

# ASEAN and Peaceful Management of Maritime Disputes in the South China Sea

*Robert Beckman and Vu Hai Dang*

## 1 Introduction

This chapter examines the role of ASEAN (the Association of Southeast Asian Nations) in the peaceful management of disputes in the South China Sea. It begins with a brief history of ASEAN, the “ASEAN way” and the concept of “ASEAN Centrality”. It then summarizes the sovereignty and maritime disputes among States bordering the South China Sea and the early attempts of ASEAN to assist in managing these disputes, including the 1992 ASEAN Declaration on the South China Sea. The chapter also analyses the ASEAN position relating to the South China Sea disputes. Next, it focuses on efforts of ASEAN to manage the South China Sea disputes between China and the ASEAN Member States through the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea and the ongoing negotiations between China and ASEAN on a Code of Conduct for the South China Sea. Finally, it explains the role that ASEAN can play in the peaceful management of the maritime disputes in the South China Sea.

## 2 ASEAN: A Brief Historical Background

### 2.1 Foundation

ASEAN came into being at the height of the Cold War between the United States and the Soviet Union. In 1967 in Bangkok, Thailand, the Ministers of Foreign Affairs of Indonesia, Malaysia, the Philippines, Singapore and Thailand signed the ASEAN Declaration,<sup>1</sup> which formally established “an Association for Regional Cooperation among the countries of South-East Asia to be known as the Association of South-East Asian Nations (ASEAN)”.<sup>2</sup> The aims and purposes of ASEAN were, among other things, to accelerate economic growth, social

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1 The ASEAN Declaration, 8 August 1967, Bangkok, Thailand.

2 *Ibid.*, Art. 1.

progress and cultural development in the region, promote regional peace and stability, promote active collaboration and mutual assistance on matters of common interest, collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples.<sup>3</sup>

## 2.2 *ASEAN Community*

ASEAN has since doubled its membership, from its five founding Member States in 1967 to ten. Brunei became ASEAN's sixth member in 1984, Viet Nam joined as its seventh member in 1995, Laos and Myanmar joined in 1997, and Cambodia joined as its tenth member in 1999.

At the 9th ASEAN Summit in 2003, ASEAN Leaders adopted the Declaration of ASEAN Concord II which provided for the establishment of an ASEAN Community.<sup>4</sup> According to the Concord, the future ASEAN Community would comprise of three pillars: political and security, economic and socio-cultural. The ASEAN Security Community was established to bring ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment. The ASEAN Economic Community is the realization of the end-goal of economic integration to create a stable, prosperous and highly competitive ASEAN economic region. The ASEAN Socio-Cultural Community envisaged a Southeast Asia bonded together in partnership as a community of caring societies.<sup>5</sup>

## 2.3 *ASEAN Centrality*

ASEAN has established a network of regional mechanisms involving major players in the Indo-Pacific through its ASEAN Plus meetings. Many of these mechanisms deal with security and maritime issues. They include the East Asia Summit,<sup>6</sup> the ASEAN Regional Forum,<sup>7</sup> the ASEAN Defense Ministerial

3 Ibid., Art. 2.

4 Declaration of ASEAN Concord II (Bali Concord II) adopted at the 9th ASEAN Summit, 7–8 October 2003, Bali, Indonesia.

5 Ibid.

6 The EAS is a forum between Leaders of 18 countries of the Asia-Pacific region formed to further the objectives of regional peace, security and prosperity. EAS Membership includes 10 ASEAN Member States, Australia, China, India, Japan, New Zealand, Republic of Korea, Russia and the United States. See India at the East Asia Summit (August 2018) online: Ministry of External Affairs of India <<http://mea.gov.in/aseanindia/about-eas.htm>>.

7 ASEAN Regional Forum serves to foster constructive dialogue and consultation on political and security issues of common interest and concern and to contribute to

Meeting Plus<sup>8</sup> and the Expanded ASEAN Maritime Forum.<sup>9</sup> These initiatives have not only been a tool for ASEAN to engage with major regional powers (China, the United States, India, Japan, South Korea and Australia) but also serve as fora where the participating States can discuss and exchange views on important regional matters. For this reason, ASEAN has actively promoted and upheld the principle of “ASEAN centrality” in order to maintain its central role in discussing and solving issues which are relevant to its Member States and the region.

#### 2.4 *The ASEAN Way*

ASEAN is well-known for its “ASEAN Way”. This refers to its tradition of dealing with regional and international issues, especially the resolution of inter-State conflicts, in a manner strongly influenced by Asian traditions and values. It prefers consensus, consultation, informality, and non-confrontation, rather than the legally binding, high institutionalization and compliance-oriented approaches followed in regional groups such as the European Union.<sup>10</sup> The influence of the ASEAN Way may be observed in the ASEAN decision-making process, enshrined in the article 20 of the ASEAN Charter, which states that “[a]s a basic principle, decision-making in ASEAN shall be based on consultation and consensus”.<sup>11</sup>

### 3 ASEAN and the South China Sea Dispute

The South China Sea dispute refers to the sovereignty and maritime disputes between China and the ASEAN Member States bordering the South China

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confidence-building and preventive diplomacy in the Asia-Pacific region. It is held annually between ASEAN Member States, observers and ASEAN partners. For details see online: ASEAN Regional Forum <<http://aseanregionalforum.asean.org/about-arf/>>.

8 ADMM-Plus involves Ministers of Defence from 10 ASEAN Member States and 8 ASEAN Dialogue Partners, namely Australia, China, India, Japan, New Zealand, Republic of Korea, Russian Federation, and the United States. It meets yearly to discuss how to strengthen security and defence cooperation for peace, stability and development in the region. For more details, see online: ASEAN Defence Ministers’ Meeting <<https://admm.asean.org/>>.

9 The EAMF was initiated in 2011 to encourage dialogue between East Asia Summit participating countries to utilise opportunities and address common challenges on maritime issues. It is held annually back-to-back with the ASEAN Maritime Forum. For details, see 1st EAMF Chairman’s Statement, 5 October 2012, Manila, Philippines.

10 A. Acharya, ‘Ideas, Identity and Institution-building: From ‘ASEAN Way’ to the ‘Asia-Pacific Way’?’, *The Pacific Review* 10, Issue 3 (1997), 319.

11 Charter of the Association of Southeast Asian Nations, 20 November 2007, Singapore, Art. 20.

Sea – Brunei, Indonesia, Malaysia, Philippines and Viet Nam. Viet Nam claims sovereignty over all the features in the Paracel Islands and Spratly Islands; Philippines claims sovereignty over most of the Spratly Islands in what it refers to as the Kalayaan Islands; and Malaysia and Brunei claim some features in the southern part of the Spratly Islands.<sup>12</sup> China claims sovereignty over four groups of features in the South China Sea (Paracel Islands, Spratly Islands, Pratas Island and Macclesfield Bank) and rights and jurisdiction over the surrounding waters.<sup>13</sup> Although the legal basis of China's claim to rights and jurisdiction in the South China Sea is shrouded in ambiguity, it is usually depicted by the 'nine-dash line map' that China attached to the diplomatic note it sent to the UN Secretary-General in May 2009.<sup>14</sup> The nine-dash lines on the map cover about 80% of the South China Sea and extend as far as the waters near the Natuna islands of Indonesia. Although Indonesia does not claim sovereignty over any of the disputed islands in the South China Sea, and its sovereignty over the Natuna Islands is not in dispute, China's claim to rights and jurisdiction in the South China Sea overlaps with the EEZ claim of Indonesia from the Natuna Islands. Consequently, there is a dispute between Indonesia and China with respect to China's maritime claims in the South China Sea.

### 3.1 *ASEAN and the South China Sea Disputes: A History*

ASEAN began addressing the South China Sea issues in the late 1980s when tensions rose after China occupied six features in the Spratly Islands. In 1988, China used force to drive Viet Nam off Johnson Reef.<sup>15</sup> Tensions between China and Viet Nam increased in the early 1990s over oil concessions in Vanguard Bank, off the southern coast of Viet Nam.<sup>16</sup>

In January 1990, Indonesia convened the first Workshop on Managing Potential Conflicts in the South China Sea. This workshop process was headed by Ambassador Hasjim Djalal of Indonesia and Professor Ian Townsend-Gault

12 R. (Pete) Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea* (August 2014) CNA Occasional Paper and J. A. Roach, *Malaysia and Brunei: An Analysis of their Claims in the South China Sea* (August 2014) CAN Occasional Paper.

13 *Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, (12 July 2016) online: Ministry of Foreign Affairs of the People's Republic of China <[https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/)>.

14 Note No. CML/17/2009 dated 7 May 2009 from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations.

15 B. Hayton, *The South China Sea: The Struggle for Power in Asia* (London: Yale University Press, 2014), 81–84.

16 *Ibid.*, 125.

of Canada, with funding from Canada, and became an important informal policy-oriented Track 1.5 forum for discussions on the South China Sea. The Workshops were attended by ASEAN member States, China and Chinese Taipei.<sup>17</sup>

The first official ASEAN joint declaration on the South China Sea was issued in 1992.<sup>18</sup> This could have been a response to the adoption by China of the Law on the Territorial Sea and Contiguous Zone in February 1992,<sup>19</sup> which had prompted negative reactions from Indonesia, Malaysia and Philippines.<sup>20</sup>

Tensions between China and the Philippines increased in 1995 after China occupied Mischief Reef, a low-tide elevation in the exclusive economic zone of the Philippines.<sup>21</sup> From the mid-1990s onward, there were regular incidents between China and Viet Nam, and between China and the Philippines.<sup>22</sup> Malaysia had also occupied several of the Spratly Islands in the early 1980s, but there were no reported incidents between Malaysia and China in the 1990s.

In May 2009, Malaysia and Viet Nam jointly submitted to the Committee on the Limits of the Continental Shelf (CLCS) their claim for an extended continental shelf in the Southern area of the South China Sea. At the same time, Viet Nam also made a separate submission to an extended continental shelf in the South China Sea. These submissions to the CLCS prompted China to send an official protest note to the UN Secretary-General and to attach its nine-dashed line map to its diplomatic note. Malaysia, Vietnam, Philippines and Indonesia then responded to challenge the claims in China's diplomatic note.<sup>23</sup>

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- 17 H. Djalal & I. Townsend-Gault, 'Preventive Diplomacy: Managing Potential Conflicts in the South China Sea' in: Chester Crocker, Fen Osler Hampson, and Pamela Aall (eds), *Herding Cats: Multiparty Mediation in a Complex World*, Washington, DC: United States Institute of Peace Press, 1999, 107.
- 18 ASEAN Declaration on the South China Sea, 22 July 1992, Manila, Philippines. For a reproduction of the text, see: H. T. Nguyen, 'Vietnam and the Code of Conduct for the South China Sea', *Ocean Development and International Law* 32, No.2, 2001, 105 at 124–125.
- 19 The Law claims sovereignty over China's mainland and offshore islands, including the Spratlys. See Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China, 25 February 2020, online: UN DOALOS <[https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1992\\_Law.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf)>, Art. 2.
- 20 L. Buszynski, 'ASEAN, the Declaration on Conduct, and the South China Sea', *Contemporary Southeast Asia* 25, No.3, 2003, 343 at 348.
- 21 B. Hayton, *supra* note 15, at 84–89.
- 22 I. Storey, 'Creeping Assertiveness: China, the Philippines and the South China Sea Dispute', *Contemporary Southeast Asia* 21, No.1 1999, 95 at 98 and R. Amer, 'The Sino-Vietnamese Approach to Managing Boundary Disputes', *IBRU Maritime Briefing* 3 (2002), 23.
- 23 The Joint Submission of Malaysia & Vietnam, China's protest, and the Notes Verbale of Vietnam, Malaysia, Philippines and Indonesia are available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](https://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).

One of the most significant developments on the South China Sea was the decision by the Philippines in 2013 to institute arbitral proceedings against China under Annex VII of the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS).<sup>24</sup> China refused to participate in the case and adopted a policy of non-participation and non-compliance. Nevertheless, the case proceeded, and the Arbitral Tribunal made its decision on the merits of the case in July 2016.<sup>25</sup> The award of the arbitral tribunal was consistent with the practice of the ASEAN States on maritime claims and contrary to the claims of China to rights and jurisdiction in the waters inside its nine dashed line in the South China Sea. The arbitral tribunal ruled that none of the features in the disputed Spratly Islands was an island entitled to an Exclusive Economic Zone or continental shelf of its own. In addition, it ruled that whatever “historic rights” China may have had to the resources in the South China Sea in areas that are now within the EEZ of other States, it gave up such historic rights when it became a party to UNCLOS. Although China decided not to participate in the arbitration, the Award of the Tribunal is nevertheless final and binding on the two parties to the case, the Philippines and China. However, China has declared that in its view the award of the tribunal is null and void.

In December 2019, Malaysia made a separate submission to the CLCS for an extended continental shelf in the South China Sea. China immediately objected by submitting an official protest. China’s diplomatic note provoked a “notes verbales war” between China and the ASEAN member States surrounding the South China Sea in which the ASEAN member States challenged the legality of China’s maritime claims in the South China Sea. In addition, States from outside the region also submitted notes or statements to the UN Secretary-General questioning the legal basis of China’s claims. This included the United States, Australia, the United Kingdom, Germany, France, Japan and New Zealand.<sup>26</sup> Several of the diplomatic notes cited the 2016 Award of the Arbitral Tribunal as a basis for challenging China’s maritime claims in the South China Sea.

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24 United Nations Convention on the Law of the Sea, Montego Bay, Jamaica on 10 December 1982, UNTS 1833, at 397 (entered into force 16 November 1994), Annex VII.

25 PCA Case No 2013–19, in the Matter of the South China Sea Arbitration, The Republic of the Philippines v. The People’s Republic of China, Award of 12 July 2016, online: PCA <<https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf>>.

26 For details about Malaysia and Viet Nam’s submissions, see: Commission on the Limits of the Continental Shelf [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mys\\_12\\_12\\_2019.html](https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html).

### 3.2 *Implications of ASEAN's Policy of Making Decisions by Consensus*

The South China Sea is one of those issues on which ASEAN Members have divergent interests. Five of the ten ASEAN member States have a direct interest in the maritime and sovereignty disputes in the South China Sea. Brunei, Malaysia, the Philippines and Viet Nam border the South China Sea and are "claimant States" in the sense that they claim sovereignty over some or all of the disputed features in the Spratlys or/and Paracels. Indonesia is not a claimant State, but it borders the South China Sea and China's claim to sovereign rights and jurisdiction inside its nine dash-line map overlaps with Indonesia's claim to an Exclusive Economic Zone from the Natuna Islands. In addition, the maritime claims of the Philippines may also overlap with the maritime claims of Malaysia and Viet Nam.

On the other extreme, two of the ASEAN Member States have almost no interest in the South China Sea. Laos PDR is a land-locked State and Myanmar borders the Andaman Sea. While Cambodia and Thailand border the Gulf of Thailand rather than the South China Sea, they have an interest in the commercial shipping routes connecting the Gulf of Thailand and the South China Sea. Singapore also has an interest in the South China Sea because the major shipping route between the Indian Ocean and East Asia passes through the Straits of Malacca and Singapore before entering the South China Sea.

Not only do the ASEAN Member States have divergent national interests in the maritime and sovereignty disputes in the South China Sea, but they also have different relationships with the major powers which have interests in the South China Sea, especially China. As a result, it is sometimes extremely difficult for the Member States to reach a consensus on statements concerning the South China Sea.

An example of the difficulties inherent in the ASEAN policy of decision-making by consensus is the failure of the ASEAN Foreign Ministers' Meeting to reach a consensus on the South China Sea paragraphs in the AMM Joint Communiqué, at the 45th AMM in July 2012 in Phnom Penh. Because of a deadlock on the wording relating to the South China Sea issue, the annual meeting of the ASEAN Foreign Ministers did not conclude with the customary Joint Communiqué for the first time.

Another example is ASEAN's silence after the Award of the Arbitral Tribunal in the South China Sea Case. Although this case was obviously of great interest to the ASEAN claimant States in the South China Sea, the ASEAN Foreign Ministers were unable to reach a consensus on any language about the arbitration case in their annual statements on the South China Sea.

### 3.3 *ASEAN Common Position on the South China Sea Dispute*

The common position of ASEAN relating to the South China Sea dispute has been set out in the official statements issued at the close of meetings of the ASEAN Foreign Ministers.<sup>27</sup> At its latest 54th meeting in August 2021, the Foreign Ministers affirmed the need to enhance mutual trust and confidence, exercise self-restraint in the conduct of activities, avoid actions that may further complicate the situation, and pursue peaceful resolution of disputes in accordance with the universally recognised principles of international law, including the UNCLOS. They emphasised the importance of non-militarisation and self-restraint in the conduct of all activities by claimants and all other states. They reaffirmed the importance of maintaining and promoting peace, security, stability, safety, and freedom of navigation in and overflight above the South China Sea and recognised the benefits of having the South China Sea as a sea of peace, stability, and prosperity. They underscored the importance of the full and effective implementation of the DOC in its entirety and looked forward to further progress towards the early conclusion of an effective and substantive COC that is in accordance with international law, including UNCLOS. They emphasised the need to maintain and promote an environment conducive to the COC negotiations and welcomed practical measures that could reduce tensions and the risk of accidents, misunderstandings and miscalculation. They stressed the importance of undertaking confidence building and preventive measures to enhance, among others, trust and confidence amongst parties, and reaffirmed the importance of upholding international law, including the 1982 UNCLOS.<sup>28</sup>

## 4 China-ASEAN Negotiations on a Code of Conduct

### 4.1 *2002 Declaration on Conduct of Parties in the South China Sea*

The establishment of a Code of Conduct (COC) for all relevant parties in the South China Sea was first suggested in the 1992 Declaration on the South China Sea by ASEAN Ministers of Foreign Affairs at the 25th AMM.<sup>29</sup> The first codes of conduct on the South China Sea were adopted bilaterally between the Philippines and China, and the Philippines and Viet Nam in 1995.<sup>30</sup> The

27 Overview, online: ASEAN Foreign Ministers' Meeting <<https://asean.org/asean-political-security-community/asean-foreign-ministers-meeting-amm/#12e7a83058760b4da>>.

28 Joint Communiqué of the 54th ASEAN Foreign Ministers Meeting, 2 August 2021, ss 89–90.

29 1992 ASEAN Declaration on the South China Sea, *supra* note 18.

30 Joint Statement of the RP-PRC on the South China Sea and on Other Areas of Cooperation, 9–10 August 1995, and Joint Statement of the 4th Annual Bilateral Consultations between

proposal for a regional Code of Conduct was then endorsed at the 29th AMM in Jakarta, Indonesia in 1995. The ASEAN Draft Code of Conduct was presented to China during the 6th ARF Meeting in 1999.<sup>31</sup> China was reluctant about the idea at first, but later it seemed to be interested and suggested its own version of the draft code.<sup>32</sup> The 1st ASEAN-China Consultation on the Code of Conduct on the South China Sea was held in Hua Hin, Thailand in 2000.

During the negotiations between the ASEAN and China on the COC important disagreements appeared. For example, China rejected the mention of Paracels in the disputed areas and in the commitment to refrain from occupying new islands, reefs, or shoals. ASEAN objected to China's proposal to ban multilateral military exercises and military patrols in the Spratly Islands. To resolve the deadlock in negotiations, Malaysia suggested at the 35th AMM in July 2002 in Brunei to have a "declaration" on the conduct of parties which would be less binding than a "code" of conduct.<sup>33</sup> This suggestion was endorsed by the AMM.<sup>34</sup> China also accepted the idea of a declaration of conduct. The result was the adoption of the 2002 Declaration on the Conduct of Parties in the South China Sea by Ministers of Foreign Affairs of China and ASEAN in November 2002 in Phnom Penh, Cambodia (DOC).<sup>35</sup>

The DOC has no provisions on the controversial issues that had been raised by the parties in the negotiations. It only refers to the South China Sea and does not state exactly where it applies. It does not ban military exercises or military patrols. Its provisions include respect for international law, peaceful resolution of disputes, respect for freedom of navigation and overflight, the exercise of self-restraint, confidence-building measures, and cooperative activities. However, the DOC also reaffirmed that the adoption of a code of conduct in the South China Sea would further promote peace and stability in

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the Republic of Philippines and the Socialist Republic of Viet Nam, Hanoi, 7 November 1995. For a reproduction of the text of these two codes of conduct see Nguyen, *supra* note 18, at Appendixes 2 & 3.

31 R. Amer, "Ongoing Efforts in Conflict Management" in: Timo Kivimäki (ed.), *War or Peace in the South China Sea*, Copenhagen: NIAS Press, 2002, 117 at note 27. See also 6th ARF Chairman's Statement, 26 July 1999, Singapore, para. 11.

32 H. T. Nguyen, "The Declaration of Conduct of Parties in the South China Sea: a Vietnamese Perspective 2002–2007", in: Bateman, Sam, and Emmers, Ralf (eds), *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime*, London: Taylor and Francis, 2009, 207 at 209; and L. Buszynski, *supra* note 20, 355.

33 Buszynski, *supra* note 20, 356.

34 Joint Communiqué of the 35th AMM, 29–30 July 2002, Brunei, paras. 40–41.

35 Declaration on the Conduct of Parties in the South China Sea, Phnom Penh, 4 November 2002, online: ASEAN <<https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/>>.

the region, and reiterated the Parties' commitment to working, on the basis of consensus, towards the eventual attainment of this objective.<sup>36</sup> The one paragraph in the DOC that arguably reduced tensions is paragraph 5 in which the parties agreed to exercise self-restraint in the conduct of activities that would complicate or escalate the disputes, including refraining from inhabiting any presently uninhabited features.

#### 4.2 *2011 Guidelines for Implementation of the 2002 Declaration of Conduct*

In 2004, the 1st ASEAN-China Senior Officials Meeting for the implementation of the DOC (SOM-DOC) was convened in Kuala Lumpur, Malaysia to set up a Joint Working Group to implement the DOC (JWG-DOC).<sup>37</sup> Its Terms of Reference stated that the JWG would formulate recommendations in guidelines and action plans for the implementation of the DOC, specific cooperative activities in the South China Sea, a register of experts and eminent persons who may provide technical inputs, non-binding and professional views or policy recommendations to the JWC-DOC, and the convening of workshops, as the needs arose.<sup>38</sup>

Due to the disagreements between the two sides on the specific content of the guidelines for the implementation of the DOC, it took seven years for China and ASEAN to reach an agreement on the guidelines.<sup>39</sup> At the 44th ASEAN PMC+1 Session with China in July 2011, a set of Guidelines for Implementation of the DOC was adopted.<sup>40</sup> It contained principles to guide the implementation of possible joint cooperative activities, measures and projects as provided

36 Ibid.

37 Press Release of the 1st SOM-DOC, 7 December 2004, Kuala Lumpur, Malaysia.

38 Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea, adopted by the ASEAN-China Senior Officials' Meeting on the implementation of the DOC, 07 December 2004, Kuala Lumpur, Malaysia. See also C. Thayer, 'China-ASEAN and the South China Sea: Chinese Assertiveness and Southeast Asian Responses' in Yann-Huei Song and Keyuan Zou (eds), *Major Law and Policy Issues in the South China Sea: European and American Perspectives*, London: Routledge, 2016, 25 at 44.

39 China objected to a clause which specified "ASEAN will continue its current practice of consulting among themselves before meeting with China". China insisted that outstanding disputes should be resolved by bilateral consultations "among relevant parties" and not with ASEAN. See C. Thayer, 'Chinese Assertiveness in the South China Sea and Southeast Asian Response', *Journal of Current Southeast Asian Affairs* 30, No.2 (2011), 77 at 91.

40 Chairman's Statement on the ASEAN PMC+1 Sessions, 21–22 July 2011, Bali, Indonesia.

for in the DOC such as step-by-step approach, voluntary participation and respect for consensus.<sup>41</sup>

#### 4.3 *ASEAN-China Confidence-Building Measures from 2014 to 2018*

From 2014 to 2018 a series of confidence building-measures were adopted by China and ASEAN to build trust and confidence between the parties. In 2014, at the 17th ASEAN-China Summit in Nay Pyi Taw, Myanmar, Leaders of ASEAN and China agreed to support “the adoption of the first list of commonalities on COC [Code of Conduct] consultation, the establishment of a hotline platform among search and rescue agencies, a hotline among foreign ministries on maritime emergencies, and a table-top exercise on search and rescue to promote and enhance trust and confidence in the region”.<sup>42</sup> These measures were considered “early harvest measures” to build trust and confidence among relevant parties and to avoid miscalculations and incidents on the ground in the South China Sea.<sup>43</sup>

At the 19th ASEAN-China Summit in 2016, Leaders of both sides adopted the Joint Statement on the Application of the Code for Unplanned Encounters at Sea (CUES)<sup>44</sup> in the South China Sea, and the Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States and China in Response to Maritime Emergencies in the Implementation of the DOC.<sup>45</sup> The Joint Statement on the Application of the CUES reaffirms the commitments of China and ASEAN to the CUES, in order to improve the operational safety of naval ships and naval aircraft in air and at sea. The statement contains the parties’ agreement to use the safety and communication procedures for the safety of all their naval ships and naval aircraft, as set out in the CUES, when they encounter each other in the

41 Guidelines for the Implementation of the DOC, adopted at the ASEAN-China Senior Officials’ Meeting at the 44th ASEAN PMC+1 Session with China, 21–22 July 2011, Bali, Indonesia.

42 17th ASEAN-China Summit Chairman’s Statement, 13 November 2014, Nay Pyi Taw, Myanmar, paras. 9–11.

43 Joint Press Briefing on the 14th SOM-DOC, 18 May 2017, Guiyang, Guizhou Province, China.

44 The CUES was adopted at the 2014 Western Pacific Naval Symposium in Qingdao, China by navies of 35 Pacific countries to provide communication and manoeuvring procedures among naval vessels and aircraft when they operate in close proximity, see Code for Unplanned Encounter at Sea, version 1, adopted at 24th Western Pacific Naval Symposium, 22 April 2014, Qingdao, China.

45 19th ASEAN-China Summit Chairman’s Statement, 7 September 2016, Vientiane, Laos, paras. 20–21.

South China Sea.<sup>46</sup> The Guidelines for Hotline Communications provide for the designation of a contact point for the Ministries of Foreign Affairs' hotline communications, and procedures for undertaking actions.<sup>47</sup> ASEAN Member States and China successfully conducted a hotline test exercise from 18 to 24 April 2017.<sup>48</sup>

In addition, a maritime exercise between ASEAN and China was organized in 2018 as another confidence-building measure. The maritime exercise took place in two phases. The first phase was a table-top exercise from 2 – 3 August 2018 hosted in Changi Naval Base, Singapore, in which navies from ASEAN Member States and China developed plans to deal with maritime incidents such as search and rescue operations, and medical evacuations.<sup>49</sup> The second phase was a field training exercise taking place from 22 – 27 October 2018 in Ma Xie Naval Base, Zhejiang, China, in which 1000 personnel and eight ships from both sides undertook joint search and rescue operations, and medical evacuation drills with the use of helicopters.<sup>50</sup>

The Declaration for a “Decade of Coastal and Marine Environmental Protection in the South China Sea” was adopted on 13 November 2017 at the 20th ASEAN-China Summit in Manila, Philippines, on the occasion of the 15th anniversary of the signing of the DOC.<sup>51</sup> The Declaration declared that 2017 – 2027 would be the “Decade for the Protection of Coastal and Marine Environment in the South China Sea”. Governments of ASEAN Member States and China committed to taking action for the protection, preservation, and

46 Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea, adopted at the 19th ASEAN-China Summit Chairman's Statement, 7 September 2016, Vientiane, Laos.

47 Guidelines for Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States and China in Response to Maritime Emergencies in the Implementation of the DOC, adopted at the 19th ASEAN-China Summit Chairman's Statement, 7 September 2016, Vientiane, Laos.

48 Joint Press Briefing on the 14th SOM-DOC, 18 May 2017, Guiyang, Guizhou Province, China.

49 “Singapore Navy Hosts Table-Top Exercise as part of Inaugural ASEAN-China Maritime Exercise” (3 August 2018) online: Ministry of Defence of Singapore <[https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2018/august/03aug18\\_nr2/!ut/p/z0/fY0xE8FAFIR\\_ilyLzbuEiDYoMEgT5lyTOTxxJC-SO8G\\_d6FR6XZ3vt0FCQIkqVbnyuqKVOH8Tg6zKJlOZnwQrJMw9Xm8TdNIOF7PN9EQFiD\\_A25BX-paxiAPFV18WhClpiOe2MeT9fi5KtHjhA\\_DFB0Zti41Hi-URWNZgwUqgy4luD\\_yuLrnd-NavO-UP8qoCbqXoFlNVjnlm7JnpulUgeh4EF8exC9\\_u8r96xH33poVbGg!/>](https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2018/august/03aug18_nr2/!ut/p/z0/fY0xE8FAFIR_ilyLzbuEiDYoMEgT5lyTOTxxJC-SO8G_d6FR6XZ3vt0FCQIkqVbnyuqKVOH8Tg6zKJlOZnwQrJMw9Xm8TdNIOF7PN9EQFiD_A25BX-paxiAPFV18WhClpiOe2MeT9fi5KtHjhA_DFB0Zti41Hi-URWNZgwUqgy4luD_yuLrnd-NavO-UP8qoCbqXoFlNVjnlm7JnpulUgeh4EF8exC9_u8r96xH33poVbGg!/).

50 Koh S. L. C., “Inaugural ASEAN-China Maritime Exercise: What to Expect” (3 August 2018) RSIS Commentary No.131.

51 20th ASEAN-China Summit Chairman's Statement, 13 November 2017, Manila, Philippines, paras. 12–14.

sustainable management of the coastal and marine environment of the South China Sea.<sup>52</sup>

#### 4.4 *Renewed Negotiations on the Code of Conduct Leading to Single Draft Negotiating Text*

China expressed interest in renewing the negotiations for a COC with ASEAN in 2013.<sup>53</sup> At the 19th ASEAN-China Senior Officials' Consultation in April 2013, Chinese officials announced their willingness to commence discussions with ASEAN on a COC later in the year.<sup>54</sup> On August 2013, at a press conference in Hanoi, Viet Nam, Chinese Minister of Foreign Affairs, Mr. Wang Yi, stated that China and ASEAN had "agreed to hold consultations [as distinct from negotiations] on moving forward the process on the Code of Conduct in the South China Sea under the framework of implementing the Declaration on the Conduct of Parties in the South China Sea (DOC)".<sup>55</sup> ASEAN and China held their first formal consultation on the COC at the 6th ASEAN-China SOM-DOC and the 9th ASEAN-China JWC-DOC in Suzhou, China, 14–15 September 2013. At the consultation, it was agreed that parties would adopt a step by step approach to reach a consensus on the COC process through consultation, starting from identifying the consensus before gradually expanding it and narrowing differences.<sup>56</sup> At the 16th ASEAN-China Summit in October 2013, leaders of both sides welcomed the positive outcomes achieved at the first official consultation on the COC and agreed to maintain the momentum of regular official consultations, and work towards the adoption of the COC.<sup>57</sup>

52 Declaration for a Decade of Coastal and Marine Environmental Protection in the South China Sea (2017–2027), adopted at the 20th ASEAN-China Summit, 13 November 2017, Manila, Philippines, paras. 12–14.

53 C. Thayer, 'New Commitment to a Code of Conduct in the South China Sea?' (9 October 2013) The National Bureau of Asian Research. For details about the South China Sea arbitration, see 2.2. Implications of ASEAN's Policy of Making Decisions by Consensus.

54 Ibid. See also '19th ASEAN-China Senior Officials' Consultation' (4 April 2013) online: ASEAN <<https://asean.org/19th-asean-china-senior-officials-consultation/>>.

55 'Foreign Minister Wang Yi on Process of "Code of Conduct in the South China Sea" (05 August 2013) online: Ministry of Foreign Affairs of the People's Republic of China <[https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/wjzb\\_663308/activities\\_663312/t1064869.shtml](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjzb_663308/activities_663312/t1064869.shtml)>.

56 'The Sixth Senior Officials Meeting and the Ninth Joint Working Group Meeting on the Implementation of the "Declaration on Conduct of Parties in the South China Sea" Are Held in Suzhou' (15 September 2013) online: Ministry of Foreign Affairs of the People's Republic of China <[https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1079289.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1079289.shtml)>.

57 16th ASEAN-China Summit Chairman's Statement, 9 October 2013, Brunei, paras. 15–16.

After two rounds of consultations, both sides agreed on a first list of commonalities on COC consultation at the 8th SOM-DOC in August 2014.<sup>58</sup> At the 17th ASEAN-China Summit in 2014, China and ASEAN considered the adoption of the first list of commonalities on COC consultation as an “early harvest measure” to promote and enhance trust and confidence in the region.<sup>59</sup> At the 9th SOM-DOC in July 2015, they concluded that by adopting the second list of commonalities, and the COC consultation had entered a new stage.<sup>60</sup> At the 10th SOM-DOC in October 2015, two preliminary documents were formulated, namely the list of crucial and complex issues and the list of elements for the outline of a COC.<sup>61</sup> At the ASEAN PMC 10 + 1 Session with China in August 2015, the Meeting welcomed the recent agreement between ASEAN Member States and China to proceed to the next stage of consultations towards the establishment of the COC, and looked forward to expeditious negotiations on the framework, structure and elements of the COC.<sup>62</sup> At the same time, the Ministers of Foreign Affairs of ASEAN and China issued a joint statement on the full and effective implementation of the DOC, in which 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 agreed to work towards the eventual attainment of this objective on the basis of consensus.<sup>63</sup>

At the 14th SOM-DOC in May 2017, a draft framework was submitted to the ASEAN PMC 10+1 session with China in August 2017 in Manila, Philippines.<sup>64</sup> The Ministers of Foreign Affairs of China and ASEAN adopted the Framework and tasked their Senior Officials to start substantive consultations and negotiations on the COC. The Framework contains three parts: Preambular Provisions,

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58 ‘ASEAN-China cooperation moves forward at the 8th ASEAN-China SOM’ (24 October 2014) online: Ministry of Foreign Affairs of the Kingdom of Thailand <<http://www.mfa.go.th/main/en/media-center/28/50886-ASEAN-China-cooperation-moves-forward-at-the-8th-A.html>>.

59 17th ASEAN-China Summit Chairman’s Statement, 13 November 2014, Nay Pyi Taw, Myanmar, paras. 9–11.

60 L. Li, *China’s Policy towards the South China Sea: When Geopolitics Meet the Law of the Sea*, New York: Routledge, 2018, 192.

61 ‘Tenth Senior Officials Meeting on the Implementation of the Declaration On the Conduct of the Parties In the South China Sea Held in Chengdu’ (20 October 2015) online: Ministry of Foreign Affairs of the People’s Republic of China <[https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1307573.shtml](https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1307573.shtml)>.

62 Chairman’s Statement of the ASEAN PMC 10+1 Sessions with Dialogue Partners, 5 August 2015, Kuala Lumpur, Malaysia.

63 Joint Statement of Ministers of the Foreign Affairs of ASEAN and China on The Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea, 25 July 2016, Vientiane, Laos.

64 Joint Press Briefing on the 14th SOM-DOC, 18 May 2017, Guiyang, Guizhou Province, China.

General Provisions and Final Clauses. Most of the provisions and principles are similar to the DOC, but there are some notable differences. For example, the Framework states that the COC is not an instrument to settle disputes and that it is necessary to have a monitoring mechanism.<sup>65</sup>

At the 15th SOM-DOC in June 2018, a Single Draft COC Negotiating Text (SDNT) was adopted by officials from ASEAN and China. The officials agreed that this would be a living document; it would serve as the basis for the negotiations and its content would be kept strictly confidential throughout the entire process. They further agreed that there would be at least three readings of the SDNT.<sup>66</sup> At the ASEAN PMC 10 + 1 Session with China in August 2018 in Singapore, Ministers of Foreign Affairs of ASEAN and China “noted that ASEAN Member States and China had agreed on a Single Draft Code of Conduct in the SCS (COC) Negotiating Text at the 15th ASEAN-China Senior Officials’ Meeting on the Implementation of the Declaration on the Conduct of Parties in the SCS in Changsha, China on 27 June 2018, and encouraged further progress towards an effective COC.”<sup>67</sup>

During 2019, ASEAN and China completed the first reading of the SDNT and exchanged views on the second reading at the SOM-DOC level.<sup>68</sup> At the ASEAN PMC 10+1 Session with China and 22nd ASEAN-China Summit, both sides welcomed the completion of the first reading of the SDNT and the commencement of the second reading of the SDNT. They also welcomed the aspiration to conclude the COC within a three-year timeline as proposed by China.<sup>69</sup>

65 Framework of a COC, adopted by at the ASEAN PMC 10+1 Session with China, 6 August 2017, Manila, Philippines. For a comprehensive assessment of the Framework of the COC, see Ian Storey, ‘Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea’ (8 August 2017) ISEAS Perspective No.62/2017.

66 C. Thayer, ‘ASEAN and China Set on Agree on Single Draft South China Sea Code of Conduct’ (27 June 2018) online: The Diplomat <<https://thediplomat.com/2018/07/asean-and-china-set-to-agree-on-single-draft-south-china-sea-code-of-conduct/>>.

67 Chairman’s Statement of the ASEAN PMC 10+1 Sessions with Dialogue Partners, 2–3 August 2018, Singapore.

68 ‘The 17th Senior Officials’ Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) Held Successfully in China’ (19 May 2019) online: Ministry of Foreign Affairs of the People’s Republic of China <[https://www.fmprc.gov.cn/nanhai/eng/wjbxw\\_1/t1665134.htm](https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1665134.htm)> and ‘The 18th ASEAN-China Senior Officials’ Meeting on the Implementation of the Declaration on the Conduct of Parties (DOC) in the South China Sea Successfully Held’ (16 October 2019) online: Ministry of Foreign Affairs of the People’s Republic of China <[https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1708862.shtml](https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1708862.shtml)>.

69 Chairman’ Statement of the ASEAN PMC 10+1 Sessions with Dialogue Partners, 31st July – 1 August 2019, Bangkok, Thailand, and 22nd ASEAN-China Summit Chairman’s Statement, 3 November 2019, Bangkok/Nonthaburi, Thailand, para. 18.

Despite COVID-19, both sides have been discussing the issue via videoconference and recently were able to agree provisionally on the Preamble section of the SDNT during 2021.<sup>70</sup>

## 5 Conclusion: What Role ASEAN Can Play in the Peaceful Management of Maritime Disputes in the South China Sea?

It is clear that ASEAN does not take a position on the sovereignty or maritime disputes in the South China Sea and it does not take sides on how the disputes should be resolved. The major objective of ASEAN is to preserve peace and stability in the South China Sea and to see that South China Sea disputes are managed in a peaceful manner. That explains the silence of ASEAN with respect to the Award of the Arbitral Tribunal in *South China Sea case* and with respect to the “notes verbales war” following the submissions of Malaysia and Vietnam to the CLCS.

On the other hand, based on the centrality principle, ASEAN wants to maintain its central role in dealing with regional issues and remain neutral in the competition between the major powers. That is the reason why some ASEAN Member States, while willing to see more balance to China's domination in the region, have been reluctant to welcome initiatives such as Quad and AUKUS. They are concerned that increased tensions between the United States and China will force Southeast Asian countries to take sides and undermine the central role of ASEAN in maintaining peace in the region.

At the 34th ASEAN Summit in June 2019, ASEAN Leaders adopted the ASEAN Outlook on the Indo-Pacific to help guide ASEAN's engagement and cooperation in the wider Indo-Pacific region.<sup>71</sup> The Outlook envisages ASEAN centrality as the underlying principle for promoting cooperation in the Indo-Pacific region, with ASEAN-led mechanisms such as East Asian Summit serving as platforms for dialogue and cooperation. It also defines four broad range of areas in which ASEAN will undertake cooperation: maritime cooperation, connectivity, UN sustainable development goals 2030 and economic and other areas.<sup>72</sup> The content of the ASEAN Outlook relating to maritime cooperation can shed some light on the future ASEAN policy on the South China Sea. Pursuant to

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70 84th AMM Joint Communiqué, 2 August 2021, 890.

71 Chairman's Statement of the 34th ASEAN Summit, 23 June 2019, Bangkok, Thailand, para. 56.

72 ASEAN Outlook on the Indo-Pacific, adopted at the 34th ASEAN Summit, 23 June 2019, Bangkok, Thailand.

the Outlook, ASEAN will “prevent, manage and eventually resolve” maritime issues such as unresolved maritime disputes, unsustainable exploitation of maritime resources, and marine pollution in a more focused, peaceful and comprehensive way. This language suggests that ASEAN will continue to place greater emphasis on the prevention of conflict and on peaceful management of the sovereignty and maritime disputes in the South China Sea, rather than on the resolution of such disputes. At the same time, ASEAN will also continue its efforts to play the primary role as a facilitator by providing forums for the relevant parties to meet to discuss how to manage the disputes, prevent conflict and enhance cooperation.

