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Trends in Southeast Asia

FROM DECLARATION TO CODE:
CONTINUITY AND CHANGE IN
CHINA'S ENGAGEMENT WITH ASEAN
ON THE SOUTH CHINA SEA

HOANG THI HA

ISEAS YUSOF ISHAK
INSTITUTE

Trends in Southeast Asia

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FOREWORD

The economic, political, strategic and cultural dynamism in Southeast Asia has gained added relevance in recent years with the spectacular rise of giant economies in East and South Asia. This has drawn greater attention to the region and to the enhanced role it now plays in international relations and global economics.

The sustained effort made by Southeast Asian nations since 1967 towards a peaceful and gradual integration of their economies has had indubitable success, and perhaps as a consequence of this, most of these countries are undergoing deep political and social changes domestically and are constructing innovative solutions to meet new international challenges. Big Power tensions continue to be played out in the neighbourhood despite the tradition of neutrality exercised by the Association of Southeast Asian Nations (ASEAN).

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From Declaration to Code: Continuity and Change in China's Engagement with ASEAN on the South China Sea

By Hoang Thi Ha

EXECUTIVE SUMMARY

- China's engagement with ASEAN over the South China Sea, from the Declaration on the Conduct of Parties in the South China Sea to the ongoing negotiations on the Code of Conduct (COC), exhibits a dynamic continuum with two constants:
 1. Dismissal of any legally binding instrument that would constrain China's freedom of action; and
 2. Persistent territorialization of the SCS despite Beijing's simultaneous diplomatic engagement with ASEAN.
- The continuity is juxtaposed with elements of change in China's engagement with ASEAN, as afforded by the former's growing power and influence. This metamorphosis is manifested in China's efforts to undermine ASEAN unity, robustly assert its claims in the SCS, and use economic statecraft towards ASEAN member states in return for their acquiescence.
- China's more "active" engagement in the COC over the past three years is tactical and does not signify a fundamental change in its long-term strategy that seeks to eventually establish its sovereignty and control over the SCS based on the nine-dash-line (NDL).
- The divergent positions between China and some ASEAN member states on the COC, especially its scope of application, self-restraint elements, legal status and dispute settlement mechanism, are not easy to reconcile. The COC may end up being a non-binding political document with a general scope of application, which will have little effect in regulating the contracting parties' behaviour.

From Declaration to Code: Continuity and Change in China's Engagement with ASEAN on the South China Sea

By Hoang Thi Ha¹

INTRODUCTION

Developments in the South China Sea (SCS) over the past two decades provide a telling illustration of the evolution of ASEAN–China relations. Its progression since the early 1990s indicates how the relationship has grown more asymmetrical, how *realpolitik* has marched ahead of the rule of law, and how power equations in the SCS are rapidly changing as a result of China's rise.

China started negotiations with ASEAN on a code of conduct in the SCS in 2000 which culminated in the signing of the Declaration on the Conduct of Parties in the South China Sea (DOC) in November 2002.² The DOC is not designed to resolve territorial and jurisdictional disputes in the SCS, and instead prescribes general principles for peaceful settlement of disputes, a set of norms of conduct to maintain the status quo, a platform for maritime cooperation and confidence building, and a stepping-stone towards a future code of conduct.

¹ Hoang Thi Ha is Lead Researcher II (Political-Security Affairs) at the ASEAN Studies Centre, ISEAS – Yusof Ishak Institute, Singapore. The author would like to thank Dr Ian Storey for his comments and suggestions on this paper.

² Declaration on the Conduct of Parties in the South China Sea <http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2>.

Embarking on the COC consultations in September 2013, ASEAN and China reached agreement on the Framework of the Code of Conduct in the South China Sea (Framework) in August 2017, and a single draft negotiating text (SDNT) in August 2018. The SDNT provides a basis for further negotiations on specific provisions in the COC.³ It was agreed that the COC would serve as a rules-based framework to promote confidence-building, and prevent or manage incidents between China and the Southeast Asian claimants. Whether the COC will be a legally binding instrument remains to be seen, and a definite timeline for its conclusion is elusive although Chinese Premier Li Keqiang in November 2018 expressed hope to conclude the document within three years.⁴

While diplomacy moves at a glacial pace, the realities at sea have changed significantly, mainly due to Chinese activities but also by other claimant states, to assert their sovereignty, jurisdiction and control over occupied features and related waters.⁵ Starting from the late 2000s, China has “exhibited a greater sense of self-confidence and diplomatic assertiveness in conjunction with its growing power and influence”, departing from the “keeping a low profile” orientation set out by Chinese leader Deng Xiaoping in the late 1970s.⁶ The SCS is the arena where Beijing’s assertiveness has become most visible and impactful. China has emerged as the most powerful player and the one which dictates the

³ “China, ASEAN arrive at single draft negotiating text of COC in South China Sea”, *China Daily*, 2 August 2018 <<http://usa.chinadaily.com.cn/a/201808/02/WS5b62c87da3100d951b8c8460.html>>.

⁴ “China hopes to complete talks on S. China Sea COC in 3 years”, *China Daily*, 13 November 2018 <<http://www.chinadaily.com.cn/a/201811/13/WS5bea29a310eff3032886fc.html>>.

⁵ For example, according to a report by the *Asia Maritime Transparency Initiative of CSIS* in May 2016, Vietnam had reclaimed over 120 acres while China had created 3,000 acres of new land in the Spratlys since 2014 <<https://amti.csis.org/vietnams-island-building/>>.

⁶ See Seng Tan, *Multilateral Asian Security Architecture: Non-ASEAN Stakeholders* (Abingdon, Oxon: Routledge, 2016), p. 87.

temperature and tempo of the situation in the SCS, leaving other claimant states and ASEAN mostly in reactive mode.

Guiding China's engagement throughout the DOC and COC processes is a deliberative strategy to serve China's "creeping assertiveness" in the SCS. This evolving strategy is consistent with the pursuit of China's long-term strategic goal — to exert its sovereignty and effective control over the SCS — while allowing tactical diplomatic compromises where necessary.

I. CHINA'S MOTIVATIONS IN ENGAGING WITH ASEAN ON THE SCS

Insulation of the SCS Issue: Keeping the United States at Bay

A key motivation for China to engage in dialogue with ASEAN is to confine the SCS debate within the ASEAN–China framework, thereby pre-empting what Beijing regards as "interference" from external powers. This motivation is interlaced with an emerging geopolitical contest with the United States in Southeast Asia.

In the early 1990s, Beijing remained firmly insistent on settling the disputes through bilateral negotiations, refusing to join ASEAN in adopting the 1992 ASEAN Declaration on the South China Sea.⁷ Beijing also originally distanced itself from ASEAN's proposal for a code of conduct in the SCS which was put forward in 1996, arguing that such a "code at any multilateral forum can only lead to further complications of the matter".⁸

China then shifted its position and started talks on a code with ASEAN in 2000. That shift was partly to distract international attention away from this issue which gathered steam due to ASEAN's increasing

⁷ The 1992 ASEAN Declaration on the South China Sea <<https://cil.nus.edu.sg/wp.../1992-ASEAN-Declaration-on-the-South-China-Sea.pdf>>.

⁸ "China rejects ASEAN 'Code of conduct' for Spratlys", *Asian Political News*, 2 August 1999 <<http://business.highbeam.com/435555/article-1G1-55364474/china-rejects-asean-code-conduct-spratlys>>.

diplomatic efforts in the late 1990s. After the 1995 Mischief Reef incident, the SCS started to feature more prominently on ASEAN's agenda. Some ASEAN states had been seeking to "internationalize" the issue, not only in ASEAN meetings but also at the newly established ASEAN Regional Forum (ARF) and other international gatherings, e.g., the Non-aligned Movement (NAM).⁹ The SCS issue also found its way into the track-2 through a series of Indonesia-initiated workshops and the Working Group on Maritime Confidence Building Measures of the Council for Security Cooperation in the Asia Pacific (CSCAP). Talking with ASEAN, and ASEAN only, was a way for China to prevent the SCS from being further "multilateralized" or "internationalized". As noted by the former ASEAN Secretary-General Rodolfo Severino, "even as China yielded to the ASEAN states and consented to deal with them as a group, Beijing managed, by that very concession, to get the U.S., Japan and everyone else out of the multilateral discussions on the South China Sea and the whole issue out of the ASEAN Regional Forum."¹⁰

After the signing of the DOC, the formulation of implementation guidelines was protracted for nearly ten years due to China's objection to a provision regarding ASEAN consultations prior to meeting with China.¹¹ The Guidelines¹² was finally adopted in July 2011 with no such reference, although the ASEAN members still maintained their practice of prior consultations. ASEAN's compromise might have been a key reason for this breakthrough, but the launch of the Obama administration's "pivot" or "rebalance to Asia" in 2010 could also have been a strong push factor. A foretaste of how this rebalancing would impact the SCS

⁹ Rodolfo C. Severino, "ASEAN and the South China Sea", *Security Challenges* 6, no. 2 (Winter 2010): 37–47 <https://www.jstor.org/stable/26459936?seq=1#metadata_info_tab_contents>.

¹⁰ Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community* (Singapore: Institute of Southeast Asian Studies, 2006), p. 189.

¹¹ Severino, "ASEAN and the South China Sea", p. 45.

¹² Guidelines for the Implementation of the DOC <<http://www.asean.org/storage/images/archive/documents/20185-DOC.pdf>>.

was reflected in the statement by then Secretary of State Hillary Clinton at the 2010 ARF when she stated that the United States had a “national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the SCS”.¹³ The statement marked a more interventionist posture of the United States in the SCS, stimulating China’s intensified diplomatic efforts to reach agreement on the Guidelines in July 2011. With the adoption of the Guidelines, China’s Foreign Minister Yang Jiechi, in his meeting with Hillary Clinton on the sidelines of the 2011 ARF, conveyed that “China and ASEAN countries have the ability and wisdom to resolve the dispute” and guard peace and stability in the SCS,¹⁴ thereby suggesting that the United States (and other countries) had no role to play.

China’s message of “excluding external interference” is emphasized as a key condition throughout the COC process. For example, to reach agreement on the Framework and to move forward from the SDNT, China has consistently attached the condition of no disturbance or outside interference. In August 2018, Chinese Foreign Minister Wang Yi remarked that “the negotiations on COC can be speeded up if we exclude external interference”.¹⁵ By appearing to accommodate ASEAN in discussions on the COC and offering these modest deliverables, China could show “progress” to nudge ASEAN towards a narrative set by Beijing, and demonstrate that ASEAN and China could work together, thus keeping outside countries’ involvement at bay.¹⁶

China’s engagement in the DOC and COC processes is also aimed at undermining America’s military presence in the SCS, “motivated by the

¹³ “Foreign Minister warns of South China Sea issue”, *China Daily*, 26 July 2010 <http://www.chinadaily.com.cn/china/2010-07/26/content_11046544.htm>.

¹⁴ “Foreign Minister Yang Jiechi Meets with US Secretary of State Hillary Clinton — 22 July 2011” <http://www.fmprc.gov.cn/mfa_eng/topics_665678/yjccxdmwzh_665750/t842324.shtml>.

¹⁵ “Foreign Minister warns of South China Sea issue”, *China Daily*.

¹⁶ Tran Truong Thuy and Le Thuy Trang, *Power, Law, and Maritime Order in the South China Sea* (London: Lexington Books, 2015), p. 320.

need to prevent further American involvement in the area”,¹⁷ including its presence missions and military exercises with countries in the region. The draft COC presented by China in 2000 had one provision implicitly targeted at the United States — “Refrain from conducting any military exercises directed against other countries in the Nansha Islands and their adjacent waters, and from carrying out any dangerous and close-in military reconnaissance. Military patrol activities in the area shall be restricted.”¹⁸ Fast-forward to 2018, and China proposed in the SDNT that China and the ASEAN states hold combined military exercises on a regular basis while insisting that “the Parties shall not hold joint military exercises with countries from outside the region, unless the parties concerned are notified beforehand and express no objection”.¹⁹ This time, not only has China’s intention become more explicit but its ambition has also been elevated — “to displace the US as the security partner of choice for countries in the Indo-Pacific”, as remarked by Admiral Philip Davidson, Commander of the U.S. Indo-Pacific Command.²⁰

Breaking ASEAN Consensus

The process leading to the conclusion of the DOC and to the current COC negotiations followed the same pattern: Intra-ASEAN discussions

¹⁷ Leszek Buszynski and Iskandar Sazland, “Maritime Claims and Energy Cooperation in the South China Sea”, *Contemporary Southeast Asia* 29, no. 1 (2007): 143–71.

¹⁸ Carlyle A. Thayer, “Challenges to ASEAN’s Cohesion: The Policy of Constructive Engagement and a Code of Conduct for the South China Sea”, Seminar on Regionalism and Globalism in Southeast Asia organized by Centre for Southeast Asian Studies, Åbo Akademi University Åland, Finland, 2–4 June 2000.

¹⁹ Carl Thayer, “A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct”, *The Diplomat*, 3 August 2018 <<https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct/>>.

²⁰ United States Senate Committee on Armed Forces, “Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command”, 17 April 2018 <https://www.armed-services.senate.gov/download/davidson_apqs_04-17-18>.

took place first to coordinate and consolidate a common position and present an ASEAN draft as a basis for further negotiations with China. To break this practice of forging ASEAN consensus, Beijing chose to join the regional process to exert its influence over individual ASEAN members and pre-empt any collective position among them.

In the case of the DOC, China accepted talks with ASEAN in 2000, just after the member states had reached an agreement on their own draft in late 1999. History repeated itself with regard to the COC process. As of late 2011, China was still lukewarm towards ASEAN's call for talks on a COC, saying that it would join "when the time is ripe".²¹ What hastened the ripening was probably ASEAN's decision to develop its own key elements of the COC which were endorsed in July 2012 as the basis for negotiations with China at a later stage. China then agreed to have formal consultations with ASEAN on the COC in 2013. In both the DOC and COC, China disregarded ASEAN's consensus-based drafts and insisted on starting anew the drafting process.

China makes it clear that the current COC negotiation is not a 10+1 process but involves eleven parties (China and the ten individual ASEAN member states). This is reflected in the leaked SDNT in which ASEAN states presented their respective national positions separately and individually. In his ASEAN lecture at the ISEAS – Yusof Ishak Institute in August 2018, former Indonesian foreign minister Marty Natalegawa raised his concern over this situation where ASEAN states are not able to come up with an ASEAN common position in the drafting of the COC.²²

Observing Beijing's anxiety with ASEAN's consensus and its eventual acceptance of multilateral talks, a case could be made that a united ASEAN would have greater bargaining power vis-à-vis China than a divided one, which is not the case in reality. On the contrary,

²¹ Greg Torode, "Asean summit unlikely to seal code of conduct with China", *South China Morning Post*, 18 November 2012 <<https://www.scmp.com/news/asia/article/1084951/asean-summit-unlikely-seal-code-conduct-china>>.

²² Q&A Session with Dr Marty Natalegawa at the 18th ASEAN Lecture, "ASEAN: Securing Relevance Amidst Change", ISEAS – Yusof Ishak Institute, Singapore, 17 August 2018.

China has been very adept at exploiting ASEAN's consensus principle by making sure that China has its say in the decision-making and also by leveraging the veto power of some ASEAN members who follow China's line on the SCS. This kind of "absorption and Sinification" of new practices is observed not only in China's engagement with ASEAN on the SCS but also in ASEAN-led institutions such as the ARF.²³ As noted by Tan See Seng, "China has evolved from a wary neophyte at multilateral diplomacy to a self-assured connoisseur and convenor of the practice."²⁴

Assurance of "Peaceful Rise" or a Biding Time Strategy?

Starting from the mid-1990s, concerns about a rising China began to gain traction among its Southeast Asian neighbours, due to Beijing's assertive moves earlier in the decade. For instance, China's passage of the 1992 Law on the Territorial Waters and Contiguous Areas, "which reiterated China's claims in the South China Sea and stipulated the right to use force to protect islands ... and their surrounding waters" was regarded by ASEAN "as a political provocation that contradicted prior diplomatic gestures towards the member states".²⁵ On its part, as argued by a number of analysts, Beijing realized that amassing national power was a long-term journey, and suspicions from other countries could derail it.²⁶ China's

²³ Thammy Evans, "The PRC'S Relationship with the ASEAN Regional Forum: Realpolitik, Regime Theory or a Continuation of the Sinic Zone of Influence System?", *Modern Asian Studies* 37, no. 3 (July 2003): 737–63.

²⁴ See Seng Tan, *Multilateral Asian Security Architecture*, p. 88.

²⁵ Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF* (London: RoutledgeCurzon, 2003), p. 135.

²⁶ For example, Avery Goldstein coined it as "China's transitional strategy" to reconcile its long-term goals and short-term limitations in his book *Rising to the Challenge: China's Grand Strategy and International Security* (California: Stanford University Press, 2005). Michael Swaine and Ashley J. Tellis, in their book *Interpreting China's Grand Strategy: Past, Present and Future* (RAND, 2000), suggested that China was engaged in a "calculative strategy" since it required "high levels of undistracted growth in economic and technological

“peaceful rise” thesis — later changed to “peaceful development” — was thus designed to reduce suspicions by insisting that “China does not seek hegemony or predominance in world affairs” and China would not follow the well-trodden paths of previous great powers which “violently plundered resources and pursued hegemony”.²⁷ It was aimed to sustain the international environment conducive to China’s focus on national development, and reduce the likelihood of external subversion that could undermine China’s nascent but steady ascension.²⁸

As China’s smaller neighbours, Southeast Asian countries were the immediate target audience of the “peaceful development” policy. It was not by coincidence that the New Security Concept, the centrepiece of the policy, was first officially pronounced at an ARF meeting in March 1997.²⁹ The concept emphasized the Five Principles of Peaceful Coexistence, including respect for sovereignty and territorial integrity, equality and peaceful co-existence. The 2005 White Paper: China’s Peaceful Development Road declared that “[t]he international community should oppose unilateralism, advocate and promote multilateralism” and “persist in settling international disputes and conflicts peacefully through consultations and negotiations on the basis of equality, work together to oppose acts of encroachment on the sovereignty of other countries,

terms, and hence significant geopolitical quiescence, to both ensure domestic order and well-being and to effectively protect its security interests along the periphery and beyond”.

²⁷ Zheng Bijian, “China’s “Peaceful Rise” to Great-Power Status”, *Foreign Affairs* (September/October 2005) <<https://www.foreignaffairs.com/articles/asia/2005-09-01/chinas-peaceful-rise-great-power-status>>.

²⁸ C. Fred Bergsten, Charles Freeman, Nicholas R. Lardy, and Derek J. Mitchell, *China’s Rise: Challenges and Opportunities* (Washington: Peter G. Peterson Institute for International Economics and Center for Strategic and International Studies, 2008), p. 212.

²⁹ Carlyle A. Thayer, “China’s ‘New Security Concept’ and Southeast Asia”, in *Asia-Pacific Security: Policy Challenges*, edited by David W. Lovell (Singapore: Institute of Southeast Asian Studies and Asia-Pacific Press, 2003).

interference in the internal affairs of other countries, and willful use or threat of use of military force.”³⁰

A key manifestation of China’s “peaceful rise” is its embrace of multilateral diplomacy, including engagement with ASEAN through becoming a Dialogue Partner in 1996, joining the ARF in 1994, proposing a China–ASEAN Free Trade Area in 2001, becoming the first Dialogue Partner to accede to the Treaty of Amity and Cooperation in Southeast Asia (TAC)³¹ — ASEAN’s key code of conduct for inter-state relations in the region — in 2003, and playing an active role in the establishment of the ASEAN Plus Three (APT) and East Asia Summit (EAS). China’s decision to join the DOC and COC talks was made against this backdrop, with the aim of easing regional anxiety over China’s strategic ambitions and lend credibility to its “peaceful rise” policy.

As China’s overall power continues its steady growth, however, the trajectory of “peaceful rise” has become less certain. The global distribution of power today is very different from two decades ago. China’s GDP in 2017 reached US\$12.24 trillion, a tenfold increase compared to 2000 — the year it began the DOC talks. Since 2014, China’s GDP in purchasing power parity (US\$18.34 trillion) has surpassed that of the United States (US\$17.43 trillion).³² China has also steadily translated its economic power into military might with military expenditure jumping more than fivefold, from US\$41.3 billion in 2000 to US\$228.2 billion in 2017, second only to the United States (US\$597.2 billion).³³ As far as the balance of power in the SCS is concerned, as acknowledged by Admiral Philip Davidson, “China is now capable of controlling the

³⁰ White Paper: China’s Peaceful Development Road, 2005 <http://www.chinadaily.com.cn/english/doc/2005-12/22/content_505678.htm>.

³¹ Full text of the Treaty is available at <<http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>>.

³² World Bank, World Development Indicators, 2018.

³³ Stockholm International Peace Research Institute (SIPRI) Military Expenditure Database, 2018 <https://www.sipri.org/sites/default/files/1_Data%20for%20all%20countries%20from%201988%E2%80%932017%20in%20constant%20%282016%29%20USD.pdf>.

South China Sea in all scenarios short of war with the United States” and “would easily overwhelm the military forces of any other South China Sea claimants”.³⁴

A new generation of Chinese leaders, especially with President Xi Jinping at the helm, has embraced a stronger national ethos and a more assertive foreign policy in conjunction with China’s growing power and expanding interests. As observed by Robert D. Blackwill and Kurt M. Campbell, Xi has “boldly departed from Deng’s injunction to keep a low profile and has reclaimed islands, created international institutions, pressured neighbors, and deployed military assets to disputed regions”.³⁵ This begs the perennial question whether “peaceful rise” is just a transitional strategy while China is biding its time. This new phase was described by some observers as “peaceful rise 2.0”³⁶ or “cold peaceful rise”.³⁷ Their explanations pointed to the changing manner in which China seeks to assert its rights and pursue its national interests, which would become more muscular but stop short of a hot war.

As an arena for both China’s behaviour towards its smaller neighbours and its great power contestation with the United States, the SCS has emerged as a litmus test of China’s “peaceful rise”. The question is no longer whether China would be content with the current status quo in the SCS since it has already altered the status quo, but how fast and how far China will upend it. In that sense, China’s stance in the implementation of the DOC and its negotiating behaviour in the COC negotiations could provide some harbinger of what lies ahead.

³⁴ United States Senate Committee on Armed Forces, “Advance Policy Questions for Admiral Philip Davidson”.

³⁵ Robert D. Blackwill and Kurt M. Campbell, “Xi Jinping on the Global Stage”, *Council on Foreign Relations*, Council Special Report No. 74, February 2016, pp. 3–4.

³⁶ Jian Zhang, “China’s New Foreign Policy under Xi Jinping: towards ‘Peaceful Rise 2.0’?”, *Taylor & Francis Online*, 28 January 2015.

³⁷ Barry Buzan, “The Logic and Contradictions of ‘Peaceful Rise/Development’ as China’s Grand Strategy”, *Chinese Journal of International Politics* 7, Issue 4 (1 December 2014): 381–420.

II. CHINA'S STANCE ON THE IMPLEMENTATION OF THE DOC

Emphasis on Practical Cooperation

Since the 1980s, China has promoted the principle of “setting aside disputes and pursuing joint development” in its disputes with Japan over the Senkaku/Diaoyu Islands and with Southeast Asian states over the Spratlys. This approach was also used during the DOC negotiations during which “ASEAN focused on prevention, while China tried to emphasize the idea of promoting cooperation, presumably through some form of joint development.”³⁸

Following the adoption of the DOC Guidelines, China launched many initiatives to promote maritime cooperation, including the establishment of a RMB3 billion (US\$437 million) China–ASEAN Maritime Cooperation Fund in 2011.³⁹ China has been actively pushing for the establishment of three technical committees: maritime scientific research and environmental protection; safety of navigation and search and rescue (SAR); and combating transnational crime at sea.⁴⁰ China has also proposed and implemented various confidence-building activities that range from workshops to SAR exercises.⁴¹

It should be noted that this focus by China on non-traditional security (NTS) issues is adopted consistently across the board, including under

³⁸ Scott Snyder, Brad Glosserman, and Ralph A. Cossa, “Confidence Building Measures in the South China Sea”, *Issues and Insights*, No. 2-01, Pacific Forum CSIS, Honolulu, Hawaii, August 2001 <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/issuesinsightsv01n02.pdf>.

³⁹ Chairman’s Statement of the 14th ASEAN-China Summit, Bali, Indonesia, 18 November 2011 <<https://www.asean.org/wp-content/uploads/archive/documents/19th%20summit/CH-CS.pdf>>.

⁴⁰ “Eleventh Senior Officials Meeting on the Implementation of the Declaration on the Conduct of the Parties in the South China Sea Held in Singapore, 29 April 2016” <https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1360552.shtml>.

⁴¹ “Zhanjiang, ASEAN prepare for joint maritime search and rescue exercise”, *China Daily*, 24 August 2017 <http://www.chinadaily.com.cn/m/guangdong/zhanjiang/2017-08/24/content_31088566.htm>.

the ambit of the ARF, the EAS and the ASEAN Defence Ministers' Meeting-Plus (ADMM-Plus) where maritime security has been set as a priority area of cooperation. For example, under the ARF Work Plan for Maritime Security, China was among the most active members in activities that focus on safety of navigation, marine oil spill and marine environmental protection, while other claimant states like the Philippines and Vietnam sought to address more traditional aspects of maritime security such as compliance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and maritime domain awareness.⁴²

Pursuing cooperation on NTS maritime challenges is a practical way for China to build confidence with the ASEAN states, leveraging its substantial resources and engaging multiple Chinese agencies in the process. It also helps promote the image of a cooperative and benevolent China while effectively diverting attention and deflecting criticism away from traditional concerns over sovereignty disputes and China's assertiveness. In that context, the conduct of the first-ever ASEAN–China maritime exercise in 2018 (tabletop exercise in August in Singapore and field training exercise in October in Zhanjiang, China, focusing on the application of the Code for Unplanned Encounters at Sea (CUES) and SAR⁴³) — served China well in sending the “subtle message to the world that ASEAN and China could work together and things are progressing well, hence no need for external involvement in the South China Sea issue”.⁴⁴

While the ASEAN states support practical cooperation in principle, most of them adopt a more cautious approach, fearing that it would inadvertently recognize China's territorial and jurisdictional claims

⁴² ASEAN Regional Forum Work Plan for Maritime Security (2018–2020).

⁴³ Koh Swee Lean Collin, “Inaugural ASEAN-China Maritime Exercise: What To Expect”, *RSIS Commentary*, 3 August 2018 <https://www.rsis.edu.sg/rsis-publication/rsis/co18131-inaugural-asean-china-maritime-exercise-what-to-expect/#.XE_JuvZuKIU>.

⁴⁴ AFP, “China wants military drills with ASEAN in disputed sea, excluding U.S.”, 2 August 2018 <<https://www.nst.com.my/world/2018/08/397275/china-wants-military-drills-asean-disputed-sea-excluding-us>>.

based on the nine-dash line (NDL). This concern had been raised by some ASEAN states in the earlier deliberations on the venue that China would choose for the field training exercise. The concern was later allayed by the choice of the waters off Zhanjiang which are not located in disputed waters of the SCS.⁴⁵

A major obstacle to cooperative activities under the DOC is that they can only be “pursued in clearly identified disputed areas,” according to its Guidelines. Meanwhile, it was almost impossible to agree on the areas in dispute due to the lack of clarity on the basis, nature and extent of the territorial claims in the SCS. As noted in 2015 by former ASEAN Secretary-General Le Luong Minh, “the ambiguous nature and extensive extent of some territorial claims in the SCS, especially the NDL, are making the identification of disputed areas for joint cooperation all the more challenging.”⁴⁶ The arbitral tribunal’s award on 12 July 2016 concerning disputes between the Philippines and China in the SCS, which identified the status of the features in the Spratlys and the maritime zones they generate,⁴⁷ could be a game-changer in this respect. Reference to the ruling, however, is a non-starter in the ASEAN–China context due to China’s rejection of the ruling.

Reluctance to Embrace Self-Restraint

China’s selective approach to the implementation of the DOC is manifested in the contrast between its enthusiastic support for practical cooperation and its reluctance to embrace the self-restraint provision in paragraph 5 of the DOC that might undercut its freedom of action

⁴⁵ Author’s interview with officials from ASEAN member states, July and September 2018.

⁴⁶ Le Luong Minh, Remarks at the High-Level International Workshop: Managing South China Sea Conflict from ASEAN Perspective, Jakarta, 26 June 2015 <http://www.asean.org/storage/images/2015/July/SG_Remarks/SG%20remarks%20at%20SCS%20conference%2026%20June%202015_FIN.PDF>.

⁴⁷ Award of the PCA Case No. 2013-19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 UNCLOS between the Philippines and China, 12 July 2016 <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>.

in the SCS.⁴⁸ Due to its general terms, effective implementation of the DOC would not be possible without elaboration of concrete parameters on what constitutes self-restraint. Some ASEAN members therefore suggested developing a list of dos (actions in conformity with the DOC) and don'ts (actions in violation of the DOC) to prevent destabilizing acts at sea.⁴⁹ Such an elaboration was hoped to add substance and concrete meaning to the term “full and effective implementation of the DOC” that both China and ASEAN profess to uphold.

The Philippines was the strongest advocate for defining the parameters of paragraph 5, proposing in 2015 that the don'ts list include such elements as occupation of previously unoccupied features, large-scale reclamation that physically change the character of the features, militarization of currently occupied features, blockade against vessels carrying provisions or personnel for rotation, use of force or threat of use of force in military and law enforcement actions, and declaration of an Air Defence Identification Zone (ADIZ). Obviously, these don't elements were crafted with reference to China's actual or potential actions on the ground.

China has been dismissive of the dos and don'ts lists because many of its activities in the SCS would breach the self-restraint clause. Discussions on the parameters of paragraph 5 have therefore been stalled since 2015. Beijing, on the other hand, criticized some ASEAN states for not exercising self-restraint, especially the Philippines for bringing the case to the arbitral tribunal in 2013, noting that such a unilateral initiation “has clearly violated international law”.⁵⁰ China also “accused

⁴⁸ Paragraph 5 stipulates, among others that “The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.”

⁴⁹ Le Luong Minh, Remarks at the High-Level International Workshop.

⁵⁰ Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014 <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm>.

Vietnam, the Philippines and others of carrying out illegal building work on ‘Chinese’ islands in the South China Sea”.⁵¹

Bilateralism versus Multilateralism

While ASEAN is not a party to the SCS disputes,⁵² the grouping has maintained the long-standing position that it has a key interest and significant role in preserving peace, stability and freedom of navigation in the SCS.⁵³ ASEAN is also the only multilateral platform that China has agreed to engage on the SCS issue. This presents Beijing with a dilemma in dealing with ASEAN as a group and at the same time pursuing bilateralism with each claimant state.

Although the DOC is not an instrument between ASEAN and China, when the ten Southeast Asian countries signed the DOC, they signed it as “Member States of ASEAN”, carrying with this act a sense of collectivity among themselves. Implementation of the DOC has also been embedded in the ASEAN framework and process: (i) ASEAN member states have consultations and coordination meetings prior to their DOC meetings with China; and (ii) implementation of activities under the DOC is reported annually to the annual ASEAN–China foreign ministers meeting, according to the DOC Guidelines.

This duality has led to a “well-worn debate over bilateralism, China’s preferred option, and multilateralism, which most ASEAN states prefer”.⁵⁴ China’s aversion to ASEAN’s collective approach on the SCS

⁵¹ David Brunnstrom, “Satellite images show Vietnam reclaiming land in the disputed South China Sea”, Reuters, 8 May 2015 <<https://www.businessinsider.com/r-images-show-vietnam-reclaiming-land-in-south-china-sea-2015-5/?IR=T>>.

⁵² Only four ASEAN member states are claimant states to the SCS, namely Brunei, Malaysia, the Philippines and Vietnam. Indonesia has maintained the official position that it is not a party to territorial disputes in the SCS but China’s NDJ includes “traditional fishing grounds” that fall within the exclusive economic zone off Indonesia’s Natuna Islands.

⁵³ Le Luong Minh, Remarks at the High-Level International Workshop.

⁵⁴ Rodolfo C. Severino, “Toward a code of conduct for the South China Sea”, *East Asia Forum*, 11 August 2012.

issue was well reflected during the formulation of the DOC Guidelines. As explained by a Chinese diplomat, “the key issue is whether ASEAN member states should consult among themselves first before they consult with China. ASEAN members insist on such a consensual approach towards China, while the Chinese side does not think this is in line with the understanding of DOC ... The whole issue of South China Sea is not a matter between ASEAN as an organization and China, but among the relevant countries.”⁵⁵

The reasons why China prefers bilateralism are self-evident: in bilateral contexts, individual Southeast Asian claimant states do not have the collective bargaining power of ASEAN. Dealing with each member state separately and bilaterally would give China an overwhelming leverage to dictate its terms, through coercion, co-option and/or commercial incentives. Another explanation points to the long history of interactions between China and Southeast Asian kingdoms in the ancient Sino-centric order, characterized by Martin Stuart-Fox as “bilateral relations regimes”. China was comfortable with, and well-versed in, this kind of centre-to-periphery hierarchical relationship. Arguably it still is. Stuart-Fox contends that with ASEAN, there is now a multilateral dimension but “as China’s own political, economic and military power has grown, so traditional modes of interaction have come increasingly to reassert themselves in shaping relations between China and the countries of Southeast Asia.”⁵⁶

Elevating the Importance and Legal Status of the DOC

As recalled by Severino, during the negotiations on the code of conduct in 2000–02, the irreconcilable difference between China and Vietnam over the inclusion of the Paracel Islands in the geographic coverage of the “code” resulted in a compromise that the “code” would apply to the SCS in general. Malaysia, however, could not sign a legally binding

⁵⁵ Rodolfo C. Severino, “ASEAN and the South China Sea”.

⁵⁶ Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (Crow’s Nest, NSW: Allen & Unwin, 2003) pp. 3–4.

“code” without knowing the precise geographic scope application of the agreement. “Thus, the document agreed upon in Phnom Penh in November 2002 was reduced to a political declaration from the originally envisioned legally binding ‘code of conduct.’”⁵⁷ In the wake of the arbitration tribunal case, however, the importance of the DOC from China’s perspective was elevated to the extent that Beijing defended the DOC as a legally binding document.⁵⁸

Paragraph 4 of the DOC, which provides for settlement of disputes through consultations and negotiations among parties directly concerned, featured prominently in China’s position paper on 7 December 2014 as a key reason to deny the arbitral tribunal its jurisdiction. The position paper went at length to explain why paragraph 4 of the DOC should be binding upon the parties to the DOC, citing the judgments of the International Court of Justice (ICJ) on many previous cases. In its official response to the arbitral tribunal’s July 2016 award, China once again accused the judges of, among other things, “erroneously constru[ing] the legal effect of the relevant commitment in the DOC”.

The elevated legal status of the DOC in China’s statements is mainly attributed to the arbitration case. It is an anomaly in the otherwise consistent Chinese approach that sees the DOC as a purely political document without binding effect. This narrative — born out of expediency — should not be taken as a serious change of approach by China. It just confirms Beijing’s selective and instrumental approach in the interpretation and application of the DOC: focusing on paragraph 4 (and paragraph 6 on practical maritime cooperation as mentioned earlier) while discounting paragraph 5 on the exercise of self-restraint.

⁵⁷ Severino, “ASEAN and the South China Sea”, p. 45.

⁵⁸ Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml>.

III. CHINA'S NEGOTIATING BEHAVIOUR ON THE COC

This section examines China's negotiating behaviour instead of its stances on specific provisions of the COC (e.g., the legal status, geographical scope and other substantive provisions of the COC) since the confidential negotiations are ongoing. This behaviour is not unique but distinctive and consistent, with some practices deeply rooted in China's cultural traditions. As noted by Tony Fang, "[r]eality has painted a picture of the Chinese negotiator as bewilderingly complex" and "[t]he Chinese negotiator is both a sincere and a deceptive negotiator",⁵⁹ influenced as they are by the Confucian emphasis on harmony and morality and at the same time the Book of Qi's stratagems that rely on unorthodox means, including deception, to win advantages. As far as the COC negotiations are concerned, the author observes that China's behaviour in the negotiating process serves its overall "creeping assertiveness" strategy in the SCS in the following ways.

Pressing for Acceptance of General Principles

A number of foreign diplomats who have engaged in diplomatic negotiations with China observed that Beijing "takes general principles seriously" and "seeks to establish her own ground rules by pressing its foreign counterparts to agree to certain general 'principles,' which are later constantly invoked"⁶⁰ so as to structure a negotiating agenda favourable to China's objectives. For example, China insisted that Japan acknowledge the existence of a territorial dispute in the Senkaku/Diaoyu Islands before any bilateral talks could begin, a precondition that Japan

⁵⁹ Tony Fang, "Negotiation: the Chinese style", *Journal of Business & Industrial Marketing* 21, Issue 1 (2006): 50–60.

⁶⁰ Jaw-Ling Joanne Chang, "Peking's Negotiating Style: A Case Study of US-PRC Normalisation", *Occasional Papers/Reprint Series in Contemporary Asian Studies*, Number 5 – 1985 (70).

rejected. Recently, China's proposal for a new type of major power relationship with the United States is based on, *inter alia*, a commitment to respect each other's "core interests"⁶¹ — a formula that is difficult to operationalize since "core interests" are not easy to define and can be expediently expanded.

Following the same pattern, on China's insistence, the ASEAN–China consultations on the COC from 2013 to mid-2016 were mostly focused on developing lists of commonalities⁶² — general principles to serve as parameters for future negotiations. Through this process, China was able to gauge the positions and test the resolve and unity of ASEAN member states. As the negotiations proceed, these commonalities could be used as parameters to deflect contentious issues since they are obviously not within the range of commonalities.

Since general principles can be interpreted differently, they can be "used to constrain the interlocutor's bargaining flexibility as the negotiation proceeds".⁶³ This may be the case applicable to all negotiating parties but "[w]hat differentiates the Chinese from the rest is that it often uses these principles to its advantages in negotiations to claim moral superiority over its opponents."⁶⁴ China's criticism of America's failure to live up to the "One China" principle in the Shanghai Communiqué is a case in point.⁶⁵ As regards the COC, a principle consistently

⁶¹ Cheng Li and Lucy Xu, "Chinese Enthusiasm and American Cynicism Over the 'New Type of Great Power Relations'", *Brookings*, 4 December 2014 <<https://www.brookings.edu/opinions/chinese-enthusiasm-and-american-cynicism-over-the-new-type-of-great-power-relations/>>.

⁶² Barry Desker, "China's Conflicting Signals on the South China Sea", *RSIS Commentary*, 24 August 2015) <<https://www.rsis.edu.sg/wp-content/uploads/2015/08/CO15180.pdf>>.

⁶³ Richard H. Solomon, *Chinese Political Negotiating Behavior, 1967–1984* (California: RAND, 1985), p. 74.

⁶⁴ Benjamin Ho, "Understanding Chinese Exceptionalism: China's Rise, Its Goodness, and Greatness", *Alternatives: Global, Local, Political* 39, no. 3 (August 2014): 171.

⁶⁵ Jessica Drun, "One China, Multiple Interpretations", *Center for Advanced China Research*, 28 December 2017 <<https://www.ccpwatch.org/single-post/2017/12/29/One-China-Multiple-Interpretations>>.

emphasized by China is that the COC must be within the framework of implementing the DOC.⁶⁶ It is also reflected in China's insistence that the COC negotiations be undertaken by the ASEAN–China Joint Working Group to implement the DOC rather than through a separate negotiating process.

This general qualification may give China a ready-made negotiating leverage to put a cap on the COC even before substantive negotiations have begun. It was self-evident in 2002 that the DOC was just the starting point, hence the provision in paragraph 10 on the ultimate development of the COC. It is therefore potentially constraining to put the COC under the overarching framework of the DOC since the former is expected to add value and have a higher status than the latter document.

Stalling the Negotiations while Creating New Facts on the Ground

China has retained the initiative of controlling the tempo of COC consultations. It appeared to have applied a stalling strategy in this process until agreement on the Framework in 2017 and the SDNT in 2018. From 2013 to 2016, discussions on the COC had heavily focused on process, modalities, working approach and accumulation of commonalities. This was despite the fact that ASEAN, in view of the widening gap between the diplomatic track and the realities at sea, has repeatedly called for expediting the COC negotiations with a concrete timeframe. On its part, China maintained from the beginning that this must be a gradual and step-by-step process, based on consensus and commonalities — seen by many observers as a “foot-dragging tactic”.⁶⁷ ASEAN's calls for a specific timeline, including proposals to link the COC progress with

⁶⁶ Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 25 April 2016, p. 7 <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1358370.shtml>.

⁶⁷ Arlene Burgos, “Experts see China foot-dragging on South China Sea code”, *ABS-CBN News*, 8 May 2014 <<https://news.abs-cbn.com/focus/05/07/14/experts-see-china-foot-dragging-south-china-sea-code>>.

the commemoration of “2015 as the year of ASEAN–China maritime cooperation” and the 25th anniversary of ASEAN–China dialogue partnership in 2016, were all dismissed by Beijing.

China’s foot-dragging in the COC formulation has raised doubts about whether it is serious about negotiating the code or simply buying time. The latter narrative appeared to gain traction given China’s relentless moves over recent years to create new facts on the ground which have materially changed the status quo and enabled China to assume a much greater military footprint with far larger strategic impact in the SCS.⁶⁸ These actions included massive land reclamation on seven features in the Spratlys, and the construction of dual purpose facilities and deployment of military equipment on these artificial islands which are observed “to be in the final stages of development as air and naval bases”.⁶⁹

The key concern with this stalling tactic is that by the time the COC is achieved, it will help cement a new status quo in which China has gained an overwhelming dominance in the SCS vis-à-vis the other claimant states. This is because, a “code of conduct will look forward in an effort to defuse future controversies, not back to reverse past offenses.”⁷⁰ Such a *fait accompli* will have become the “new normal” upon the conclusion of the COC. In a media interview with Reuters in 2013, former Philippine Foreign Minister Albert del Rosario characterized China’s delaying actions on the COC as strategic procrastination: “We think that China is trying to stay ahead of the COC. They have an assertion agenda that they are trying to complete before they are able to sit down and negotiate

⁶⁸ Patrick M. Cronin and Melodie Ha, “Toward a New Maritime Strategy in the South China Sea”, *The Diplomat*, 22 June 2018 <<https://thediplomat.com/2018/06/toward-a-new-maritime-strategy-in-the-south-china-sea/>>.

⁶⁹ Frances Mangosing, “New photos show China is nearly done with its militarisation of South China Sea”, *Inquirer.net*, 5 February 2018 <<https://www.inquirer.net/specials/exclusive-china-militarization-south-china-sea/>>.

⁷⁰ James R. Holmes, “ASEAN Should Reject a Code of Conduct in the South China Sea”, *The Diplomat*, 5 September 2013 <<https://thediplomat.com/2013/09/asean-should-reject-a-code-of-conduct-in-the-south-china-sea/>>.

a COC ... because the COC looks forward, not back.”⁷¹ His remark was prescient, given the fact that China over the past three years has changed tact to become more forward-leaning on the COC negotiations after almost completing its island-building in the SCS. As remarked by Lee Ying Hui, “there is no reason for China to obstruct the negotiation process further. Beijing has arrived at a crossroads in its approach to the South China Sea.”⁷²

Blaming ASEAN States for Causing Trouble

Chinese leaders and officials tend to assume the high moral ground in criticizing some ASEAN members for causing disturbances on the SCS issue while being defensive of its own actions and insisting that negotiations be conducted on China’s terms. On various occasions, Foreign Minister Wang Yi attributed the slow progress in the DOC implementation and COC negotiations to interference from certain parties, most notably the arbitration case initiated by the Philippines.⁷³ China therefore put forward the condition of “staying free from disturbances” for the COC talks to move forward.⁷⁴ The problem lies in interpretation — what are these “disturbances” and who causes them?

⁷¹ “Philippines says China expanding territory before code takes effect”, Reuters, 4 September 2013 <<http://www.reuters.com/article/us-philippines-china-idUSBRE9830KQ20130904>>.

⁷² Lee YingHui, “China’s Charm Offensive in the South China Sea”, *The Strategist*, 23 August 2018 <https://www.realcleardefense.com/articles/2018/08/23/chinas_charm_offensive_in_the_south_china_sea_113726.html>.

⁷³ “Wang Yi Talks about Situation and Achievements of a Series of Foreign Ministers’ Meetings on East Asian Cooperation”, *Ministry of Foreign Affairs of the People’s Republic of China*, 27 July 2016 <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1385204.shtml>; “China warns against rush to set code of conduct in South China Sea”, *Global Times*, 5 August 2013 <<http://www.globaltimes.cn/content/801630.shtml>>.

⁷⁴ “China calls for fast-track talks on Code of Conduct”, *Straits Times*, 26 July 2016 <<https://www.straitstimes.com/asia/china-calls-for-fast-track-talks-on-code-of-conduct>>.

This blame fits into a pattern where “the Chinese often present themselves as the injured party”⁷⁵ and blame their counterparts for deadlocked negotiations. Professing itself on a defensive and moralistic mode, China from 2013 to 2016 claimed itself to be exercising the utmost restraint and patience while putting the onus for rising tensions in the SCS on the other claimants, especially Vietnam and the Philippines.⁷⁶ President Xi expressed this view in a meeting with his Malaysian counterpart in 2014: “We will never stir up trouble, but will react in the necessary way to the provocations of countries involved.”⁷⁷ As surmised by Benjamin Ho, “[b]y characterizing its actions as reactive, China is able to substantially absolve itself of any accusation of moral failing, while at the same time deflect the burden of blame onto an external party (or nation), thus maintaining its claim to be ‘good’ or ‘benevolent.’”⁷⁸

While not being unique to any single country, this self-righteous posturing tends to be more manifest in great powers which consider themselves not only “materially great” but also “morally good”.⁷⁹ For China, that sense of exceptionalism is nurtured by a millennia-old belief in the nation’s moral authority and great destiny as “the first ancient civilization” and “the centre of the world”⁸⁰ and bolstered by its newly acquired power over recent decades. China’s self-righteousness, however, is distinctively intertwined with a “victim” mentality associated with the “century of humiliation” that started with the First Opium War in the

⁷⁵ Solomon, *Chinese Political Negotiating Behavior, 1967–1984*, p. 6.

⁷⁶ Liu Qiang, “Better to be safe than sorry”, *China Daily*, 30 July 2012 <http://www.chinadailyasia.com/opinion/2012-07/30/content_115599.html>.

⁷⁷ “Xi says China won’t stir trouble in South China Sea”, Reuters, 31 May 2014 <<http://www.reuters.com/article/us-china-malaysia-southchinesea-idUSKBN0EB05B20140531>>.

⁷⁸ Ho, “Understanding Chinese Exceptionalism”, p. 170.

⁷⁹ William A. Callahan, *China Dreams: 20 Visions of the Future* (New York: Oxford University Press, 2013), pp. 10, 92.

⁸⁰ Ho, “Understanding Chinese Exceptionalism”, p. 166.

1840s and only ended with the establishment of the People's Republic of China in 1949 and the reversion of Hong Kong in 1997 and Macau in 1999 (Taiwan and the SCS remain part of the "lost territories").

This "victim" narrative however juxtapositions with an increasingly paternalistic attitude towards ASEAN member states. China's then-Foreign Minister Yang Jiechi captured this "big brother" mentality at the 2010 ARF in Hanoi when he proclaimed that "China is a big country and other countries are small countries, and that's just a fact."⁸¹ Another manifestation of this attitude is the inclination to take punitive actions to "teach another country a lesson", as can be seen from the attack by the Chinese media on Singapore for "intervening *inappropriately* in the SCS dispute" at the 17th NAM Summit in September 2016.⁸²

Over the past two years, however, China has shifted its criticism towards "non-regional countries", presenting itself on the same front with regional countries, i.e., ASEAN and its member states. Speaking in August 2018, Wang Yi noted that "[c]ertain non-regional countries, mainly the United States, have been sending massive strategic weaponry into this region, especially to the South China Sea" which put pressure on China to push for its own "self-defense" and "self-preservation". He said, in an unmistakably moralistic tone: "Yet, such defensive acts have been labelled as acts of militarization. That is confounding right and wrong."⁸³

⁸¹ John Pomfret, "US takes a tougher tone with China", *Washington Post*, 30 July 2010 <<http://www.washingtonpost.com/wp-dyn/content/article/2010/07/29/AR2010072906416.html?noredirect=on>>.

⁸² "Global Times: Singapore raises South China Sea arbitration at NAM summit of heads of state despite opposition", *Straits Times*, 27 September 2016; Liu Zhun, "Spat reveals true stance of Singapore to Chinese public", *Global Times*, 30 September 2016; William Zheng, "Why Singapore should not be surprised that relations with China have changed", *South China Morning Post*, 7 July 2017.

⁸³ "Wang Yi: South China Sea build-up an act of self-defence", *Straits Times*, 5 August 2018 <<https://www.straitstimes.com/singapore/wang-yi-s-china-sea-build-up-an-act-of-self-defence>>.

IV. CONTINUITY AND CHANGE

Continuity

Guiding China's engagement from the DOC to the COC process is a deliberative yet evolving strategy to serve China's creeping assertiveness in the SCS. This strategy carries consistency in pursuing China's long-term and strategic goal — asserting its sovereignty and effective control over the SCS — while allowing tactical flexibility when the situation dictates. China can agree to engage in diplomacy and norms-setting, the very purpose of the DOC and COC, so long as such engagement does not compromise this long-term goal. In that sense, there is a dynamic continuum from the DOC to the COC process which is manifested in these two key constants:

- *Dismissal of any legally binding instrument with ASEAN that would undercut China's freedom of action in the SCS*

The limits of international law in regulating or constraining the conduct of major powers are well recorded. For China, nothing would stand out more than its NDL based on historical rights which are not compatible with the 1982 UNCLOS, and its refusal to abide by the arbitral tribunal's ruling. China, however, is not the only outlier, as noted by Graham Allison in a 2016 commentary which listed a number of maritime disputes where the United States, Russia and the United Kingdom also rejected the jurisdiction of the relevant international courts.⁸⁴ At the regional level, China has always been cautious about any multilateral agreement that may potentially undermine its claims to sovereignty and maritime jurisdiction in the SCS, be it the DOC, the Southeast Asian Nuclear Weapon-Free Zone Treaty (SEANWFZ)⁸⁵ and the future COC.

⁸⁴ Graham Allison, "Heresy to say great powers don't bow to tribunals on Law of the Sea?", *Straits Times*, 16 July 2016 <<https://www.straitstimes.com/opinion/heresy-to-say-great-powers-dont-bow-to-international-courts>>.

⁸⁵ China is ahead of other nuclear power states in agreeing to accede to the Protocol to the SEANWFZ Treaty but with a condition that such accession will be without prejudice to its sovereignty.

Officially, both ASEAN and China have been ambivalent about the legal status of the COC, deferring their decision on this matter towards the end of the negotiating process. In April 2018, Dr Wu Shicun of the Hainan-based National Institute for South China Sea Studies noted that “the Code of Conduct as an upgraded version of the DOC should have some legally binding force.”⁸⁶ This view may come as a surprise given many public sources saying that China allegedly opposes a legally binding COC.⁸⁷ It may, however, suggest a tactical change that leaves the possibility for China to accept a legally binding code if its final content is set in accordance with Beijing’s terms. But a legally binding code which contains provisions limiting China’s freedom of action in the SCS would be out of the question.

- *Persistent territorialization of the SCS despite diplomatic engagement with ASEAN*

ASEAN–China diplomacy lags behind the reality in the SCS which has seen China and other Southeast Asian claimant states take actions to assert their sovereignty and jurisdiction in the area. China, however, has received the most attention because of its sheer capability and scale. While negotiations on the DOC were proceeding in 2001, Chinese fishermen engaged in intermittent skirmishes with Philippine military patrols around Scarborough Shoal which lies 123 miles from the Philippine island of Luzon and is claimed by China as Huangyan Island.⁸⁸ More than ten years later, the DOC in effect failed to prevent China from exercising de facto

⁸⁶ “South China Sea code ‘should be binding’, says Chinese scholar”, *Straits Times*, 11 April 2018 <<https://www.straitstimes.com/asia/east-asia/south-china-sea-code-should-be-binding-says-chinese-scholar>>.

⁸⁷ Lee YingHui, “A South China Sea Code of Conduct: Is Real Progress Possible?”, *The Diplomat*, 18 November 2017 <<https://thediplomat.com/2017/11/a-south-china-sea-code-of-conduct-is-real-progress-possible/>>; Carlyle A. Thayer, “ASEAN’s Long March to a Code of Conduct in the South China Sea” <www.maritimeissues.com>.

⁸⁸ Daojiong Zha and Mark J. Valencia, “Mischief Reef: Geopolitics and Implications”, *Journal of Contemporary Asia* 31, no. 1 (2001): 86–103.

control over Scarborough Shoal in 2012. China's territorialization of the SCS has only intensified over time with various administrative measures, including "tourism, administrative re-zoning, and land reclamation".⁸⁹ It has also employed para-military measures such as "using its vast fishing fleet as the advance guard to press its expansive territorial claims"⁹⁰ and building up the world's largest coast guard fleet to patrol and enforce its claims more robustly in the SCS.⁹¹

Similarly, the ongoing COC negotiations are of little effect in constraining China from stepping up its militarization of the SCS. Media reports cited intelligence sources that China had installed anti-ship cruise missiles and surface-to-air missile systems on Fiery Cross Reef, Subi Reef and Mischief Reef (Spratlys) in May 2018 and redeployed surface-to-air missile systems on Woody Islands (Paracels) in June 2018.⁹² Experts have warned about the COC being used as a "mirage in the desert" which will not affect the central dynamics of the SCS disputes in any shape or form.⁹³ Moreover, "[t]he veil of cooperation and mutual

⁸⁹ Ian Rowen, "Tourism as a territorial strategy in the South China Sea", *Asia Dialogue – the Online Magazine of the University of Nottingham Asia Research Institute*, 6 June 2018 <<http://theasiadialogue.com/2018/06/06/tourism-as-a-territorial-strategy-in-the-south-china-sea/>>.

⁹⁰ Simon Denyer, "How China's fishermen are fighting a covert war in the South China Sea", *Washington Post*, 12 April 2016 <https://www.washingtonpost.com/world/asia_pacific/fishing-fleet-puts-china-on-collision-course-with-neighbors-in-south-china-sea/2016/04/12/8a6a9e3c-fff3-11e5-8bb1-f124a43f84dc_story.html?noredirect=on&utm_term=.4889de1f12bf>.

⁹¹ "Are Maritime Law Enforcement Forces Destabilising Asia", *Center for Strategic & International Studies (CSIS)* <<http://chinapower.csis.org/maritime-forces-destabilizing-asia/>>.

⁹² Amanda Macias, "China quietly installed defensive missile systems on strategic Spratly Islands in hotly contested South China Sea", *CNBC*, 2 May 2018; Catherine Wong, "China puts missiles back on contested South China Sea island as United States pushes allies for bigger military presence in waters", *South China Morning Post*, 11 June 2018.

⁹³ Ian Storey, quoted by Arlene Burgos in "Experts see China foot-dragging on South China Sea code", *ABS-CBNNews*, 8 May 2014.

trust created by re-starting COC negotiations will in fact buy China time to complete its ambitions in the South China Sea without constant harsh criticism from ASEAN.”⁹⁴

Change

The very notion of “creeping assertiveness” carries both continuity and change, and China’s rise is the key determinant to its pace and intensity. As China’s quest for comprehensive national strength gained momentum, Beijing embraced a more assertive foreign policy, boosted by rising nationalism at home. Deng Xiaoping’s “Hide and Bide” dictum is giving way to Xi Jinping’s calling for the realization of the “Chinese Dream of the Great Rejuvenation of the Chinese Nation”.⁹⁵ In the context of China’s engagement with ASEAN on the SCS, such a metamorphosis is apparent with more aggressive posturing and assertive actions, especially in the following aspects:

- *Undermining ASEAN unity*

While not being a monolith, ASEAN has been trying to maintain a collective approach and a principled position on the SCS based on the following key elements: (i) not taking a position on territorial claims but having a stake in ensuring peace, stability and freedom of navigation and overflight in the region; (ii) upholding peaceful settlement of disputes in accordance with international law, including UNCLOS; (iii) expressing concerns over developments at sea that undermine regional peace and stability and urging all parties concerned to exercise self-restraint; and (iv) creating an environment conducive for peaceful resolution of disputes through the DOC and COC processes.

Beijing has become increasingly uncomfortable with any demonstration of ASEAN collectiveness on the SCS issue. The gap

⁹⁴ Lee YingHui, “A South China Sea Code of Conduct”.

⁹⁵ Xi Jinping, *The Chinese Dream of the Great Rejuvenation of the Chinese Nation* (Beijing: Foreign Languages Press, 2014).

between China's rhetoric of respect for ASEAN centrality and its attempts to unravel ASEAN unity is widening. Quiet diplomacy and face-saving, once valued both in Chinese culture and Asian regionalism, were set aside during the 45th ASEAN Foreign Ministers Meeting (AMM) in July 2012 which, for the first time in ASEAN's history, failed to issue a joint communiqué (JC). Allegedly in consultation with China, Cambodia — Beijing's closest Southeast Asian ally and Chair of ASEAN in 2012 — took a hardline stance against requests made by the Philippines and Vietnam to respectively refer to Scarborough Shoal and the EEZ in the JC.⁹⁶ The failure of the 2012 AMM was remarkable since it revealed that Beijing was no longer hesitant about openly and directly driving wedges within ASEAN, even to the point of breaking ASEAN unity.

Chinese leaders and officials have become more vocal in giving admonitions and even threats against any alleged provocation by ASEAN, to the extent of pre-empting ASEAN from discussing or expressing its views on the SCS. At his meeting with ASEAN counterparts in August 2015, Wang Yi warned that “the AMM is not a proper platform for discussing the SCS issues”, saying that doing so would only bring about more serious confrontations and clashes.⁹⁷ Following a special ASEAN–China foreign ministers meeting in June 2016, a previously agreed joint ASEAN statement could not be released after the withdrawal of Cambodia and Laos, reportedly under pressure from China.⁹⁸ At the same meeting, a senior Chinese official sitting beside Wang Yi told ASEAN foreign ministers that as far as China was concerned, ASEAN was not

⁹⁶ Ernest Z. Bower, “China Reveals Its Hand on ASEAN in Phnom Penh”, *Center for Strategic and International Studies*, Washington, D.C., 20 July 2012 <<https://www.csis.org/analysis/china-reveals-its-hand-asean-phnom-penh>>.

⁹⁷ “Multilateral forums not the right place for discussing sea disputes”, *China Daily*, 6 August 2015 <http://www.chinadaily.com.cn/opinion/2015-08/06/content_21513580.htm>.

⁹⁸ Tang Siew Mun, “China shoots itself in the foot with divide and rule tactics in ASEAN”, *Todayonline*, 17 June 2016 <<https://www.todayonline.com/commentary/china-shoots-itself-foot-divide-and-rule-tactics-asean>>.

central to the issue.⁹⁹ In other words, Beijing sees ASEAN’s centrality and unity as irrelevant and unacceptable when it comes to the SCS issue.

- *More assertive than creeping*

If creeping assertiveness is the common thread throughout China’s SCS strategy, then it could be characterized as more “creeping” in the first decade (2000–09), and more “assertive” from 2009 onwards.¹⁰⁰ This growing assertiveness is most apparent in the way China flexes its muscles at sea more regularly and more forcefully with time. According to CSIS in Washington, D.C., Chinese maritime law enforcement and naval vessels were involved in 84 per cent out of fifty-five major incidents identified in the SCS from 2010 to 18.¹⁰¹ Furthermore, with its massive land reclamation and construction of military facilities on its artificial islands since 2014, China is redrawing the landscape of the SCS with unprecedented intensity that would establish its regional maritime hegemony in the near future.

ASEAN–China’s engagement on the SCS has been taking place against this backdrop of increasing Chinese assertiveness and displays of force. By June 2012, a month before the 45th AMM in Phnom Penh, China had seized Scarborough Shoal, triggering both a crisis at sea and a debacle at the AMM. In May 2014, a few days ahead of the 24th ASEAN Summit in Nay Pyi Taw, China deployed an oil rig inside Vietnam’s EEZ, resulting in maritime clashes with the Vietnamese and prompting ASEAN to issue its first stand-alone statement on the SCS since the 1995

⁹⁹ Bilahari Kausikan, “The lesson Hong Kong must learn from the South China Sea”, *South China Morning Post*, 28 August 2016 <<https://www.scmp.com/week-asia/politics/article/2009574/lesson-hong-kong-must-learn-south-china-sea>>.

¹⁰⁰ 2009 — the year China included the Nine-Dash-Line map in its submission to the UN regarding its territorial claims in the South China Sea — is generally considered “the turning point”.

¹⁰¹ “Are Maritime Law Enforcement Forces Destabilising Asia”, *CSIS*.

Mischief Reef incident.¹⁰² In the lead-up to the arbitral tribunal’s ruling, temperatures were high, with China conducting military drills around the Paracel Islands¹⁰³ and at least eleven incidents involving Chinese coast guard vessels harassing vessels from Indonesia, the Philippines and Vietnam from February to July 2016.¹⁰⁴

From the later part of 2016 until now, the dynamic has somewhat shifted, with China offering gestures to reduce tensions and change the narrative, especially through its proposal to finalize the Framework of the COC and conclude the COC in the next three years. Important factors leading to another Chinese “charm offensive” towards ASEAN were the Duterte administration’s about-turn in the Philippine approach towards the SCS, i.e., playing down the arbitration ruling and appeasing China in the hope of getting economic rewards, and ASEAN’s meek response to the ruling itself.¹⁰⁵ Both ASEAN and China have declared that the situation has improved and there have indeed been fewer incidents at sea (the CSIS chronology listed only four encounters between Chinese and Philippine/Vietnamese vessels throughout 2017 to May 2018).¹⁰⁶

However, the fundamentals, i.e., China’s persistence in enforcing its territorial claims based on the NDL, have not changed. China still acts forcefully where it deems necessary especially in bilateral contexts

¹⁰² ASEAN Foreign Ministers’ Statement on the Current Developments in the South China Sea, Nay Pyi Taw, 10 May 2014 <<https://www.asean.org/storage/images/documents/24thASEANSummit/ASEAN%20Foreign%20Ministers%20Statement%20on%20the%20current%20developments%20in%20the%20south%20china%20sea.pdf>>.

¹⁰³ “South China Sea: Beijing begins military drills ahead of key territorial ruling”, *The Guardian*, 5 July 2016 <<https://www.theguardian.com/world/2016/jul/05/south-china-sea-beijing-begins-military-drills-ahead-of-key-territorial-ruling>>.

¹⁰⁴ “Are Maritime Law Enforcement Forces Destabilising Asia”, *CSIS*.

¹⁰⁵ ASEAN did not release any joint statement on the arbitral tribunal’s ruling in July 2016 and none of ASEAN statements refers to the ruling itself. However, since 2016, ASEAN’s lexicon has included “full respect for legal and political processes” as a tacit and indirect acknowledgement of the ruling.

¹⁰⁶ “Are Maritime Law Enforcement Forces Destabilising Asia”, *CSIS*.

with individual Southeast Asian claimant states. For instance, Vietnam had to halt the ongoing drilling work of its “Red Emperor” natural gas project in July 2017 and March 2018, allegedly following a threat by China to attack Vietnam’s outpost on Vanguard Bank.¹⁰⁷ The Philippines, regardless of its warming relations with Beijing, is also on the receiving end of Chinese intimidation. As narrated by Philippine President Duterte himself in 2017, Xi Jinping warned him that “there would be war if Manila tried to enforce the arbitration ruling and drill for oil in a disputed part of the South China Sea.”¹⁰⁸

- *Economic statecraft for geopolitical gains*

Alongside a calculated and measured display of hard power, China has deployed its economic clout in full swing, going around the region “with lollipops in their pockets”¹⁰⁹ such as aid, trade and investment deals. China has become more proactive in economic statecraft as a component of its overall foreign policy, using its economic influence to retaliate against or reward regional countries, subject to their resistance or deference to China’s geopolitical interests. Economic statecraft has emerged as the most powerful tool for China to exert its influence over individual ASEAN members regarding the SCS and mute ASEAN’s collective voice of concern over China’s assertiveness, with considerable success thus far.

China’s economic incentives have been embraced by pragmatic Southeast Asian leaders in most ASEAN states who “preferred to engage

¹⁰⁷ Bill Hayton, “South China Sea: Vietnam ‘scraps new oil project’”, *BBC News*, 23 March 2018 <<https://www.bbc.com/news/world-asia-43507448>>.

¹⁰⁸ Manuel Mogato, “Duterte says China’s Xi threatened war if Philippines drills for oil”, *Reuters*, 19 May 2017 <<https://www.reuters.com/article/us-southchinasea-philippines-china/duterte-says-chinas-xi-threatened-war-if-philippines-drills-for-oil-idUSKCN18F1DJ>>.

¹⁰⁹ Singapore Prime Minister Lee Hsien Long’s Interview with *Time Magazine*, 26 October 2016 <<http://time.com/4545407/lee-hsien-loong-singapore-globalization/>>.

with China as an investor and trading partner rather than an incipient threat to sovereignty.”¹¹⁰ President Duterte set aside the arbitration ruling and downplayed the Philippines’ security alliance with the United States to form a commercial alliance with China during his trip to Beijing in October 2016, reaping US\$24 billion in deals.¹¹¹ Malaysia’s then Prime Minister Najib Razak was given promises of investments and loans worth US\$34 billion while visiting China in November 2016, raising criticisms in some quarters in Malaysia “as a sell-off to Chinese interests”.¹¹² The SCS disputes were thus played down significantly under the Duterte and Najib administrations as a result of this marriage of convenience.

China’s economic influence in continental Southeast Asia looms even larger. Beijing’s “cheque book diplomacy” has been most successful in Cambodia where China has become the country’s largest trade partner (US\$5.8 billion), aid donor (US\$5.27 billion from 2001 to 2018) and foreign investor (with accumulative value of over US\$12.6 billion by end-2017).¹¹³ As remarked by Phay Siphon, Secretary of State of Cambodia’s Council of Ministers, China is now “the number one in terms of money” that stands out with no strings attached on democracy and human rights matters.¹¹⁴ The political dividend from this relationship investment is Cambodia’s staunch alignment with China on the SCS issue even to the detriment of ASEAN unity and credibility.

¹¹⁰ Michael Vatikiotis, “Populism on the March”, *ASEANFocus*, Issue 9/2016, December 2016 <<https://www.iseas.edu.sg/images/pdf/ASEANFocus1216.pdf>>.

¹¹¹ Willard Cheng, “Duterte heads home from China with \$24 billion deals”, *ABS-CBN News*, 21 October 2016 <<https://news.abs-cbn.com/business/10/21/16/duterte-heads-home-from-china-with-24-billion-deals>>.

¹¹² Tang Siew Mun, “Malaysia’s perilous dance with China”, *Todayonline*, 11 November 2016 <<https://www.todayonline.com/commentary/malaysias-perilous-dance-china>>.

¹¹³ Cambodia-China Relations, *GlobalSecurity.org* <<https://www.globalsecurity.org/military/world/cambodia/forrel-prc.htm>>.

¹¹⁴ James Kynge, Leila Haddou, and Michael Peel, “FT Investigation: How China bought its way into Cambodia”, *Financial Times*, 9 September 2016 <<https://www.ft.com/content/23968248-43a0-11e6-b22f-79eb4891c97d>>.

While Cambodia may be the best example in this respect, the truth is that the whole of Southeast Asia increasingly finds itself in China's economic orbit. The Belt and Road Initiative (BRI), which includes not only infrastructure connectivity but also trade facilitation, financial cooperation and people-to-people exchanges¹¹⁵ will further deepen this asymmetric dependence. China is the biggest trading partner of ASEAN with the total trade volume reaching US\$441.6 billion in 2017. But ASEAN depends more on China than the other way around. For example, in 2017 trade with China accounts for 36.3 per cent of Myanmar's total trade but only 0.33 per cent of China's total trade. Three major Southeast Asian claimant states in the SCS — Malaysia, the Philippines and Vietnam — also run high trade dependencies with China (at 16.4 per cent, 15.4 per cent and 22.1 per cent respectively).¹¹⁶ China is the largest source of tourist arrivals to ASEAN with exponential growth from 9.3 million in 2012 to 20.3 million in 2016, accounting for 17.6 per cent of total tourist arrivals to ASEAN countries (except intra-ASEAN tourism) and exceeding the combined tourist arrivals from the EU, Japan, Australia and New Zealand.¹¹⁷

Trade, investment, loans and tourism have become powerful levers for China to advance its geopolitical interests in Southeast Asia, especially regarding the SCS issue. The emerging ASEAN Economic Community is not large enough or integrated enough to provide a credible counterweight to China's economic pull. Meanwhile, other major powers, including the United States and Japan, due to their political, economic and institutional constraints, could not compete with China's financial prowess either. Southeast Asian countries will therefore increasingly find themselves being pulled into China's economic orbit. This will have immediate and long-term impacts on the strategic landscape of the SCS.

¹¹⁵ The State Council of the People's Republic of China, "Action plan on the Belt and Road Initiative", 30 March 2015 <http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm>.

¹¹⁶ CEIC Databases 2017, based on statistics reported by ASEAN member states.

¹¹⁷ ASEAN Secretariat, 2018.

CONCLUSION

Despite its initial reluctance, China's engagement with ASEAN in the DOC and COC processes has gradually shifted from "reactive" to "active". This engagement has given China space for diplomatic manoeuvring to achieve its political aims, namely to control the pace and direction of the discussions, give reassurance of China's "peaceful development", and pre-empt involvement of other major powers. Meanwhile Beijing continues to act decisively on the ground to step up its presence and control in the SCS.

Since mid-2016, China has been more forward-leaning in the COC process as both sides have agreed on the Framework and then the SDNT as the basis for further substantive negotiations. China's more "active" engagement on the COC is tactical and does not signify a fundamental change in its long-term strategy that seeks to eventually establish its sovereignty and control over the SCS based on the NDL. The current environment works to China's interests: the COC talks proceed to give an impression of "progress and cooperation"; ASEAN as a whole does not robustly challenge China's assertiveness at sea so as not to disrupt this 'veil of cooperation'; and with a divided ASEAN, individual Southeast Asian claimant states are under greater pressure to accept China's terms in their bilateral negotiations.

Now in the substantive phase, the COC negotiations will be even more time-consuming and difficult, especially on three contentious points that will determine its effectiveness: (i) the scope of application of the code; (ii) specific elements of self-restraint by the parties in the SCS; and (iii) the legal status of the code with a compulsory dispute settlement mechanism to address effectively differences in the interpretation and application of the code's provisions. Experience from the DOC drafting process suggests that bridging the gaps between China and some Southeast Asian claimant states on these points requires a leap of imagination besides the good faith of all the negotiating parties. There is a real and big possibility that the future COC would not be significantly different from the DOC — a political document with a scope too vague and provisions too general to be effective in governing the conduct of the contracting parties.

As the COC negotiations proceed, a new status quo in the SCS is taking shape with the balance of power shifting decisively in China's favour. Meanwhile, the ASEAN member states' economic dependence on China is growing. ASEAN is bracing for tough times ahead to keep its cohesiveness and credibility in the face of a more confident and resourceful China. Although ASEAN has good reason to push ahead with the COC negotiations, the COC should not be the endgame. Nor should it blindside ASEAN from other developments on the ground that are turning China into the dominant but not necessarily benevolent power in the SCS.

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