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ASEAN, China and the Code of Conduct in the South China Sea

Carlyle A. Thayer

This article provides an overview of diplomatic efforts by the Association of South East Asian Nations (ASEAN) and China to reach an agreement on a Code of Conduct in the South China Sea. The article covers the period from 1992, when ASEAN issued its first statement of concern on the South China Sea, to September 2013 when the two sides commenced formal consultations on the Code of Conduct. The article concludes that the process is likely to be protracted if not interminable.

Introduction

Current territorial and maritime jurisdiction disputes in the South China Sea are the major irritant in relations between China and the claimant states of Southeast Asia—Brunei, Malaysia, the Philippines, and Vietnam. All four claimant states are members of the Association of Southeast Asian Nations (ASEAN). Since ASEAN was founded in 1967, it has sought to preserve Southeast Asia’s autonomy from interference by outside powers. At the same time, ASEAN has sought to assert its centrality in regional security affairs.

South China Sea disputes have proven to be a particularly vexing obstacle to the attainment of these objectives. ASEAN has had difficulty reaching consensus among its diverse members on a unified South China Sea policy.

ASEAN also has had difficulty asserting its centrality in dealing with China. China claims “indisputable sovereignty” over most of the South China Sea, and insists that these disputes be settled bilaterally by the countries directly concerned. This has created dynamic tensions in ASEAN-China relations.

ASEAN and China are in agreement that sovereignty disputes over features (islands and rocks) in the South China Sea can only be solved through direct negotiation between the claimant parties. But ASEAN also insists on a

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role in managing South China Sea disputes to prevent any claimant from using force or the threat of force to advance its claims pending the resolution of sovereignty disputes. Since 2002, ASEAN has sought to obtain China's consent to a binding Code of Conduct (COC) in the South China Sea.

This article provides an historical overview of the evolution of ASEAN's South China Sea policy from 1992 until 2013, when China finally agreed to commence official consultations on a COC. The analysis of this period is enriched by the inclusion of leaked diplomatic documents that shed new light on the negotiating positions of claimants in the 1990s, as

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well as more recent diplomatic documents that broach internal ASEAN differences and policy initiatives.

The article provides convincing evidence of ASEAN's dogged success in asserting its centrality in regional security affairs in general, and the South China Sea in particular. However,

the resolution of South China Sea territorial disputes remains a work in progress. ASEAN and China consultations on a binding COC are likely to be prolonged, if not interminable.

ASEAN and the South China Sea, 1992–2011

The South China Sea is a semi-enclosed sea. It is bordered in the north by China and Taiwan, the Philippines in the east, Brunei and Malaysia in the south, and Vietnam in the west. The Association of South East Asian Nations (ASEAN) first became involved in South China Sea issues in July 1992 when China and Vietnam (not yet a member of ASEAN) became embroiled in a dispute over oil exploration activities in the area. ASEAN issued a declaration that urged unnamed parties “to exercise restraint.”¹ This call went unheeded, and both Vietnam and China proceeded to take control of unoccupied islets and reefs comprising the Spratly archipelago near the Philippines, Malaysia, and Brunei.

In late 1994, China sparked another Spratly-related controversy when it occupied the Philippine-claimed Mischief Reef. This incident marked a turning point. ASEAN foreign ministers issued their second statement on the South China Sea in which they expressed their “serious concern” and urged the concerned parties “to refrain from taking actions that de-stabilize the situation.”² The Philippines lobbied its fellow members to adopt a Code of Conduct (COC) that would constrain China from further encroachment. It took ASEAN officials nearly five years to agree on a draft ASEAN COC. By that time China had drawn up its own draft COC.

ASEAN and China agreed in March 2000 to exchange their respective drafts and to consolidate them into a final agreed text. Four major areas of disagreement emerged: the geographic scope, restrictions on construction

on occupied and unoccupied features, military activities in waters adjacent to the Spratly islands, and policies concerning detainment of fisherman found in disputed waters. After two years of negotiations, it became evident that an agreement was not possible.

In November 2002, as a compromise, ASEAN member states and China signed a non-binding political statement known as the Declaration on Conduct of Parties in the South China Sea (DOC). This document set out four trust and confidence building measures and five voluntary cooperative activities. Significantly, the parties reaffirmed “that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.”⁴

It took another twenty-five months before ASEAN and Chinese senior officials reached agreement on the terms of reference for a Joint ASEAN-China Working Group (JWG) to implement the DOC. At the first meeting of the JWG in August 2005, ASEAN tabled draft Guidelines to Implement the DOC. Point two of the ASEAN draft, which called for ASEAN consultations prior to meeting with China, proved such a sticking point that it took six years of intermittent discussions and the exchange of twenty-one successive drafts before final agreement could be reached. China insisted then, as it does now, that sovereignty and jurisdictional disputes could only be resolved bilaterally by the parties directly concerned.

In July 2011, the Guidelines to Implement the DOC were finally adopted after ASEAN dropped its insistence on prior consultations. ASEAN amended Point 2 as follows: “to promote dialogue and consultation among the parties.” A new point was added to the original ASEAN draft specifying that activities and projects carried out under the DOC should be reported to the ASEAN-China Ministerial Meeting. In all other respects, the final guidelines were nearly verbatim to the original ASEAN draft tabled in 2005.

In January 2012, ASEAN and Chinese senior officials commenced discussions in Beijing on the implementation of the guidelines. This meeting agreed to establish four expert committees on maritime scientific research, environmental protection, search and rescue, and transnational crime. These committees were based on four of the five cooperative activities included in the 2002 DOC. Notably, no expert committee on safety of navigation and communication at sea was established due to its contentious nature. Moreover, not one single cooperative project has been undertaken.

From ASEAN Disunity to ASEAN Unity, 2012

The adoption of the DOC Guidelines led ASEAN officials to consider a clause in the 2002 DOC to adopt “a code of conduct in the South China Sea . . . on the basis of consensus.”⁸ In January 2012, the Philippines circulated an informal working draft simply titled, “Philippines Draft Code of Conduct.” ASEAN senior officials began discussion of this draft with the intention of reaching a common position before presenting it to China for discussion.

China insisted, however, that the DOC Guidelines should be implemented first. China also stated it would discuss the COC with ASEAN at an “appropriate timing” or when “appropriate conditions” were met. As ASEAN discussions progressed China changed its position and sought to join ASEAN officials in drafting the COC. China’s demarche quickly became a contentious issue within ASEAN. At the twentieth ASEAN Summit last year in Phnom Penh, Cambodia, the ASEAN chair pushed for China’s inclusion in ASEAN discussions. The Philippines and Vietnam objected strongly and a compromise was reached. It was agreed that ASEAN would proceed on its own to draft a COC, while communication with China would take place through the ASEAN chair at the same time.

ASEAN senior officials quickly accomplished their task. On June 13, a special working group reached agreement on key elements to be included in ASEAN’s draft Code of Conduct in the South China Sea after only seven meetings. This document was formally approved by a meeting of ASEAN senior officials in Phnom Penh from July 6–7.

ASEAN foreign ministers also unanimously approved the document at the forty-fifth Annual Ministerial Meeting (AMM) in Phnom Penh from July 8–13. The foreign ministers also directed ASEAN senior officials to meet with their Chinese counterparts to complete negotiations on the COC. Chinese officials privately conveyed their agreement to meet with ASEAN officials in September.

ASEAN’s remarkable accomplishment was quickly marred by the extraordinary events at the AMM Retreat held on the evening of July 9. Cambodia’s foreign minister Hor Nam Hong, as ASEAN chair, delegated the task of drawing up the joint statement on AMM discussions to a working group composed of the foreign ministers from Indonesia, Malaysia, the Philippines, and Vietnam. When the draft joint statement was tabled at the AMM Retreat, Cambodia objected to the wording of two paragraphs summarizing discussions on the South China Sea. The draft mentioned the Philippines’ objections to the deployment of Chinese paramilitary vessels to Scarborough Shoal, and Vietnam’s objections to China’s announcement that it was leasing oil blocks that fell within Vietnam’s Exclusive Economic Zone. Cambodia insisted that these were bilateral issues and should not be included in AMM joint statement.

Despite repeated attempts by Indonesia and Singapore to broker a compromise over the wording of the South China Sea section of the joint statement, Cambodia remained firm. Hor Nam Hong reportedly rejected the wording of all successive drafts. As a result, a joint statement was not issued. This was unprecedented in ASEAN’s forty-five year history. In the aftermath of the AMM, unseemly recriminations erupted in public between Cambodia and the Philippines. China used ASEAN’s disarray to renege on its earlier informal agreement to meet with ASEAN senior officials in September to begin discussions on the COC.

ASEAN’s disarray proved temporary. Amidst the recriminations that followed the AMM, Indonesia’s Foreign Minister Marty Natalegawa initiated consultations with his ASEAN counterparts in an effort to restore unity

and commit ASEAN to a common position on the South China Sea. Marty (as the foreign minister prefers to be called) conducted an intense round of shuttle diplomacy flying to five capitols (Manila, Hanoi, Bangkok, Phnom Penh and Singapore) over a two-day period (July 18–19). He and Philippine Foreign Secretary Albert del Rosario met first and agreed to a six-point proposal that Marty put to his other ASEAN counterparts. After he obtained their agreement, Marty informed Cambodia's Hor Namhong and left it to him as ASEAN chair to complete the diplomatic formalities. On July 20, Hor Namhong officially released ASEAN's Six-Point Principles on the South China Sea. All ASEAN foreign ministers reaffirmed their commitment to:

1. The full implementation of the DOC
2. Guidelines for the Implementation of the DOC
3. The early conclusion of a Regional COC in the South China Sea
4. Full respect of the universally recognized principles of international law including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)
5. Continued exercise of self-restraint and non-use of force by all parties
6. Peaceful resolution of disputes in accordance with the universally recognized principles of international law including the 1982 UNCLOS.

In response, China dispatched Foreign Minister Yang Jiechi on a visit to Indonesia, Brunei and Malaysia for talks with his counterparts. Yang stated at a joint press conference in Jakarta that China was willing to work with ASEAN to implement the DOC and “on the basis of consensus” to work toward the eventual adoption of the COC.¹⁴

Indonesia also launched another diplomatic initiative. At the forty-fifth AMM Retreat, Marty promised to circulate a “non-paper” on the COC with additional elements to make it more prescriptive and operational. On September 27, Indonesia presented its “non-paper” to the ASEAN foreign ministers meeting in New York on the sidelines of the annual session of the UN General Assembly. The Indonesian proposal was titled “Zero Draft A Regional Code of Conduct in the South China Sea.”¹⁵

This document drew heavily on three sources: the 2002 DOC, ASEAN's Proposed Elements of a Regional Code of Conduct, and ASEAN's Six-Point Principles on the South China Sea. Extracts from these documents accounted for approximately one-third of the text, with the remainder containing Indonesian proposals. The most significant Indonesian contribution was Article 6 on the implementation of the COC, which accounted for nearly half the length of the full document.

Article 6 contained suggested rules, norms and procedures for carrying out confidence-building measures. It also included detailed provisions for preventing incidents and collisions at sea drawn from the 1972 International Regulations for Preventing Collisions at Sea (COLREGS). Article 8 of the Indonesian draft also repeated verbatim the two dispute mechanisms contained in ASEAN's Proposed Elements of a Regional Code of Conduct: the ASEAN High Council established under the Treaty of Amity and Cooperation (of which China was a signatory), and dispute settlement mechanisms provided under international law, including UNCLOS.

2013 Developments

In January 2013, the ASEAN chair passed from Cambodia to Brunei and career Vietnamese diplomat Le Luong Minh replaced Surin Pitsuwan as ASEAN secretary general. Both pledged to give priority to reviving discussions with China on the COC. In July 2012, Thailand assumed the role of ASEAN country coordinator for relations with China for two years. Thailand proceeded to raise the South China Sea issue with China. And, as noted above, Indonesia played a major leadership role on South China Sea issues. These developments altered the dynamics of the previous year and appear to have had a positive impact on China.

On January 22, without prior consultation with other ASEAN states, the Philippines formally lodged a legal Notification and Statement of Claim to the United Nations to establish an Arbitral Tribunal under UNCLOS. China rejected this claim and declined to participate. However, under the provisions in UNCLOS, the Arbitral Tribunal can proceed without China's participation. A five-member Arbitral Tribunal was set up in April. It must now determine whether the Philippines has established a case in international law and if the Arbitral Tribunal has jurisdiction over the matters raised. The Arbitral Tribunal can only proceed to hear the claim brought by the Philippines if it decides yes on both questions.

The Philippine legal action immediately raised concern among ASEAN members because the Philippines unilaterally submitted its claim without prior consultation and the Philippine legal claim could undermine discussions with China on a Code of Conduct. Diplomatic sources in Southeast Asia reported that Beijing was putting diplomatic pressure on ASEAN states to lobby the Philippines to drop its legal action with the UN in return for restarting talks on the COC. China's lobbying fell on deaf ears.

ASEAN's changed dynamics appear to have led to a rethinking by Beijing of its approach to the South China Sea issue. On April 2, at the nineteenth ASEAN-China Senior Officials Consultation, Chinese officials

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announced their agreement to commence discussions with ASEAN on a COC later in the year. That same month, Brunei's Sultan raised the issue of the COC with President Xi Jinping during his visit to Beijing and the Boao Forum on Hainan Island. Newly installed

ASEAN Secretary General Minh also requested Indonesian President Susilo Bambang Yudhoyono's assistance in addressing the South China Sea dispute.

ASEAN convened its forty-sixth AMM in Brunei on April 11. The Philippine Foreign Secretary Albert Rosario provided an explanation for his country's legal action and reaffirmed his support for a legally binding COC. The joint communiqué issued after the AMM stated that the ministers

looked forward to formal consultations between ASEAN and China at the senior official level with the aim of reaching an early conclusion of the COC.

Immediately following the AMM, ASEAN held its twenty-third summit from April 11–16. ASEAN leaders discussed the South China Sea without the contretemps of the previous year. The Chair's Statement issued by Brunei declared:

We looked forward to continued engagement with China in implementing the DOC in a full and effective manner, including through mutually agreed joint cooperative activities and projects... [and] we tasked our Ministers to continue to work actively with China on the way forward for the early conclusion of a Code of Conduct in the South China Sea (COC) on the basis of consensus.

The ASEAN Summit also endorsed a proposal by Thailand to host a special meeting of foreign ministers in Bangkok prior to the ASEAN-China Summit scheduled for October.

In late April, China's new Foreign Minister Wang Yi visited Thailand, Indonesia, Singapore, and Brunei to discuss the South China Sea issue prior to the scheduled ministerial meeting. In Jakarta, Foreign Minister Marty Natalegawa reaffirmed that an agreement had been reached to hold a meeting of the ASEAN-China Working Group on the DOC "in the near future" to discuss the COC. He also endorsed a Chinese proposal, made in April of the previous year and reiterated by Foreign Minister Wang Yi, to set up an Eminent Persons Group to complement the government-to-government talks.

In early August, Wang Yi visited Malaysia, Thailand, Laos, and Vietnam, and attended the high-level forum on the tenth anniversary of the China-ASEAN strategic partnership held in Bangkok. Wang Yi used his trip to promote joint development and dialogue on South China Sea matters. At a press conference on August 5 he noted that China and ASEAN had only "agreed to hold consultations [as distinct from negotiations] on moving forward the process on the 'Code of Conduct in the South China Sea (COC)' under the framework of implementing the 'Declaration on the Conduct of Parties in the South China Sea (DOC)..."

Wang Yi further stated that China "has noticed that there came out some different ideas from some parties concerned on how to promote the process of COC." Wang Yi then sounded a note of caution:

First, reasonable expectations. Some countries are talking about "quick fix", like reaching consensus on COC within one day. It is an attitude neither realistic nor serious.

Second, consensus through negotiations: ... Wills of individual country or of a few countries should not be imposed on other countries, as an old Chinese saying, nothing forcibly done is going to be agreeable.

Third, elimination of interference. China and ASEAN countries tried several times to discuss on COC before, but got stuck due to some interferences.

Fourth, step-by-step approach. The formulation of COC is stipulated in DOC. COC is not to replace DOC, much less to ignore DOC and go its own way. The top priority now is to continue to implement DOC, especially promoting maritime cooperation. In this process, we should formulate the road map for COC through consultations, and push it forward in a step-by-step approach.

Conclusion

After eighteen years of discussions, ASEAN and China commenced their first round of formal consultations on the COC in Suzhou, China in mid-September. This meeting drew up a work plan on the DOC for 2013–14, approved an expert group to assist in developing the COC, and agreed to meet in Thailand in early 2014.

Unlike 2012, China now faces a more unified and determined ASEAN. Brunei, as ASEAN chair, is playing a leading role in consensus making in contrast to Cambodia’s role as spoiler. Thailand, as ASEAN’s country co-

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ordinator for relations with China, has given priority to diplomatic efforts to facilitate progress on COC discussions. And China cannot afford to ignore the diplomatic role of Indonesia, Southeast

Asia’s largest country and a member of the Group of Twenty, and its proactive Foreign Minister Marty Natalegawa. In addition, Singapore, Malaysia, Vietnam, and the Philippines all support ASEAN’s current diplomatic efforts. The South China Sea will continue to be high on the agenda for upcoming ASEAN-China meetings.

Comments by Foreign Minister Wang Yi (quoted above) indicate that China is in no hurry to conclude an agreement on a COC. China is likely to test ASEAN unity by first insisting that the cooperative activities and confidence-building measures in the DOC be implemented first. This process could take several years. China has only agreed to consultations on the COC under the umbrella of the Joint Working Group to Implement the DOC. China pointedly has not agreed to separate negotiations with ASEAN on the COC proper.

Meanwhile, China will be testing ASEAN’s unity and resolve. China can, as it has in the past, manufacture a pretext at any moment to suspend discussions due to what it considers to be the unacceptable behaviour of one of the claimants, or outside interference by the United States or other major power. In summary, ASEAN-China discussions on the COC are likely to be protracted if not interminable.

Yet even if ASEAN-China discussions on the COC become protracted and interminable, ASEAN will gain from this experience.

ASEAN has set the end of 2015 as its deadline for the creation of an ASEAN Community, including an ASEAN Political-Security Community as one of its three pillars. ASEAN diplomatic efforts to forge a common posi-

tion on the South China Sea will contribute to this goal by demonstrating to its members that their interests are interdependent, and that national security can be enhanced by pooling sovereignty under ASEAN's auspices. Success in this area is likely to spill over and positively influence the development of common policies in other issue areas, such as an enhanced China-ASEAN Free Trade Agreement.

Although bilateral frictions will persist between China and individual claimant states, China increasingly will find that its national interests are better served by a unified

ASEAN that upholds Southeast Asian autonomy in its relations with external powers, and maintains its centrality in the region's political and security architecture.

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