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Pitfalls for ASEAN in Negotiating a Code of Conduct in the South China Sea

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EXECUTIVE SUMMARY

- ASEAN and Southeast Asian claimant states have long called for a speedy conclusion to negotiations on a Code of Conduct in the South China Sea (COC). China has since 2017 started to advocate the same.
- However, recent diplomatic progress in the COC process has had no noticeable effect on the ground conduct of the parties so far.
- China has continued its assertive actions at the expense of the maritime rights and interests of other claimant states while claiming that “the South China Sea is calm and the region is in harmony.”
- ASEAN will need to exercise caution during the COC negotiations to avoid institutionalising “a regional arrangement” that seals off the South China Sea from extra-regional powers’ engagement in ways that contravene international law.

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INTRODUCTION

Over the past two decades, developing a code of conduct (COC) for the parties in the South China Sea (SCS) appears to be the end-goal of the longstanding ASEAN-China discourse on the SCS. It was the original objective of ASEAN's engagement with China on the SCS in the late 1990s, which led to the signing of the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. After the decade-long impasse regarding the DOC implementation guidelines was cleared in 2011, ASEAN member states and China embarked on official consultations on the COC in September 2013. From 2013 to 2016, the consultations only focused on accumulating commonalities and discussing procedural matters. Beginning from mid-2017, China shifted gear and adopted a more forward-leaning approach towards the COC, encouraged by the Philippines' decision under the Duterte administration to play down the 2016 arbitration ruling and ASEAN's meek response to the ruling itself.¹ This paved the way for the adoption of the Framework of the COC in August 2017 and the Single Draft Negotiating Text (SDNT) in June 2018.² This article examines some potential pitfalls for ASEAN in the COC negotiations, and argues that the diplomatic progress in the COC process should not distract and divert ASEAN's attention from the continuing problems at sea.

WHAT SIMMERS UNDER THE SCS "CALM WATERS"?

As a result of the recent progress in the COC process, ASEAN documents and statements by its member states unanimously refer to the future COC in a forward-looking and positive tone. The Chairman's Statement of the 34th ASEAN Summit on 23 June 2019 in Bangkok was "encouraged by the progress of the substantive negotiations towards the early conclusion of an effective and substantive COC".³ At the Shangri-La Dialogue (SLD) in June 2019, Philippine Defence Secretary Delfin Lorenzana said that "it is to the advantage of everybody if the COC is finally finished. That would address all the concerns of all people, claimants or players."⁴ Meanwhile, China has used the "progress" in the COC negotiations to reinforce its narrative that the current situation in the SCS is calm. As stated by Chinese Premier Li Keqiang at the 2018 ASEAN-China Summit in Singapore: "Thanks to the concerted efforts of China and ASEAN countries, the situation in the SCS has eased and consultations on the COC have been moving forward smoothly."⁵ This has become a common refrain in Chinese statements concerning the SCS at all levels.

Over the past year, China has continued to militarise its occupied features in the SCS, including the deployment of offensive weaponry. This has vastly increased China's "power-projection capabilities" and "maritime domain awareness" that would facilitate Chinese patrolling and control over the entire SCS.⁶ China also exerted pressure and made implicit threats to Vietnam, forcing Hanoi to cancel the Red Emperor project which was about to enter the drilling phase in March 2018.⁷ The cancellation of this project, 273 miles off the coast of Vietnam, signalled Hanoi's reluctance to push ahead with oil and gas projects within its own exclusive economic zone (EEZ) but too near the nine-dash line, for fear of punitive reactions from Beijing.⁸ China has also leveraged on the overwhelming presence of its fleet (comprising the navy, coast guard, maritime militia and armed fishing vessels) to launch obstructive and disruptive activities towards the ships of other countries'.

Despite these disturbing developments on the ground, China continues to promote a “South China Sea is calm” narrative, using the COC as a stratagem. The past two years have seen China going on a charm offensive towards ASEAN on the COC – from agreement to its Framework and the SDNT to the proposal to finish the first reading in 2019 and finalise the COC by 2021.⁹ What “the first reading” means remains ambiguous. Yet, it creates a semblance of progress although all that it has offered is no more than a process. This has played into ASEAN’s process-driven approach – which is meant to keep the discussions going and maintain at least the notion of working together.

In the meanwhile, individual Southeast Asian claimant states are increasingly under pressure to settle their grievances discreetly and bilaterally with China.¹⁰ This has in effect silenced the more critical voices within ASEAN ranks, and bolstered the voices of appeasement even within the claimant states. For example, on 9 June 2019, a Philippine fishing boat was sunk and its 22 crew members were abandoned in distress, allegedly by a Chinese vessel according to the original narration of the boat’s captain.¹¹ In response, President Duterte played this down as “a little maritime incident” on the one hand. On the other, he “expressed concern and disappointment over the delay in the COC negotiations” at the 34th ASEAN Summit, saying that “the longer the delay for an early conclusion of the COC, the higher the probability of maritime incidents happening and the greater the chance for miscalculations that may spiral out of control.”¹² His argument is a fallacy because it puts the blame on the protracted COC process instead of directing an upfront criticism at Chinese actions.

The effectiveness of China’s mix of multilateral diplomacy and bilateral pressure was also displayed at SLD2019 where the most critical voice against Chinese encroachments on the jurisdiction of regional countries in their respective EEZs did not come from regional defence ministers themselves. It was then US Acting Defence Secretary Shanahan who called it out: “nations are unable to make use of natural resources within their exclusive economic zones” and “fishermen’s livelihoods are in peril as they are denied access to waters they and their ancestors have fished for generations.” Shanahan coined this tactic as “using friendly rhetoric to distract from unfriendly acts.”¹³

IN-GROUP-OUT-GROUP BIAS AND REGIONAL ARRANGEMENT VERSUS INTERNATIONAL LAW?

China is proactively projecting itself on the same front with *regional countries*, claiming that “the SCS is calm and the region is in harmony”.¹⁴ At SLD2019, Chinese Defence Minister said that “the current situation in the SCS is improving towards greater stability” thanks to “the common efforts of the countries in the region.” He directed his criticism instead at “some countries outside the region [who] come to the SCS to flex muscles, in the name of freedom of navigation.”¹⁵

Beijing is in effect employing the in-group-out-group bias to challenge military presence and operations of other extra-regional powers who pursue their freedom of navigation on the sea lanes of the SCS as a global commons. The intention is reflected in the narration by Indonesia’s Defence Minister Ryamizard Ryacudu at SLD2019 when he recalled the words of Chinese General Fan Changlong to ASEAN defence ministers: “Gentlemen, the SCS is our *backyard*, so we have to secure the SCS *together* [emphasis added].”¹⁶ In 2018, Premier

Li also urged ASEAN countries and China to “grasp the key to addressing the SCS issue with our own hands and overcome external impediments.”¹⁷ These statements hark back to the “Asia for Asians” underlying theme of China’s Asia Security Concept which was first pronounced by Chinese President Xi Jinping at the Conference on Interaction and Confidence-Building Measures in Asia (CICA) in 2014: “It is for the people of Asia to run the affairs of Asia, solve the problems of Asia, and uphold the security of Asia.”¹⁸

The intention to seal off the SCS from “outsiders” was also manifest in China’s proposed text of the COC, especially the two following provisions: (i) oil and gas exploration and development in disputed waters shall be carried out by the littoral states in the SCS and not in cooperation with companies from countries outside the region; and (ii) the parties to the COC shall not hold joint military exercises with countries from outside the region, unless the parties concerned are notified beforehand and express no objection.¹⁹

The above propositions have heightened the concern in the international community that the future COC could create a “regional arrangement” exclusive in nature and in contravention with the 1982 UN Convention on the Law of the Sea (UNCLOS).²⁰ The essence of this concern is that the future COC could be used to justify denial of access to and use of the sea lanes in the SCS by military vessels of non-regional countries, infringing upon their freedom of navigation as provided for under UNCLOS. At the SLD2019, there was a chorus among the defence ministers of Australia, France and New Zealand who all stressed that the COC must comply with international law.²¹ Indonesian analyst Dewi Fortuna Anwar also shared this concern in her question at the SLD2019: “How do we ensure that the COC, when it does come into being, will not actually institutionalise a very, very asymmetrical relationship which, in the long run, will be to the detriment not just of ASEAN members, but also the wider stakeholders in the South China Sea? Including not really paying sufficient attention to all of the clauses in UNCLOS.”²²

To their credit, ASEAN member states, especially the claimant states, are well aware of this pitfall. Upholding the universally recognised principles of international law including UNCLOS serves their sovereignty and maritime interests. Therefore, in their proposed texts to the SDNT, Malaysia, the Philippines and Vietnam asserted that “nothing in the COC shall affect the rights or obligations of Parties under international law, including rights and processes relating to the peaceful resolution of disputes of the rights or ability of the Parties to conduct activities with foreign countries or private entities of their choosing.”²³ This clause strikes at the heart of China’s above-mentioned proposals which intend to apply regional exclusivism to international law in the SCS context.

While the possibility that ASEAN member states would allow the COC to contradict UNCLOS is not high, China’s intention to seek regional exclusivism in maritime governance of the SCS through the COC cannot be overstated. Premier Li Keqiang expressly noted that the COC is part of the regional countries’ efforts to “address the SCS issue with a constructive approach and *jointly shape the rules of the region* [emphasis added]”.²⁴ Extra caution should be exercised throughout the COC negotiating process to avoid ambiguities or contradictions that may give rise to different interpretations in the future.

Dino Kritsiotis, in exploring the relationship between law and politics in international relations, observes “how law is used and abused, applied or misapplied, interpreted and

misinterpreted within the political realm.” He therefore deems it necessary to “understand the realities and limitations of stereotyping international law as a ‘primitive’ system of rules awaiting jigsaw-fit applications to specific fact-scenarios, towards ‘a more complex understanding of “law” as a sociological phenomenon.”²⁵ This observation is fitting in the ASEAN context where its normative instruments are often formulated in general terms as a result of political compromise during the drafting, which is perpetuated by the characteristic absence of credible dispute settlement and enforcement mechanisms. For example, in the course of the arbitration proceedings initiated by the Philippines in 2013-2016, China often quoted paragraph 4 of the DOC (which provides for settlement of disputes through consultations and negotiations *among parties directly concerned* [emphasis added]) to deny the jurisdiction of the arbitral tribunal and to criticise the Philippines for violating the DOC provisions.

PRACTICAL MARITIME COOPERATION IN THE SCS

Promoting maritime cooperation has been included as an objective of the COC, apart from promoting trust, preventing incidents and managing incidents should they occur.²⁶ This is a continuity from China’s approach to the implementation of the DOC, which is meant to “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.”²⁷ While practical maritime cooperation could serve to promote mutual trust and confidence among the parties to the dispute, two pitfalls may arise in the process which do not serve the interest of Southeast Asian claimant states.

First, practical maritime cooperation especially in a bilateral context between individual Southeast Asian claimant states and China may inadvertently recognise China’s territorial and jurisdictional claims based on the nine-dash line (NDL) that encroaches upon the former’s sovereign rights to their EEZs and continental shelf. This is exactly the concern with regard to the current Philippines-China cooperation in oil and gas development. In the Memorandum of Understanding (MOU) on this cooperation signed with China in 2018, the Philippines did put up safeguards through the non-prejudice clause and the stipulation that such cooperation will be undertaken only in “relevant maritime areas consistent with applicable rules of international law.”²⁸ However, as noted by Jay Batongbacal, “this does not discount the political impact of the MOU itself. The accommodation of joint exploration and development in the West Philippine Sea – under the premise that its status is still “disputed” rather than “settled” – is a step backward from the tribunal award’s vindication of the Philippines’ exclusive economic zone and continental shelf.”²⁹

Second, more ASEAN-China cooperation in the SCS, even in supposedly less sensitive areas such as maritime scientific research, search and rescue services and ocean surveys, could lend legitimacy to the deployment of China’s capabilities and facilities in the disputed features and waters of the SCS. This is because practical maritime cooperation requires the deployment of resources at sea, including ships and other platforms with adequate technological capabilities. China holds the absolute advantage in this regard with its large fleet of ocean-going vessels capable of monitoring and patrolling the entire SCS, plus the utilities now available on its seven reclaimed features in the Spratlys.

A historical lesson in this respect is the decision by UNESCO Intergovernmental Oceanographic Commission (IOC) in March 1987 that commissioned China to build an observation post in the Spratlys Islands for worldwide ocean survey. This in effect set the stage for China's occupation of then-unoccupied Fiery Cross Reef and the ensuing clashes with Vietnamese forces, after which China took control of six features in the Spratlys by end-1988.³⁰ China's capability and presence in the SCS have since immensely increased, but the narrative of 'delivering public goods' to justify the reinforcement of Chinese facilities and deployment of its dual-use assets to the SCS remains. For example, in July 2018, China sent its 3,510-tonne rescue vessel *Nanhaijiu 115* with helicopter capabilities to be stationed at Subi Reef.³¹ It is noteworthy that the jurisdiction of *Nanhaijiu 115*'s authorities, the Nanhai Rescue Bureau of the Ministry of Transport of China, covers not only search and rescue duties but also "special political and military tasks and disaster relief instructed by the government."³² Caution therefore must be exercised by Southeast Asian claimant states in negotiating regional maritime cooperation so as not to lend legitimacy to the deployment of China's dual-use facilities in the disputed waters of the SCS as well as in the former's EEZs.

CONCLUSION

The COC is still under negotiation and nothing is concluded yet. However, it would serve the interest of ASEAN and Southeast Asian claimant states to be mindful that the COC process holds both promise and pitfalls, hence the need for reality check throughout the negotiations. Former Indonesian foreign minister Marty Natalegawa recently warned that "there is a real risk that developments on the ground – or more precisely at sea – are far outpacing the COC's progress, thereby possibly rendering it irrelevant."³³ One might also point to the largely ineffective DOC as a grim reminder against misplaced expectations on the COC. The risk of irrelevance aside, ASEAN should make sure that the future COC will not institutionalise a potentially exclusivist ASEAN-China arrangement to manage the SCS that may compromise the territorial and maritime interests of the Southeast Asian claimant states, the sanctity of international law, and the security engagement of extra-regional powers in the region. China may see it as an expression of "regional harmony" but such harmony is being defined on China's terms in the vertical hierarchy of the ASEAN-China asymmetrical relationship, not as a horizontal relationship among sovereign equals based on international law.

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- ³ Chairman's Statement of the 34th ASEAN Summit, 23 June 2019, https://asean.org/storage/2019/06/Final_Chairs-Statement-of-the-34th-ASEAN-Summit_as-of-23-June-2019-12....pdf.
- ⁴ Shangri-la Dialogue 2019, Q&A of the Fifth Plenary, <https://www.iiss.org/events/shangri-la-dialogue/shangri-la-dialogue-2019>.
- ⁵ Full text of Premier Li Keqiang's speech at China-ASEAN Summit, 14 November 2018, the State Council of the People's Republic of China, http://english.gov.cn/premier/speeches/2018/11/15/content_281476391331254.htm.
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- ⁷ "Vietnam 'scraps South China Sea oil drilling project under pressure from Beijing'", *South China Morning Post*, 23 March 2018, <https://www.scmp.com/news/china/diplomacy-defence/article/2138619/vietnam-scraps-south-china-sea-oil-drilling-project>.
- ⁸ Author's interview with some Vietnamese officials, Hanoi and Singapore, June 2019.
- ⁹ Full text of Premier Li Keqiang's speech at China-ASEAN Summit, 14 November 2018, op. cit.
- ¹⁰ Author's interviews with officials from some Southeast Asian claimant states, Singapore, June 2019.
- ¹¹ Rambo Talabong, "Captain of abandoned PH boat: I'm sure Chinese ship sank us", *Rappler*, published on 14 June 2019 and updated on 19 June 2019, <https://www.rappler.com/nation/233057-captain-abandoned-philippine-boat-sure-chinese-ship-sank-them>.
- ¹² Jodesz Gavilan, "In ASEAN, Duterte vents 'disappointment' over sea code delays", *Rappler*, <https://www.rappler.com/nation/233738-duterte-vents-disappointment-south-china-sea-code-of-conduct-delays-asean-summit-2019>.
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- ¹⁴ Liu Xiaoming, "China will not tolerate US military muscle-flexing off our shores", *The Guardian*, 27 June 2018, <https://www.theguardian.com/commentisfree/2018/jun/27/china-not-tolerate-trump-military-muscle-south-china-sea>.
- ¹⁵ Shangri-La Dialogue 2019, op. cit., Fourth Plenary Speech by General Wei Fenghe, Minister of National Defence, State Councilor of China.
- ¹⁶ Shangri-La Dialogue 2019, op.cit., Q&A of the Fifth Plenary
- ¹⁷ Full text of Chinese Premier Li Keqiang's speech at China-ASEAN Summit, *Xinhuanet*, 15 November 2018, http://www.xinhuanet.com/english/2018-11/15/c_137607654.htm.
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- ²¹ Shangri-La Dialogue 2019, op.cit., Q&A of the Third Plenary and the Fifth Plenary
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- ²³ Carl Thayer, op. cit.
- ²⁴ Full text of Chinese Premier Li Keqiang's speech at China-ASEAN Summit, op. cit.
- ²⁵ *The Politics of International Law*, Edited by Christian Reus-Smit (Cambridge, UK: Cambridge University Press, 2004), pp. 45-79.
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- ²⁸ Jay Batongbacal, "The Philippines-China MOU on Cooperation in Oil and Gas Development", *Asia Maritime Transparency Initiative*, 5 December 2018, <https://amti.csis.org/philippines-china-mou-cooperation-oil-gas-development/>.
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