanism under UNCLOS that may allow these countries to force the International Seabed Authority, a chamber created by the Law of the Sea, to make a binding decision about international boundaries in the South China Sea even

23 See Kittichaisaree, supra note 2, at 136.
if China does not agree to appear before the chamber or be bound by its decisions.

IV. The International Seabed Authority

Part XI Section 4 of UNCLOS III established the International Seabed Authority, which began operations in 1994. The Authority is headquartered in Jamaica and has established branches in several countries across the world. It is governed by an Assembly, in which all 159 signatories to the Law of the Sea are represented, and a Council, composed of 36 countries with particular interests in seabed exploration. Contract applications for open ocean mining are evaluated and approved by the Council, which turns them over to the ISA’s Legal and Technical Commission upon receipt and bases its decision primarily on the Commission’s recommendation.24 The Commission itself is composed of 25 experts in law and the science of deep-sea mining elected by the Council. These members come from many different countries but are meant to act in their capacity as experts and not as representatives of their states. The Commission also recommends regulations and rules regarding the exploitation of certain types of mineral deposits. To date, it has ratified rules for only three types of mineral deposits: polymetallic nodules, polymetallic sulfides, and ferromanganese crusts.25

The ISA’s mandate is to “organize and control activities in the Area, particularly with a view to administering the resources of the

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25 Id.
Area.”26 The Area is defined as the seabed and waters outside the jurisdiction of any nation: that is, any area beyond the furthest extent of any state’s Exclusive Economic Zone. Significantly, the convention itself does not establish the status of disputed areas. Perhaps this is because they did not anticipate a circumstance in which one country would dispute another’s claim not with its own counterclaim but with an argument that the area in question is in fact beyond any national jurisdiction. However, this is precisely the dispute in the South China Sea. All ASEAN countries have expressed some willingness to agree to a plan whereby UNCLOS provisions would be applied as though all islands and waters in the South China Sea were considered *res nullius*, or newly discovered islands, and if such a policy were formally adopted by ASEAN, there would still be an area that belonged to no state (fig. 1).27 The existence of this “no man’s land” will be crucial to my argument for ASEAN’s options under the Law of the Sea.

The International Seabed Authority’s mandate is quite vague, and there is no consensus on the precise limits of its activities. Some scholars argue that its authority is strictly limited by article 82.4, which states that the authority shall arrange for an equitable distribution to all nations of resources taken from the Area.28 Others take a more expansive view. Whatever the theoretical powers of the ISA are, however, in practice the ISA has interpreted its responsibility to organize activities in the Area very broadly. All development and exploration of resources in the Area seabed, for example, must first be approved by and contracted with the Authority. Contract applications are submitted to the Legal and Technical Commission, which evaluates whether the proposed work conforms to the regulations

26 Id.
27 See Kittichaisaree, supra note 2, at 136.
governing exploration or mining of the relevant mineral.\textsuperscript{29} If the contract conforms to these regulations, the Commission accepts the application, and the Council then approves the contract.

To date, the Authority has approved nine contracts. Most are in the Clarion-Clipperton Zone south of Hawaii, which contains the world’s richest polymetallic sulfide deposits and most abundant polymetallic nodules.\textsuperscript{30} The only other other area that has been opened for exploration and development is in the Indian Ocean just to the southeast of the Maldives. The contract for this area, which was concluded with the China Ocean Mineral Resources Research and Development Association in May 2001, has been widely controversial, because many observers, particularly India, have interpreted it as part of China’s effort to extend its reach to south Asia and blunt India’s influence. The Authority’s relevance to the South China Sea is particularly striking considering that in this case, China used mineral exploration contracting as a geopolitical tool.

\section*{V. ASEAN and the International Seabed Authority}

If all members of ASEAN with claims in the South China Sea can agree to a framework that includes the application of boundaries based on the Law of the Sea (as shown by the dotted lines in figure 1) a contract with the International Seabed Authority may offer a unique opportunity for them to legitimate their claims. If ASEAN applies for an exploratory contract in the area claimed by China but not by any other Southeast Asian nation, when considering the contract, the ISA (or more particularly, the Legal and Technical Commission) may be forced to decide whether the piece of seabed in question is indeed part of the Area, that is, whether it falls within any nation’s jurisdiction. To decide that it is in the Area would not only invalidate China’s claim to that particular part of the ocean, it would also legitimate ASEAN’s broader claims to a delineation

\textsuperscript{29} See Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18 (July 20, 2000), at 15.

of boundaries based strictly on exclusive economic zones evaluated from each country’s coasts.

For such a result to be possible, however, ASEAN would have to do considerable preparation beforehand. Any contract application that it submitted would have to conform to the Authority’s regulations in every detail. This would be particularly important because it is unlikely that a functionalist institution like the ISA would relish being asked to step into the middle of one of the most important boundary disputes in the world. If the application could be rejected on a technicality, therefore, it is likely that the Commission would reject it on that basis to avoid having to decide the limits of national jurisdiction.

If the application were sufficiently foolproof, however, the regulations and procedures of the Authority suggest that the Commission would either have to decide on its own the limits of China’s EEZ or refer the matter to the Law of the Sea Tribunal for a decision. The regulations for the exploration of polymetallic nodules state that after an application is received, the secretary general first reviews the application.31 If the secretary general determines that it conforms to the Convention and the regulations, he or she will give notification and send it on to the Legal and Technical Commission. The Commission then confirms that proper assurances have been made, that the project will not pose a significant danger to marine life, and that the project conforms to several other technical specifications. The regulations state that “if the Commission. . .determines that the proposed plan of work for exploration meets the requirements. . .the Commission shall recommend approval of the plan of work for exploration to the Council.”32 In other words, if the applications do not violate the Convention or the regulations, then the Commission shall recommend approval. The Council’s subsequent approval is largely pro forma.

Considering the geopolitical consequences of having some areas determined to be outside of national jurisdiction, one might assume that disputed areas are off-limits for exploration. However, whether

31 See Supra, at 4.
32 Supra at 15.
because of simply an oversight or because of a conscious decision, neither the Convention in its definition of the Area nor the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area contain any mention of disputed areas. The closest guidance here is the statement that the Area is any part of the ocean beyond any states’ jurisdiction. The International Seabed Authority, in its role as approver of contracts, can reasonably be expected to decide if certain parts of the seabed fall within the Area, and if ASEAN can force the ISA to make such a decision, it seems most likely that the Authority will not side with China, as we will see in the next section.

VI. The Case for ASEAN

There is not enough space here to give a complete analysis of the case for and against China’s claims to the South China Sea. Such analyses have also already been given in great detail by experts in the field on both sides of the issue. In this section, I aim only to give enough evidence to show that an argument for boundary delimitation based on the law of the sea is *prima facie* stronger than China’s argument based on historical records and archaeological discoveries.

First, it seems reasonable to accept the Law of the Sea principles unless there is compelling evidence or extraordinary circumstances that necessitate adopting some different rule. In the South China Sea dispute, China claims that because it has historical maps purporting to show the South China Sea islands as part of its territory as well as archaeological evidence that the Chinese had visited the islands as early as the voyages of Zheng He in the early 15th century, its claims extend much farther into the South China Sea than they would if
the EEZ were simply calculated with the islands being considered *res nullius*.\(^{33}\) As can be seen in figure 1, China’s claims extend even to the beaches of Malaysia! If this evidence cannot be conclusively shown to support China’s claim to historical ownership of the islands, therefore, our preference *prima facie* should be for treating the islands as *res nullius* and drawing the EEZs accordingly.

China’s evidence is not nearly as conclusive as Beijing claims that it is. As the government of Vietnam has argued, the map that the Chinese have produced gives no reason to believe that the islands belong to China.\(^{34}\) In fact, it seems that if they are labeled or demarcated at all, the map indicates that these islands were outside of China. The archaeological evidence is similarly ambiguous. In the pre-modern era, Chinese commerce was common throughout East Asia, and communities of overseas Chinese have existed in Malaysia and the Philippines for centuries.\(^{35}\) A Chinese artifact, therefore, is almost as likely to have come from any other nations in the area as it is to have come from China. Furthermore, even if these artifacts could be shown to have come from China, they are more likely to have been dropped by a ship temporarily docking on the island than to have come from a permanent settlement. In the time period that the artifacts are dated to, it is unlikely that a community on even the largest of the islands would be able to survive because of how isolated it would have been.

Other members of ASEAN, such as Vietnam, which occupied the Paracels until the Chinese invaded, have equally valid claims to many of the islands. And many, including the Philippines, have argued that because of the islands long occupation by the Japanese, World War II effectively made the area a *res nullius*.\(^ {36}\) Indeed, when


\(^{34}\) See Ian James Storey, Creeping Assertiveness: China, Philippines, and the South China Sea Dispute, Contemp. Southeast Asia, Apr. 1999, at 95, 95. (Sing.).

\(^{35}\) See id. at 95.

\(^{36}\) See id. at 95.
Japan and the United States signed the San Francisco treaty, which ended World War II, the islands of the South China Sea were ordered to be returned to their rightful owners, but unlike almost every other square inch of former Japanese territory, no nation was named as owner of the islands.\textsuperscript{37} The Philippines has the additional claim that, as an archipelagic nation, the Spratly islands more naturally belong to it, seeing that geologically they are arguably part of the same archipelago.

In addition to this evidence based on international law and precedent that the area \textit{should} be evaluated based on the Law of the Sea EEZ lines, there is also good evidence that the International Seabed Authority does not consider China’s claims totally valid. And since under the scenario I have outlined the Authority’s opinion is the essential element in legitimating ASEAN’s claims, this evidence is extremely important. According to the ISA's own maps (fig. 2), part of the South China Sea is outside all national boundaries.\textsuperscript{38} It would be very difficult for the Authority to deny ASEAN’s application on the basis that the area is in dispute or on the basis that it belongs to China when its own maps show it to be beyond any state’s EEZ.

Even if one does not accept this evidence as conclusive, it still seems that in the absence of compelling evidence either way, it is most reasonable to start from a clean slate and simply evaluate the area based on the Law of the Sea as it is currently written. In other words, the burden is on China to prove its claims. If it cannot do so (as is likely), then evaluating boundaries as though the area were \textit{res nullius} is the only principled and tenable compromise position. It therefore is likely that if the International Seabed Authority did agree to decide whether the piece of seabed in question were part of the Area, it would decide that at least some portion of the sea is beyond all international boundaries. This would invalidate China’s strident claims and pave the way for a settlement that favors ASEAN.


VII. Conclusion

The dispute in the South China Sea has only become more intractable since it began, and if decisive steps are not taken, the situation is likely to continue to deteriorate. The discovery of important oil reserves and the increasing geopolitical importance of the region have raised the stakes tremendously. Because China is quickly rising as a military and economic force in the region, ASEAN can no longer afford to simply sit back and hope that the crisis turns out in its favor.

As I have shown, one option that has striking legal benefits is pursuing a contract for mineral exploration from the International Seabed Authority. Though it is certainly an unconventional avenue for legitimating or arbitrating territorial claims, the provisions of the UN Convention on the Law of the Sea and the Authority’s regulations on mineral exploitation are written in such a way that the ISA may be compelled to decide whether the center of the South China Sea belongs to China or is the “common heritage of mankind” and falls beyond any national jurisdiction.\(^\text{39}\) China has refused several times to have its disputes adjudicated before the International Tribunal of the Law of the Sea, and this response is unsurprising and even rational. After all, Beijing knows that its claims are contrary to commonly accepted international norms and laws and unlikely to stand up to international legal scrutiny. Because any settlement must be based on the Law of the Sea, appealing to the International Seabed Authority may be the only peaceful way for ASEAN to force China to live up to the international agreements it claims to uphold.

\(^{39}\) Wines, supra note 7.