INTERNATIONAL CONFERENCE: TERRITORIAL AND MARITIME BOUNDARIES IN A CHANGING WORLD: CHALLENGES AND OPPORTUNITIES

21 OCTOBER 2025

SESSION 4: INTERNATIONAL COOPERATION IN THE MANAGEMENT AND RESOLUTION OF MARITIME ISSUES

15:45 PM - 17:15 PM

The Role of ASEAN in Developing a Code of Conduct and Prospects for South China Sea Governance

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The Role of ASEAN in Developing a Code of Conduct for the South China Sea

ASEAN began discussing the South China Sea issues in the late 1980s. In 1990, Indonesia convened "track 1.5" Workshops on Managing Potential Conflicts in the South China Sea. The issue was then taken up at the track one level, and in 1992 in Manila, the foreign ministers of ASEAN issued the *1992 ASEAN Joint Declaration on the South China Sea*. The 1992 Declaration urged all parties concerned to exercise restraint with a view to creating a positive climate for the eventual resolution of the sovereignty and jurisdictional disputes. The Declaration also urged the countries concerned to explore the possibility of cooperation in the South China Sea, without prejudicing claims to sovereignty and jurisdiction. In addition, the Declaration recommended that the parties concerned apply the principles set out in the 1976 *Treaty of Amity and Cooperation in Southeast Asia* as a basis for establishing a code of international conduct over the South China Sea.

The ASEAN approach to the South China Sea disputes has been to follow what is referred to as the "ASEAN Way", which emphasises consensus, consultation, informality and non-confrontation rather than legally binding compliance-oriented approaches. ASEAN as a body takes decisions by consensus. This sometimes makes it very difficult for ASEAN bodies to agree on language in statements concerning the South China Sea because the ten member States of

ASEAN have very different national interests in the maritime and sovereignty disputes in the South China Sea.

The proposal for a code of conduct in the South China Sea was first proposed at the 29th ASEAN Foreign Ministers Meeting (AMM) in Jakarta in 1995. In 2002 the ASEAN foreign ministers decided to attempt to agree on a "declaration on the conduct of parties" rather than a code of conduct. This suggestion was accepted, and in November 2002 the *Declaration of the Conduct of Parties in the South China Sea* (2002 DOC) was adopted by ASEAN member States and China.

Beginning in 2004 ASEAN and China focussed on drafting guidelines for implementation of the 2002 DOC. After seven years of negotiations, a set of seven Guideline for Implementation of the 2002 DOC were adopted in July 2011.

In 2013, at the 19th ASEAN-China Senior Officials Meeting in Beijing, China announced its willingness to commence discussion on a Code of Conduct (COC) for the South China Sea. This was a few months after the Philippines had instituted proceedings against China before an international arbitral tribunal under the dispute settlement mechanisms in the 1982 UN Convention on the Law of the Sea (1982 UNCLOS). In August 2013, it was announced that China and ASEAN had agreed to hold consultations on moving forward the process for negotiating a Code of Conduct for the South China Sea. The negotiations have proceeded as follows:

- In August 2014, after two rounds of negotiations, agreement was reached on the first list of commonalities (an "early harvest" measure)
- In May 2017, the foreign ministers of China and ASEAN adopted a framework to start substantive consultations and negotiations on the COC
- In June 2018, at the 15th SOM-DOC, a Single Draft Negotiating Text (SDNT) was adopted by officials from China and ASEAN
- In 2019, ASEAN and China completed the first reading of the SDNT and exchanged views on the second reading
- In July 2023, under Indonesia's chairmanship, ASEAN and China adopted *Guidelines for Accelerating the Early Conclusion of an Effective and Substantive Code of Conduct in the South China Sea*, and the second reading of the draft negotiating text was completed at the 56th ASEAN Ministerial Meeting in July 2023 in Jakarta

- In October 2023, ASEAN and China agreed to commence the third and final reading of the Single Draft SCS COC Negotiating Text
- In 2025, five rounds of COC negotiations are being held in various ASEAN and Chinese cities — Jakarta in February, Manila (April), Kuching (August), Singapore (September) and China (November).

ASEAN and China continue to express a political commitment to finalizing the COC. However, some analysts remain sceptical about the possibility that the States can reach agreement on a legally binding document, given their fundamental differences. Since the current draft of the COC is confidential, I am unable to comment on its specific provisions. Secondary literature suggests that among the difficult issues that have yet to be resolved are the geographic scope of the COC, whether it will be legally binding, and whether it will be subject to a system of compulsory binding dispute settlement.

PROSPECTS FOR SOUTH CHINA SEA GOVERNANCE

In my opinion the fundamental issue between China and the ASEAN claimant States in the South China Sea is not over which State has the better claim to sovereignty over the disputed islands. It is over whether the rights and jurisdiction of all coastal States bordering the South China Sea are governed by 1982 UNCLOS or also by "other rules of international law". The ASEAN member States have claimed maritime zones from baselines along their mainland coast or from their archipelagic baselines as set out in 1982 UNCLOS, including a territorial sea, archipelagic waters, an exclusive economic zone (EEZ), and an extended continental Shelf. However, China has asserted that it has "sovereign rights and jurisdiction" in the waters inside its "nine-dash line", even though area inside the nine-dash overlaps significantly with the maritime zones claimed by the ASEAN member States. China has not clarified what "sovereign rights and jurisdiction" it is claiming within the nine-dash line. Is it claiming sovereign rights and jurisdiction to explore and exploit the natural resources in and under the waters inside the nine-dash line, subject to the right of all States to exercise high seas freedoms, or is it claiming even greater rights and jurisdiction? Also, are the rights and jurisdiction it is asserting subject to the obligation to have "due regard" to the rights and duties of other States in these waters? I am doubtful that agreement can be reached on language in a COC which clarifies these issues.

Another issue that is a source of tension in the South China Sea is the fact that some claimant States have engaged in "island-building" and have "militarized" the islands they occupy. Contrary to some reports in the media, there are no rules of international law prohibiting States from engaging in land reclamation or from constructing military facilities on islands that they occupy, so long as the reclamation activities are consistent with their obligations under 1982 UNCLOS, especially those relating to the protection and preservation of the marine environment in Part XII of the Convention. However, States cannot change the status of a feature through reclamation. In other words, a State cannot use reclamation to change a "low-tide elevation" entitled to no maritime zones of its own into an "island" entitled to maritime zones, and it cannot change "rock" entitled only to a 12 nm territorial sea to an "island" entitled to a 200 nm exclusive economic zone. I am doubtful that agreement can be reached on language to limit or restrict island-building and the militarization of occupied islands, although it may be possible to agree to a moratorium on reclamation activities. These issues could also be addressed under the DOC through an agreement on specific measures on the exercise of restraint.

One of the major challenges in governing the South China Sea is whether China and the ASEAN member States can agree on rules and practices to manage potential conflicts between their navies and coastal guards. In the 2002 DOC, they agreed to exercise self-restraint in the conduct of activities that would complicate or escalate the disputes and affect peace and stability. The challenge is to agree on practical steps on the exercise of self-restraint by navies and coast guards. Consequently, measures such as a Code for Unplanned Encounters at Sea (CUES) are critically important. However, such measures should not be limited to the activities of navies and coast guards. They should also include limits on so-called "grey zone" activities by merchant ships and fishing vessels that are allegedly part of the "maritime militia" of a State. It would be extremely difficult to reach agreement on such measures, but they could negotiated under the 2002 DOC as well as under a COC.

Another sensitive issue that arises under the 2002 DOC is the conduct of military exercises in the disputed waters in the South China Sea, especially live firing exercises with navies of States from outside the region. In paragraph 3 of the 2002 DOC the Parties affirm their respect for the freedom of navigation in and overflight above the South China Sea as provided by the universally recognized principles of international law, including UNCLOS. At the same time, a State bordering the South China Sea has an obligation under the paragraph 5 of the 2002 DOC

to exercise self-restraint in the conduct of activities that would complicate or escalate the disputes and affect peace and stability. Given the tensions in the area, live firing exercises with navies from outside the region are likely to be of concern to other States with claims in the South China Sea. One possible compromise solution is for the coastal States that will be involved in such exercises to inform all the States bordering the South China Sea in advance about the time and location of any such planned exercises. They would be providing this information not because they are legally obliged to do so, but because they want to alleviate unnecessary concerns by other States who claim rights and jurisdiction in the waters.

One of the provisions in the 2002 DOC that has been complied with by all the parties is the obligation in paragraph 5 to refrain from inhabiting any features that were not occupied when the DOC was adopted in 2002. This paragraph is a potential source for resolving the ongoing tensions between China and the Philippines over Second Thomas Shoal. If China would formally agree that it will abide by the 2002 DOC and pledge not to occupy the shoal if the Philippines removes its navy personnel, it could resolve the issue and reduce tensions. However, the Philippines may want to make this part of a broader agreement to reduce tensions in the South China Sea by addressing the issue of grey zone activities.

Paragraph 2 of the 2002 DOC provides that the Parties commit to exploring ways for building trust and confidence on the basis of equality and mutual respect. Paragraph 6 states that the Parties concerned may explore or undertake "cooperative activities" which may include marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue operations, and combating transnational crime. It further provides that modalities, scope and locations of such cooperative activities should be agreed upon by the Parties concerned prior to their actual implementation. Such activities are sometimes described as "low-hanging fruits", but to date this has not been the case.

A major weakness in the 2002 DOC with respect to such cooperative activities is that the DOC does not contain a "without prejudice" clause. Such a clause is essential to protect the legal position of States participating in cooperative activities in disputed areas. A without prejudice clause provides that if a State participates in cooperative activities with other States in a disputed area, its participation is "without prejudice" to its position on the issues of sovereignty and jurisdiction in the area where the cooperative activities are taking place. In other words, by participating in an activity, the State is not recognizing the legitimacy of the sovereignty

and maritime claims of any other State, and it is not giving up its own sovereignty and maritime claims in the area where the cooperative activities are taking place. Furthermore, such a clause should also provide that the participation of a State in discussions or negotiations on cooperative activities is also done on a "without prejudice" basis.

One of the cooperative activities mentioned in the 2002 DOC is measures to protect the marine environment. Such measures could work if all States surrounding the South China Sea would agree to take certain measures to prevent pollution of the marine environment in particular areas by their nationals and by ships flying their flag. The States bordering the South China Sea could agree to establish marine protected areas in certain areas in the South China Sea. Each participating State could agree to prohibit its nationals or ships flying its flag from entering designated areas or from engaging in particular activities in such designated areas. On the other hand, the unilateral declaration of a marine protected area by one claimant State in a disputed area is likely be viewed as a disguised attempt by that State to strengthen its claim to sovereignty and jurisdiction, and is likely to increase tensions. This may be the case with China's recent proposal to establish a marine protected area in Scarborough Shoal.

In conclusion, fundamental differences between China and the ASEAN member States make agreement on a COC with meaningful provisions extremely difficult. And even if a more robust COC can be agreed upon, it is not likely to address the fundamental issue relating to governance in the South China – China's refusal to bring its claims to sovereign rights and jurisdiction in the South China Sea into conformity with 1982 UNCLOS. Nevertheless, even if no agreement can be reached on a COC, all is not lost. If the political will is present, measures can be taken to reduce tensions and promote cooperation under the framework of the 2002 DOC and 1982 UNCLOS.