



Cambodian Insights on Southeast Asia

Stormy Voyage at Sea: Explaining ASEAN's Options about the Code of Conduct in the South China Sea

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Executive Summary

- The dispute over the South China Sea has been long for ASEAN to solve. As an effort to resolve this conflict, ASEAN and China signed the Declaration on the Conduct of Parties (DoC) in 2002, focusing on promoting confidence-building measures and maritime cooperation and laying the groundwork for discussing a formal and binding Code of Conduct (CoC). The two parties revealed a draft Framework CoC in 2017 and a Single Draft Negotiating Text (SDNT) in 2018. The projected CoC's 20-page first draft was released the following year in 2019. In 2023, China and the ASEAN nations agreed on new regulations to quicken the process of negotiating a legally binding Code of Conduct (CoC) for the South China Sea.
- However, the negotiation of the Code of Conduct (CoC) has faced significant hurdles, primarily stemming from internal divisions within ASEAN, China's strategic unclear intentions, and doubt about the CoC's effectiveness. Despite years of negotiations, differences persist on crucial issues such as geographic coverage and enforcement mechanisms, casting doubt on the CoC's viability.
- These lingering negotiations of the CoC have raised one important question whether ASEAN should continue the negotiation or abandon it.
- This paper discusses the pros and cons of abandoning the CoC negotiation. As pointed out in the following text, there are many consequences of abandoning the CoC negotiation while at the same time providing possible conditions for ASEAN to conclude the CoC to maintain regional peace and security in the South China Sea.

- The article also suggested some possible solutions for ASEAN to continue the CoC negotiation despite its consequences. In addition, the possibility of bolstering confidence-building measures (CBMs) to de-escalate tensions, ensuring China's adherence to a rules-based order, avoiding legitimizing illegal claims, and promoting bilateral negotiations with China will contribute to fostering stability and security in the South China Sea dispute.

Introduction

The Declaration on the Conduct of Parties (DoC) was formally signed on November 4 in Phnom Penh, Cambodia, by government representatives from China and the ASEAN nations. It was seen as a landmark agreement between ASEAN and China in 2002. The DoC underlines freedom of navigation and overflight, the peaceful resolution of disputes, and restraint in operations.¹ The DoC makes three goals clear: fostering confidence-building measures, engaging in real-world maritime cooperation, and laying the groundwork for discussing and concluding a formal and binding CoC.² However, the goal of increasing confidence between the claimant states and halting the dispute's escalation, leading to the conclusion of the Code of Conduct in the South China Sea, has not been achieved.

All sides agreed that the framework is merely a guide for how the CoC will be developed. Still, critics contend that the lack of an initial purpose outlining the need to make the code enforceable and legally binding, as well as the lack of a dispute resolution mechanism, cast doubt on the effectiveness of the agreement.³ Controversies frequently arise during the negotiations for the implementation of a Code of Conduct (CoC). A 1992 ASEAN paper and a 2002 joint declaration between ASEAN and China both referenced the need for a CoC to oversee maritime activity in the

¹ “Declaration on the Conduct of Parties in the South China Sea – Maritime Awareness Project.” n.d. Maritime Awareness Project. Accessed February 16, 2024. <https://map.nbr.org/2020/10/declaration-on-the-conduct-of-parties-in-the-south-china-sea/>.

² Mingjiang, Li. 2014. “Managing Security in the South China Sea: From DOC to COC.” *Kyoto Review of Southeast Asia*. <https://kyotoreview.org/issue-15/managing-security-in-the-south-china-sea-from-doc-to-coc/>

³ Shepherd, Christian, and Manuel Mogato. 2017. “ASEAN, China adopt framework for crafting code on South China Sea.” *Reuters*. <https://www.reuters.com/article/us-asean-philippines-southchinasea-idUSKBN1AM0AY>.

region. However, the two parties are still debating the document's structure and content 20 years later. Some analysts suggested ending the CoC negotiations because they were ineffective.⁴

Against this background, it is important that we revisit the debate surrounding the CoC negotiations and, finally, provide some ideas as to what can be done about the CoC. While the debate suggests that ASEAN should either abandon or conclude the CoC, this paper will take a look at both sides and analyze possible solutions for ASEAN as it progresses towards the conclusion of the CoC. The paper begins by discussing the key issues around the CoC negotiations. After that, we will take a look at the possible consequences and precautions if ASEAN abandons the CoC negotiation. At the same time, the paper will discuss the significance of ASEAN concluding the CoC for the sake of long-term stability in the South China Sea. In addition, we also provide the possible consequences and precautions for concluding the CoC negotiation.

Key Issues around the CoC Negotiation

High-level negotiation is not easy to conclude. The CoC negotiation is not different. This section discusses key issues facing the CoC negotiation. First, the ASEAN member states themselves have been struggling to agree to the content of the CoC due to a high degree of difference regarding the South China Sea between the claimants and non-claimants. Non-claimants place greater importance on their bilateral relations with China than engaging Beijing in collective negotiations. This effectively prevents the ASEAN members from combining their power in an initiative to settle territorial conflicts.⁵ ASEAN members can be broadly classified into three groups regarding the South China Sea disputes such as those actively defending their sovereignty (Vietnam and the Philippines), those with significant interests in the resolution of the dispute (Indonesia, Malaysia, Singapore, and Brunei), and those inclined to accommodate China (Cambodia, Laos, Myanmar, and Thailand).⁶

⁴ Trang, Ngoc M. 2022. "ASEAN, China, and the COC negotiation: How relevant is UNCLOS? | Asia Maritime Transparency Initiative." Asia Maritime Transparency Initiative. <https://amti.csis.org/asean-china-and-the-coc-negotiation-how-relevant-is-unclos/>.

⁵ Simões, Leticia. 2022. "The Role of ASEAN in the South China Sea Disputes." E-International Relations. <https://www.e-ir.info/2022/06/23/the-role-of-asean-in-the-south-china-sea-disputes/>.

⁶ Vu, Truong, and Phuong Nguyen. 2014. "China and the South China Sea Disputes." E-International Relations. https://www.e-ir.info/2014/09/09/china-and-the-south-china-sea-disputes/#google_vignette.

Following the progress, Thailand has taken a moderate stance toward SCS issues. It avoids condemning China because of Bangkok's close economic links to China and the lack of any claims in the SCS. In addition, Laos has strong economic cooperation with China, similar to Thailand. Since they are not parties to any SCS conflicts, they typically give in to Chinese pressure and assist in preventing attempts by other ASEAN members to criticize Beijing in the group's reports and communiqués. Cambodia has been China's main supporter inside ASEAN, particularly when the DoC and CoC were brought up.

In 2012, it was the first time that ASEAN failed to reach a consensus and did not produce a Joint Communiqué at the 45th ASEAN Foreign Ministers' Meeting because of the lack of agreement and unity among ASEAN members. This is because the joint communique includes references to Chinese aggressions in the SCS. Along with Cambodia, Thailand, and Laos, Brunei was also opposed to bringing up the Chinese activities in the SCS since doing so might compromise the stability of the area by undermining ASEAN's relations with China.⁷ In 2023, during the ASEAN Summit in Jakarta, ASEAN remained divided about how to deal with China's assertive behavior in the disputed waters and seek backing from non-ASEAN partners. For more than ten years, ASEAN's division over China's assertiveness in the South China Sea has been noticeable ever since Cambodia, as ASEAN chair in 2012, declined to mention the issue in the Chairman's Statement. For the sake of their economic interests, ASEAN leaders of nations that are not directly involved in the conflict, such as Indonesia, appear to have been very careful in addressing the South China Sea issue. Even when other ASEAN members stated their open harsh protests against China's assertive behavior in their territory, they remained silent.⁸

Second, China has been using the CoC negotiation as a means of influence. The Code of Conduct will help China foster the impression that China has complied with the international practices of resolving conflict peacefully. Despite having stated its willingness to engage in such negotiations, China has not followed through on this promise and has even strengthened its military presence in

⁷ Simões, Leticia. 2022. "The Role of ASEAN in the South China Sea Disputes." E-International Relations. <https://www.e-ir.info/2022/06/23/the-role-of-asean-in-the-south-china-sea-disputes/>.

⁸ Chap, Chetra. 2023. "ASEAN Remains Divided Over China's Assertiveness in South China Sea." VOA. <https://www.voanews.com/a/asean-remains-divided-over-china-s-assertiveness-in-south-china-sea/7264923.html>.

the South China Sea.⁹ In the Paracel Islands, China has twenty outposts and seven in the Spratly. In addition to a significant increase in its presence in the Paracels, China has been dredging and creating artificial islands in the Spratly Islands since 2013, developing 3,200 acres of extra land.¹⁰ Moreover, China had completely armed at least three man-made islands in the Spratly archipelago, including Mischief Reef, Subi Reef, and Fiery Cross.¹¹ In addition, the man-made islands are equipped with fighter jets, anti-ships, anti-aircraft missile systems, laser and jamming equipment, and other military equipment, in a move that is seen as increasingly assertive and a danger to all neighboring countries.¹² Beijing has employed intimidation to undercut the sovereignty of Southeast Asian coastal governments in the South China Sea, coerced them out of offshore resources, frightened them out of shipping lanes, claimed dominance unilaterally, and denied fishermen access to their means of subsistence.¹³

The year 2023 was a year of increasing tensions in the contentious and economically important waterway as China further reinforced its claims over the vast "nine-dash line," which claims virtually the entire South China Sea. The most vehement Chinese operations occurred in areas claimed by the Philippines, specifically near the Second Thomas Shoal, a submerged feature in the Spratly Islands that the Philippines holds. China has increasingly prevented the Philippines' forces from resupplying troops stationed aboard the BRP Sierra Madre.¹⁴ Moreover, China's Ministry of Natural Resources has produced an updated official map of the geographical boundaries claimed by the People's Republic of China (PRC) in 2023. This map, unlike the previous Nine-Dash Line standard, now contains a tenth dash, which officially consists of the island of Taiwan in its core

⁹ Vu, Truong, and Phuong Nguyen. 2014. "China and the South China Sea Disputes." E-International Relations. https://www.e-ir.info/2014/09/09/china-and-the-south-china-sea-disputes/#google_vignette.

¹⁰ "China Tracker." n.d. Asia Maritime Transparency Initiative. Accessed February 18, 2024. <https://amti.csis.org/island-tracker/china/>.

¹¹ RFA Staff. 2022. "New photos show China's artificial islands are highly developed military bases." Radio Free Asia. <https://www.rfa.org/english/news/southchinasea/china-artificial-islands-10312022043801.html>.

¹² Associated Press. 2022. "U.S. admiral says China has fully militarized islands." Politico. <https://www.politico.com/news/2022/03/20/china-islands-militarized-missiles-00018737>.

¹³ "China's Military Aggression in the Indo-Pacific Region - United States Department of State." n.d. state.gov. Accessed February 18, 2024. <https://2017-2021.state.gov/chinas-military-aggression-in-the-indo-pacific-region/index.html>.

¹⁴ Strangio, Sebastian. 2024. "ASEAN Foreign Ministers Speak Out About South China Sea Tensions." The Diplomat. <https://thediplomat.com/2024/01/asean-foreign-ministers-speak-out-about-south-china-sea-tensions/>.

area. After introducing the revised map, the governments of Taiwan, Malaysia, Vietnam, the Philippines, India, and Malaysia have all issued statements denouncing these claims in one way or another. This widespread condemnation is unlikely to prevent China from continuing to produce maps with this feature, as Chinese law requires that all maps created in China adhere to their standard of world geography.¹⁵ These activities of China suggest that China is not likely to negotiate a legally binding CoC or address the South China Sea conflicts in line with international law, as evidenced by its efforts to raise tensions in the South China Sea.¹⁶

Third, whether the CoC will be signed as a legally binding document remains unclear. The DoC's full implementation, which would ultimately result in a CoC, appears to be impractical shortly. When ASEAN released its initial statement on South China Sea territorial issues in 1992, the CoC began to take form. In 1996, they agreed with the concept of a CoC, and in 2002, they signed a Declaration on the Conduct of Parties in the South China Sea (DoC).¹⁷ Draft Guidelines to Implement the DoC were presented by ASEAN in August 2005. In July 2011, the DoC Implementation Guidelines were lastly approved. The two parties revealed a draft Framework CoC in 2017 and a Single Draft Negotiating Text (SDNT) in 2018. The projected CoC's 20-page First Draft was released the following year. However, none of these accomplishments have been sufficient to resolve the bilateral disagreements. Some participants in the negotiation process argued that there are some significant differences between the Chinese and the ASEAN claimants' stances in the First Draft.¹⁸ Due to these factors, both sides have reaffirmed their commitment to a CoC; nonetheless, there are still problems preventing both parties from reaching an agreement.

¹⁵ Clayman, Troy. 2023. "China's New Map: The 10-Dash Line." Boston Political Review. <https://www.bostonpoliticalreview.org/post/china-s-new-map-the-10-dash-line>.

¹⁶ Vu, Truong, and Phuong Nguyen. 2014. "China and the South China Sea Disputes." E-International Relations. https://www.e-ir.info/2014/09/09/china-and-the-south-china-sea-disputes/#google_vignette.

¹⁷ Darmawan, Aristyo R. 2022. "The US-ASEAN summit and the South China Sea Code of Conduct." Policy Forum. <https://www.policyforum.net/the-us-asean-summit-and-the-south-china-sea-code-of-conduct/>.

¹⁸ Hoang, Viet. 2020. "The Code of Conduct for the South China Sea: A Long and Bumpy Road." The Diplomat. <https://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road/>.

During talks, issues such as the CoC's legal validity, its scope, and the role of extra-regional powers in upholding it came up.¹⁹

Interestingly, there is no indication, for instance, that the parties can agree on the purported CoC's application on whether the Paracel Islands and Scarborough Shoal are included in the CoC's geographic coverage, as Vietnam and the Philippines prefer, or whether it simply includes the Spratly Islands, as China prefers. In addition, the problem remains in ASEAN's response to China's assertion of "historic rights" under their respective national laws. All of these factors undermine the legally binding and enforceable CoC.²⁰ Although the regional governments have still supported the CoC negotiations, there must now be serious doubts about whether these endless negotiations will ever have a satisfactory conclusion or whether any final agreement would cause China to reconsider its assertive actions. Although China ratified UNCLOS in 1996, it has currently challenged both the outcome of the arbitral tribunal in favor of the Philippines and its applicability to the South China Sea. Furthermore, despite having ratified the DoC in 2002, China has consistently and openly been against its most fundamental principles. These evidences suggest the fact that China is not likely to consent to a just and binding CoC.²¹

After all, it seems to suggest that ASEAN should not waste its resources and time continuing the adoption of the CoC given the lack of unity among ASEAN members, the unwillingness of China, and the uncertain future of the CoC, which will face a lot of stumbling blocks that undermine its effectiveness. But if ASEAN were to abandon the CoC negotiation, it should consider the following consequences.

Consequences of Abandoning the CoC Negotiation

¹⁹ Darmawan, Aristyo R. 2022. "The US-ASEAN summit and the South China Sea Code of Conduct." Policy Forum. <https://www.policyforum.net/the-us-asean-summit-and-the-south-china-sea-code-of-conduct/>.

²⁰ Hoang, Viet. 2020. "The Code of Conduct for the South China Sea: A Long and Bumpy Road." The Diplomat. <https://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road/>.

²¹ Powell, Raymond. 2023. "A South China Sea Code of Conduct Cannot Be Built on a Foundation of Bad Faith." The Diplomat. <https://thediplomat.com/2023/11/a-south-china-sea-code-of-conduct-cannot-be-built-on-a-foundation-of-bad-faith/>.

There are many consequences if ASEAN abandons the CoC negotiation now. First, abandoning the Code of Conduct may expose ASEAN to greater criticism. ASEAN is a ten-member regional organization to foster economic and security cooperation.²² Moreover, ASEAN has received recognition for its ability to uphold international peace. To minimize physical conflict, ASEAN has been crucial in promoting dialogue, mutual trust, and collaboration among parties. However, ASEAN has been criticized harshly for its inability to come up with legally binding solutions to multiple territorial issues that continue to heat diplomatic ties to the breaking point.²³ Moreover, the consensus decision-making process of ASEAN has sometimes drawn criticism from those who believe it restricts development and favors avoiding, rather than addressing, contentious issues like human rights and the South China Sea dispute.²⁴

ASEAN has a significant challenge as a result of the complicated maritime and territorial conflicts in the South China Sea (SCS), threatening the stability of the area and putting its leadership to the test. The successful dispute resolution by ASEAN is to everyone's benefit, both regionally and internationally.²⁵ However, the largest obstacle of ASEAN to creating a cohesive stance is responding to territorial conflicts in the South China Sea. Regarding how to handle security issues, such as China's claims in the South China Sea, ASEAN is still divided.²⁶ ASEAN has been unable to act as a single entity in response to the SCS conflicts, which have caused disagreements between and among its member states, beyond serving as a platform for dialogues. Many critics have argued that ASEAN's failure to create an effective tool to resolve territorial disputes despite decades of talks is a sign of its declining relevance and that the organization's guiding principles of consensus and non-interference are incompatible with the new security realities in the area, giving each

²² Kurlantzick, Joshua. 2023. "What Is ASEAN?" Council on Foreign Relations.

<https://www.cfr.org/background/what-asean#chapter-title-0-1>.

²³ York, Michael. 2015. "ASEAN's Ambiguous Role in Resolving South China Sea Disputes." Indonesian Journal of International Law: 12 (3). <https://doi.org/10.17304/ijil.vol12.3.607>

²⁴ Fish, Eric. 2016. "Why ASEAN Continues To 'Make Haste Slowly.'" Asia Society.

<https://asiasociety.org/blog/asia/why-asean-continues-make-haste-slowly>.

²⁵ Clare, Angela. 2021. "ASEAN and the South China Sea – Parliament of Australia." Parliament of Australia.

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/ASEANSouthChinaSea.

²⁶ Fish, Eric. 2016. "Why ASEAN Continues To 'Make Haste Slowly.'" Asia Society.

<https://asiasociety.org/blog/asia/why-asean-continues-make-haste-slowly>.

member a de facto veto power regardless of their interests in the SCS.²⁷ In addition, the most significant and effective peacekeeping instrument for the South China Sea that will be advanced through ASEAN and its member states will be the continuous discussion that strengthens multilateral ties to demonstrate the effectiveness and capability of ASEAN.²⁸ Stepping away from the Code of Conduct may lead to a major criticism of ASEAN's leadership and unity as well as a great controversy over ASEAN's capacity and the efficiency of the decision-making process.

Second, abandoning the Code of Conduct could increase China's influence and power over the South China Sea, posing a serious threat to ASEAN claimant states. The South China Sea has one of the largest fishing stocks that could meet China's annual needs. Furthermore, it is estimated that the South China Sea, through which around \$4.5 trillion in ship-borne trade passes annually, contains a treasure of unexplored oil and gas deposits. If ASEAN withdraws the Code of Conduct, China will be able to accomplish both economic and military goals by controlling a big part of the South China Sea.²⁹ This will lead to a big threat to ASEAN claimant states.

The state of affairs in the South China Sea is far from stable. China has occasionally attempted to bolster its maritime claims and sovereignty. Firstly, China does not respect the Permanent Court of Arbitration's ruling in favor of the Philippines and it has further encroached into ASEAN coastal states' Exclusive Economic Zones (EEZs). In 2016, China claimed that it has historical rights to the majority of the South China Sea but the claim was rejected by the tribunal. The tribunal added that China had violated international law by endangering the Philippines' ships, harming the marine environment, and interfering with the Philippines' fishing and petroleum exploration.³⁰ The tribunal stated that the traditional fishing rights enjoyed by Chinese and Filipino fishermen at the

²⁷ Clare, Angela. 2021. "ASEAN and the South China Sea – Parliament of Australia." Parliament of Australia.

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2122/ASEANSouthChinaSea.

²⁸ York, Michael. 2015. "ASEAN's Ambiguous Role in Resolving South China Sea Disputes." Indonesian Journal of International Law: 12 (3). <https://doi.org/10.17304/ijil.vol12.3.607>

²⁹ Taylor, M. 2016. "Why does China care so much about the South China Sea? Here are 5 reasons." Washington Post. <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/13/why-does-china-care-so-much-about-the-south-china-sea-here-are-5-reasons/>.

³⁰ Perlez, Jane. 2016. "Tribunal Rejects Beijing's Claims in South China Sea (Published 2016)." The New York Times. <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>.

Scarborough Shoal have been violated by China.³¹ It was further said that China had put the Philippines' fishing boats in grave danger of collision by physically obstructing them with its patrol boats.³² However, China has countered that the tribunal lacked jurisdiction over the matter.³³ Second, in addition to building ports, military outposts, and airports in the Paracel and Spratly Islands, where it has twenty, and seven outposts, China has also piled sand over existing reefs.³⁴ In addition, if ASEAN decides to withdraw the Code of Conduct, it will not only serve as a large benefit to China, but it will also pose a serious threat to the claimant states as well.

Even though China continues to increase its presence and violates ASEAN claimant states territory rights along the discussion of the Code of Conduct, having the Code of Conduct can serve as a symbol of ASEAN's leadership role, and an ability to negotiate and bargain with China multilaterally. Importantly, we cannot imagine what ASEAN claimant states are going to face if ASEAN withdraws the Code of Conduct from their mechanism in the South China Sea conflict.

Precautions If Abandoning the CoC Negotiation

To help reduce tensions in the South China Sea as well as lessen the consequences discussed above, we should consider another separate Code of Conduct. To continue promoting the ASEAN image and protecting ASEAN claimant states, the ASEAN CoC is still a fundamental mechanism for resolving the conflict. However, to prevent the obstacle from the lack of unity among ASEAN members, and prevent China from using CoC in ASEAN as a means of influence, first, the ASEAN claimant states and China should consider drafting their own Code of Conduct according to their scope of island, interests, and needs. After finishing the individual Code of Conduct, the ASEAN claimant states and China should bring it together on the table and discuss their mutual needs and interests. Rather than focusing on the position of claiming each part of the island in the South

³¹ Phillips, Tom, Oliver Holmes, and Owen Bowcott. 2016. "Beijing rejects tribunal's ruling in South China Sea case." The Guardian. <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

³² Ibid.

³³ Perlez, Jane. 2016. "Tribunal Rejects Beijing's Claims in South China Sea (Published 2016)." The New York Times. <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>.

³⁴ Center for Preventive Action. 2023. "Territorial Disputes in the South China Sea | Global Conflict Tracker." Council on Foreign Relations. <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

China Sea, both parties should point out their interests that represent what they truly hope to achieve such as securing access to fishing grounds, natural resources, or exclusive economic zones (EEZs), and their needs such as economic prosperity or security from military threats. By doing so, both parties can explore common interests and needs, and resolve the dispute through the ASEAN Code of Conduct more constructively and efficiently. Second, ASEAN claimant states should enhance their relations with one another in terms of military and security cooperation in their claimed areas in the South China Sea. By doing so, ASEAN claimant states can improve military ties and allow for sharing intelligence on Chinese activities in the South China Sea, enabling a more informed response to potential threats. Third, ASEAN claimant states should consider promoting their relation with the other ASEAN non-claimant states in terms of investment and trading to increase the degree of interdependence among ASEAN members and decrease the level of economic dependence on China.

If ASEAN Concludes the CoC

In this part, we will take a look at another aspect of the debate over the CoC negotiation. This section begins by providing three main reasons that motivate ASEAN to further push the Code of Conduct (CoC) in the South China Sea to be concluded.

First, the Code of Conduct needs to be implemented because ASEAN must accomplish its goals and ASEAN is the only regional organization that can resolve the dispute. According to the ASEAN Declaration, the Association's goals and objectives are to foster regional peace and stability while accelerating economic growth, social advancement, and cultural development in the region through mutual respect for the rule of law and justice as well as adherence to the principles outlined in the UN Charter.³⁵ Thus far, China has rivaled ASEAN claimants Brunei, Malaysia, the Philippines, and Vietnam with its claims of sovereignty over the South China Sea. By sending fighter jets, cruise missiles, and a radar system, China has militarized Woody Island.³⁶ China's

³⁵ “Overview ASSOCIATION OF SOUTHEAST ASIAN NATIONS.” n.d. Europarl. Accessed February 18, 2024. https://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/04_asean-generalin/04_asean-generalinfo.pdf.

³⁶ Center for Preventive Action. 2023. “Territorial Disputes in the South China Sea | Global Conflict Tracker.” Council on Foreign Relations. <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

assertive behaviors in the South China Sea, including the coast guard using water cannons to attack Philippine vessels.³⁷ Despite Chinese assertive actions in the South China Sea, China has remained engaged in the negotiations of the CoC and China has already rejected any methods of third-party dispute settlement or solutions that are imposed on it concerning territorial problems and disputes over maritime boundary lines.³⁸

If ASEAN fails to conclude the CoC, the South China Sea conflict could be worse, giving rise to the bilateral or trilateral code of conduct between and among ASEAN member states. This is angering China. In 2023, due to the slow progress in ongoing negotiations between Beijing and ASEAN countries, China issued a warning against attempts to create a separate code of conduct in the disputed South China Sea. This came after Philippine President Ferdinand Marcos Jr. revealed that Manila had started discussions with other claimants to create a new set of guidelines in the area. A spokesperson from the Chinese Foreign Ministry, Mao Ning, issued a warning, saying that "any departure from the DoC framework and its spirit will be null and void."³⁹ At the same time, Chinese foreign minister, Wang Yi, emphasized that China is prepared to collaborate with ASEAN nations to speed up the negotiation of a Code of Conduct in the South China Sea. To establish a shared homeland and preserve peace and stability in the South China Sea, China, and the ASEAN nations think they are intelligent and capable of doing so.⁴⁰ To sum up, these indicate that China only welcomes the collaboration with ASEAN on the Code of Conduct and denies the other possible mechanisms. This emphasizes the ability of ASEAN and how important it is to continue the CoC negotiation to resolve the dispute in the South China Sea.

³⁷ Lema, Karen, and Nick Macfie. 2023. "China's 'aggressive behaviour' in South China Sea must be challenged, US Navy official says." Reuters. <https://www.reuters.com/world/chinas-aggressive-behaviour-south-china-sea-must-be-challenged-us-navy-official-2023-08-27/>.

³⁸ Ministry of Foreign Affairs of the People's Republic of China. 2016. "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/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html.

³⁹ Callar, Michaela D. 2023. "China warns vs. moves to craft new code in disputed sea." GMA Network. <https://www.gmanetwork.com/news/topstories/nation/889015/china-warns-vs-moves-to-craft-new-code-in-disputed-sea/story/>.

⁴⁰ Ministry of Foreign Affairs of the People's Republic of China. 2023. "Wang Yi Talks about the Current Situation in the South China Sea Region." https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202308/t20230814_11126321.html.

Second, for long-term stability in the South China Sea, the CoC becomes the only effective mechanism to protect the sovereignty of ASEAN claimants. The CoC can be effective in making sure that relevant parties practice restraint, enhance confidence-building, and carry out cooperative missions in non-sensitive areas.⁴¹ In addition, the CoC could restrict the scope of the legal claims to those recognized by international law. To oppose China's assertive action, it might also restrict some maritime law enforcement methods and forbid any disproportionate use of force. Moreover, multilateral negotiating with China will strengthen the bargaining position of ASEAN claimants rather than bilateral negotiations due to the power imbalance between China and each claimant state.⁴²

For instance, we can take a look at the ASEAN and China agreement over a Single Draft Negotiating Text on August 3, 2018. This meeting served as a roadmap for discussions over the Code of Conduct. Under multilateral discussion, Hanoi can pursue a long list of demands that it believes are necessary for the code to be "substantive and effective". It particularly wants the future code to be enforceable and to apply to the entire South China Sea. While Vietnam served as a host country for the 36th ASEAN Summit, they also grabbed the chance to reaffirm the importance of maintaining and promoting peace, security, and freedom of navigation in the South China Sea, as well as upholding international law of the UNCLOS. Interestingly, Vietnam has used the association's venues to engage external parties on the significance of peaceful dispute resolution and to oppose China's actions in the Sea in addition to strengthening and emphasizing the primacy of international law.⁴³

Third, the dispute in the South China Sea has attracted extra-regional countries to support the adoption of CoC and expect a high commitment from ASEAN leadership. The United States has increased its military cooperation with ASEAN members, including the Philippines, Thailand, and

⁴¹ Mingjiang, Li. 2014. "Managing Security in the South China Sea: From DOC to COC." *Kyoto Review of Southeast Asia*. <https://kyotoreview.org/issue-15/managing-security-in-the-south-china-sea-from-doc-to-coc/>.

⁴² Laksmana, Evan A. 2022. "Counterpoint SoutheastAsia." Lee Kuan Yew School of Public Policy. https://lkyspp.nus.edu.sg/docs/default-source/cag/csa-2---june-2022.pdf?sfvrsn=45522d0a_2.

⁴³ "Vietnam Tacks Between Cooperation and Struggle in the South China Sea." 2021. Crisis Group. <https://www.crisisgroup.org/asia/north-east-asia/china/318-vietnam-tacks-between-cooperation-and-struggle-south-china-sea>.

Vietnam. The United States has a keen interest in preventing China from controlling access to the South China Sea. The United States continues to have important interests in preserving freedom of passage and securing marine lines of communication (SLOCs), hence it has expressed support for an agreement on a legally binding code of conduct and other confidence-building measures. The United States has conducted FONOPs and increased support for Southeast Asian allies to counter China's aggressive territorial claims and land reclamation initiatives to safeguard its regional economic, security, and political interests.⁴⁴ Moreover, the United States has given the Philippines planes, armored vehicles, small guns, and other military equipment and training estimated at around \$1.14 billion since 2015.⁴⁵ The first ASEAN-US Maritime Exercise was held in 2019. The ASEAN navies and law enforcement agencies and the United States are working together more and more on maritime security. Despite the disagreements between China and ASEAN over a potential CoC, the improving US-ASEAN alliance and their growing maritime security cooperation are probably increasing pressure on China to negotiate a CoC urgently once more. It indicates to China that the United States and ASEAN are strongly committed to upholding a rules-based order in the area and have a common interest in doing so.⁴⁶

Additionally, Japan has also provided the Philippines and Vietnam with military ships and equipment to strengthen their capacity for maritime security and discourage China's assertive presence in the disputed zone.⁴⁷ Cooperation in the South China Sea is based on close economic ties and shared objectives. For instance, Japan has provided significant support to Vietnam in developing its marine capabilities, including a \$348.2 million loan for the construction of six patrol vessels. The two countries decided to intensify their defense and security cooperation during Prime Minister Suga Yoshihide's visit to Vietnam in October 2020. They also came to an agreement that

⁴⁴ Center for Preventive Action. 2023. "Territorial Disputes in the South China Sea | Global Conflict Tracker." Council on Foreign Relations. <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

⁴⁵ "Fact Sheet: U.S.-Philippines Defense and Security Partnership." 2022. U.S. Embassy in the Philippines. <https://ph.usembassy.gov/fact-sheet-u-s-philippines-defense-and-security-partnership/>.

⁴⁶ Darmawan, Aristyo R. 2022. "The US-ASEAN summit and the South China Sea Code of Conduct." Policy Forum. <https://www.policyforum.net/the-us-asean-summit-and-the-south-china-sea-code-of-conduct/>.

⁴⁷ Center for Preventive Action. 2023. "Territorial Disputes in the South China Sea | Global Conflict Tracker." Council on Foreign Relations. <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

would allow Japan to export defense technology and equipment to Vietnam.⁴⁸ Furthermore, Japan had intended to provide the Philippines the first-ever grant of foreign military assistance of around \$15 million US dollars to purchase equipment that would increase the security of the Philippines' naval communications lines across the South China Sea.⁴⁹ Together with the help from external actors, the adoption of CoC needs to be implemented to serve the needs of claimant states and provide peace in the region.

Considering all these, ASEAN needs to strive for the adoption of the CoC to fulfill its obligations, ensure long-term stability for its member states, and fulfill high expectations from external actors. ASEAN has spent over two decades drafting the binding document of the Code of Conduct. In addition, the CoC's flaws and several other things that slowed down its implementation must be fixed for the CoC to be effective and legally binding.

Consequences of Concluding the CoC

Despite the significance of the CoC discussed above, there are potential consequences if ASEAN concludes the CoC negotiation. First, while the CoC negotiations are ongoing, China might use the time to solidify its presence in the South China Sea. The main concern is that China's pursuit of the CoC may not truly foster regional stability. The PRC has insisted on dealing with SCS claimants bilaterally for years and did not significantly engage with ASEAN until 2013 when the Philippines approached the Permanent Court of Arbitration for the settlement of China's nine-dash line claims of the SCS. These findings provide evidence for the idea that China's CoC negotiations are more motivated by self-interest than by a sincere desire for SCS stability.⁵⁰

⁴⁸ “Vietnam Tacks Between Cooperation and Struggle in the South China Sea.” 2021. Crisis Group. <https://www.crisisgroup.org/asia/north-east-asia/china/318-vietnam-tacks-between-cooperation-and-struggle-south-china-sea>.

⁴⁹ Chang, Felix K. 2023. “Japan’s Security Engagement with the Philippines.” Foreign Policy Research Institute. <https://www.fpri.org/article/2023/08/japans-security-engagement-with-the-philippines/>.

⁵⁰ Vu, Minh P. 2023. “First Stalled, Now at Full Sail: China's Rush Toward a South China Sea Code of Conduct - Australian Institute of International Affairs.” Australian Institute of International Affairs. <https://www.internationalaffairs.org.au/australianoutlook/first-stalled-now-at-full-sail-chinas-rush-toward-a-south-china-sea-code-of-conduct/>.

Since the 1990s, China has been seen as dominating the South China Sea. In 1994, it invaded Mischief Island and declared that it would only be used as a temporary shelter for fishermen. China captured Scarborough in 2012, a year when the 'War on Terror' and West Asia were the center of attention for the entire world. The Tianjin dredger was brought to Curoton Reef by China in September 2013, where it stayed for three weeks without starting any land reclamation. Now that the Russian-Ukrainian crisis has the attention of the entire world, satellite images from Maxar Technologies have shown China building more artificial islands at Eldad Reef, Panata Island, Julian Felipe Reef, and Sandy Cay.⁵¹ These actions can serve as references that China on the one hand has controlled the South China Sea, and on the other, it has engaged in diplomatic negotiations of the CoC so as to buy more time to further solidify its position in the South China Sea.⁵²

Second, the road to a finalized CoC in the South China Sea is likely to be long and complex. The CoC negotiations have remained in a deadlock on many crucial points. Although there is a formal SDNT that serves as the starting point for conversations, the parties are still deadlocked over the same problems. There is no indication, for instance, that the parties can agree on the scope of the CoC's application. China has consistently wished to keep the United States and other nations out of the CoC negotiations. China wants all signatories to have the authority to veto maritime exercises with any non-signatory, but ASEAN nations cannot accept this because they depend on their alliances with external powers to balance China's growing power.⁵³

Moreover, the legal status of the CoC is also another issue. If it is legally binding, it probably has mechanisms in place to settle disagreements between the claimants and punish those who violate it. If the CoC is voluntary and non-binding, it will not be an improvement over the DoC, and

⁵¹ Pradhan, SD. 2023. "ASEAN Foreign Ministers' meeting stresses early conclusion of the Code of Conduct: China buys time." Times of India. <https://timesofindia.indiatimes.com/blogs/ChanakyaCode/asean-foreign-ministers-meeting-stresses-early-conclusion-of-the-code-of-conduct-china-buys-time/>.

⁵² Chatys, Mateusz. 2023. "The Code of Conduct - a way to move forward with the South China Sea dispute?" Fundacja im. Kazimierza Pułaskiego. <https://pulaski.pl/en/the-code-of-conduct-a-way-to-move-forward-with-the-south-china-sea-dispute-2/>.

⁵³ Hoang, Viet. 2020. "The Code of Conduct for the South China Sea: A Long and Bumpy Road." The Diplomat. <https://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road/>.

anyone who violates it will get away with it.⁵⁴ The CoC process is not expected to be finished anytime soon and it has been reaffirmed that the phrase "legally binding," a highly anticipated element of the CoC, was absent from the Single Draft Negotiating Text that was made public in 2018. Detailed procedures for investigating and sanctioning parties who are accused of violating the Code were not included in the text. Analysts suggest that if ASEAN does not push for an updated version of this text, the Code could end up being a widely recognized and costly failure.⁵⁵ It was revealed in July 2023 that China and the ASEAN nations agreed on new regulations to quicken the process of negotiating a legally binding code of conduct (CoC) for the South China Sea. Still, they also highlight the huge gap between China's actions and words on the issues and the difficulties that ASEAN has in managing it as a diplomatic bloc in a strategic area.⁵⁶ In addition, ASEAN and China had finished the second reading of the negotiating text and a set of recommendations to quicken discussions on upcoming drafts. The second reading and the guidelines have not been officially made public. However, it doesn't seem like the second reading did anything to move the CoC dial. Several terms have been agreed upon, but the most controversial problems have not yet been settled.⁵⁷

Recommendations if ASEAN Concludes the CoC

To prevent the above consequences, firstly, the Code of Conduct (CoC) negotiations must be accelerated as soon as possible with additional support from confidence-building measures (CBM), reducing tensions to support regional prosperity, and maintaining ASEAN's centrality in

⁵⁴ Aljibe, Ted. 2023. "The Code of Conduct for the South China Sea: Movement in lieu of Progress | FULCRUM." <https://fulcrum.sg/the-code-of-conduct-for-the-south-china-sea-movement-in-lieu-of-progress/>.

⁵⁵ Vu, Minh P. 2023. "First Stalled, Now at Full Sail: China's Rush Toward a South China Sea Code of Conduct - Australian Institute of International Affairs." Australian Institute of International Affairs. <https://www.internationalaffairs.org.au/australianoutlook/first-stalled-now-at-full-sail-chinas-rush-toward-a-south-china-sea-code-of-conduct/>.

⁵⁶ Nadery, Nader, and Prashanth Parameswaran. 2023. "What's Behind the New China-ASEAN South China Sea Code of Conduct Talk Guidelines?" Wilson Center. <https://www.wilsoncenter.org/blog-post/whats-behind-new-china-asean-south-china-sea-code-conduct-talk-guidelines>.

⁵⁷ Vu, Minh P. 2023. "First Stalled, Now at Full Sail: China's Rush Toward a South China Sea Code of Conduct - Australian Institute of International Affairs." Australian Institute of International Affairs. <https://www.internationalaffairs.org.au/australianoutlook/first-stalled-now-at-full-sail-chinas-rush-toward-a-south-china-sea-code-of-conduct/>.

South China Sea issues.⁵⁸ Secondly, to guarantee China's compliance with a rules-based order in the South China Sea, the CoC must be drafted under the conditions of the ASEAN claimant states. The ASEAN members must make sure that all of the CoC document's provisions and finer points comply with international law. Moreover, the document needs to limit some maritime law enforcement actions and forbid the disproportionate use of force in disputed waters. Furthermore, ASEAN needs to be aware that once it acknowledges that the "nine-dashed line" might be included in the CoC's scope, ASEAN may unintentionally be allowing illegal claims under international law to become legal. This is why the CoC should not be implemented in areas based on illegal UNCLOS claims, such as those that are inside the nine-dash line.⁵⁹ Lastly, ASEAN claimant states should continue to seek bilateral negotiations with Beijing to reduce tension as well as make an effort to strengthen collaboration on joint development and regular consultation mechanisms on maritime issues in the South China Sea.

Conclusion

This paper discusses two aspects of the CoC whether ASEAN should abandon or conclude the negotiation. We have discussed key issues around the CoC negotiation and the significance of the CoC conclusion. In addition, the paper also analyzes the possible consequences and precautions in each aspect of the Code of Conduct negotiation. Based on our analysis of both problems and opportunities, we strongly recommend that ASEAN should continue to have further discussions with China to conclude the CoC because it is the only way out for ASEAN claimant states to have the ability to bargain with China, reduce the tension in the contested area, and strengthen the collaboration on the regular consultation mechanisms. Continuing the CoC negotiation provides the best option for ASEAN to secure its central role and protect its members from China's assertive behavior. Moreover, China has often stressed collaboration with ASEAN and rejected any third-party involvement and any departure from the DoC framework. These have shown that China only

⁵⁸ Ministry of Foreign Affairs of The Republic of Indonesia. 2023. "Indonesias Initiative Accelerates South China Sea Code Of Conduct Negotiations | Portal Kementerian Luar Negeri Republik Indonesia." Kemlu. <https://kemlu.go.id/portal/en/read/5153/berita/indonesias-initiative-accelerates-south-china-sea-code-of-conduct-negotiations>.

⁵⁹ Laksmana, Evan A. 2022. "Counterpoint SoutheastAsia." Lee Kuan Yew School of Public Policy. https://lkyspp.nus.edu.sg/docs/default-source/cag/csa-2---june-2022.pdf?sfvrsn=45522d0a_2.

welcomes the ASEAN mechanism and the Code of Conduct must be continued to promote long-term peace in the South China Sea dispute.

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