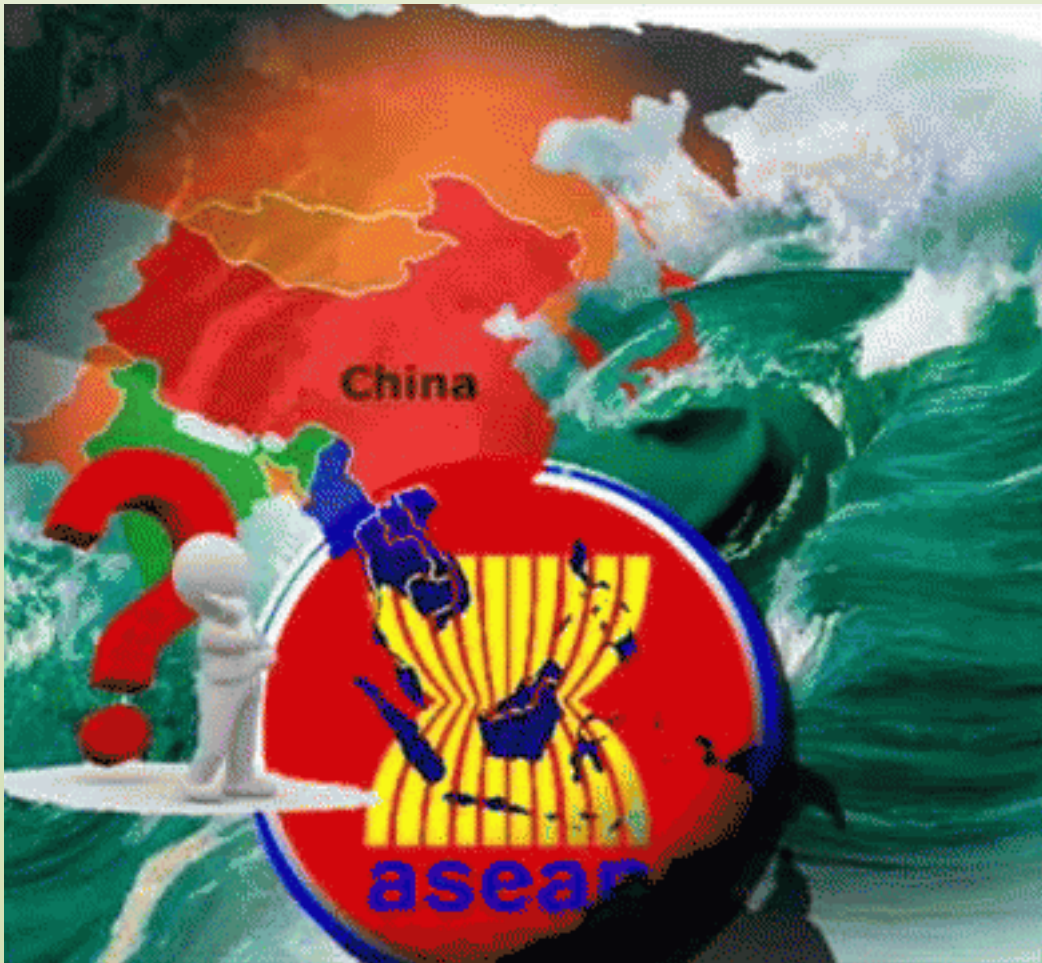


# The Code of Conduct in the South China Sea and Beyond

## Foolish Consistency or Holy Grail?

Carlyle A. Thayer



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## Carlyle A. Thayer

### Introduction

A Code of Conduct in the South China Sea (COC) was first mentioned when the Association of Southeast Asian Nations (ASEAN) and China adopted the Declaration on Conduct of Parties in the South China Sea (DOC) on November 4, 2002. Point 10, the last point in the DOC, stated:

The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

Since 2002, ASEAN and China have reached agreement on the Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the DOC (JWG) and in 2011 adopted the Guidelines to Implement the DOC.

On July 9, 2012, ASEAN Foreign Ministers unanimously adopted the key elements of their draft Code of Conduct for the South China Sea at the plenary meeting of the 45<sup>th</sup> ASEAN Ministerial Meeting (AMM). In September of the following year, the 9<sup>th</sup> ASEAN-China JWG met in Suzhou, Jiangsu province, China. In an important development China agreed to begin consultations with ASEAN on a Code of Conduct in the South China Sea. China's Foreign Ministry reported:

In the consultations on the COC, the participating parties had healthy discussions on how to promote the COC process. The parties agreed to follow the 'step by step and to reach consensus through consultation' approach and start from identifying the consensus to gradually expand consensus and narrow differences. The parties agreed to continue to steadily push forward the COC process during the full and effective implementation of DOC. The meeting decided to authorize the Joint Working Group to conduct concrete consultations on the COC and agreed to take steps to establish a celebrity expert group.<sup>1</sup>

The 10th ASEAN-China JWG met on March 18, 2014. According to Thailand's Ministry of Foreign Affairs this meeting:

reviewed the Work Plan on the Implementation of the DOC for 2013-2014 and welcomed new cooperation initiatives to promote the full and effective implementation of the DOC such as conducting seminars on establishment of hotline communications channel, exploring the possibility of conducting search and rescue exercises, organising workshop on conservation of marine environment, and holding a photo exhibition under the theme 'Maritime Cooperation' in view of

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<sup>1</sup>Ministry of Foreign Affairs of the People's Republic of China, "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," September 15, 2013;

[http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1079289.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1079289.shtml).

promoting the ASEAN-China Cultural Exchange Year in 2014.<sup>2</sup>

With respect to ASEAN-China consultations on the COC, the Thai Foreign Ministry reported that the JWG:

discussed about areas of convergence in order to come up with commonalities in developing the COC as well as programme of its work in the year 2014. It also exchanged preliminary views on preparing Terms of Reference of the Eminent Persons and Experts Group (EPEG) or other mechanisms to support the official consultations.<sup>3</sup>

The 12th ASEAN-China Joint Working Group on the DOC met in Thailand in late October 2014. According to the Chairman's Statement of the 17<sup>th</sup> ASEAN-China Summit held in Nay Pyi Taw, Myanmar on November 13, 2014:

12. We welcomed the positive outcomes from the 8th ASEAN-China SOM on DOC and the 12th Joint Working Group (JWG) on the Implementation of the DOC in Bangkok, Thailand, from 26 to 29 October 2014. We will continue to maintain the momentum of regular official consultations and work towards the early conclusion of the COC.<sup>4</sup>

Premier Li Keqiang in remarks to the East Asia Summit in Nay Pyi Taw noted that with respect to the COC an 'early harvest has been achieved.'<sup>5</sup>

According to the Chairman's Statement of the 26<sup>th</sup> ASEAN Summit (April 26-28, 2015),:

62. While noting the progress made in the consultations on the Code of Conduct in the South China Sea (COC), we urged that consultations be intensified, to ensure the expeditious establishment of an effective COC.

By 2015 the ASEAN-China JWG has held fifteen meeting as a result which agreement has been reached on two lists of commonalities for the COC. In August, the ASEAN Foreign Ministers noted that the 9<sup>th</sup> ASEAN Senior Officials Meeting 'agreed to proceed to the next stage of consultations and negotiate the framework, structure, elements as well as to address crucial, difficult and complicated issues relating to the proposed COC.'

The full implementation of the DOC is a prerequisite for completing consultations on the COC. This paper canvasses what are the likely 'crucial, difficult and complicated issues' that remain to be resolved. The paper argues that ASEAN should pursue its own dual track approach to managing tensions in the South China Sea. First, ASEAN must continue to pursue its consultations with China on the COC to keep China on board politically. Second, ASEAN should look beyond the COC and adopt a Treaty of Amity and

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<sup>2</sup> Ministry of Foreign Affairs of The Kingdom of Thailand, "The 10<sup>th</sup> ASEAN-China Joint Working Group on the Implementation of the Declaration of Conduct of Parties in the South China Sea (JWG of DOC)," May 19, 2014; <http://www.mfa.go.th/main/en/media-center/14/44171-The-10th-ASEAN-China-Joint-Working-Group-on-the-Im.html>.

<sup>3</sup> *ibid.*

<sup>4</sup> Ministry of Foreign Affairs of the People's Republic of China, "Chairman's Statement of the 17<sup>th</sup> ASEAN-China Summit," November 13, 2014; [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1215668.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1215668.shtml).

<sup>5</sup> Ministry of Foreign Affairs, People's Republic of China, "Li Keqiang Expounds on China's Principled Position on South China Sea in East Asia Summit," November 13, 2014, [http://www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/lkqzlcxdyhzldrxlhybdmdjxzsfw/t1211375.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/lkqzlcxdyhzldrxlhybdmdjxzsfw/t1211375.shtml).

Cooperation for Southeast Asia's Maritime Domain, enlist the support of its Dialogue Partners for this effort, and finally, shore up the ASEAN Political-Security Community. Only by taking proactive measures can ASEAN maintain unity and leadership to preserve its centrality in managing challenges to Southeast Asia's security. If ASEAN does not seize the initiative Southeast Asia will once again become the cockpit for great power rivalry.

### Full Implementation of the DOC.

A pre-requisite for reaching a COC is the full implementation of the DOC. The 2002 DOC represents the collective commitment by ASEAN members and China to promote peace, stability and mutual trust and ensure resolution of disputes in the South China Sea. However, to fully implement the DOC ASEAN must press China to clarify and define the wording of this agreement. ASEAN and China need to clarify and operationalize key terms used in paragraphs 4, 5 and 6 of the DOC through the ASEAN-China JWG process.

**Threat or Use of Force.** Paragraph four of the DOC refers specifically to 'the threat or use of force.' In light of frequent physical confrontations in the South China Sea, especially involving fishermen and maritime law enforcement agencies, ASEAN and China need to consider whether a spectrum of activities short of armed force constitute in fact 'the use of force' within the meaning of the DOC. Such activities could include: dangerous naval maneuvers, threatening to ram, ramming, directing flares at fishing boats, use of high-powered water canons, unsheathing and aiming deck guns during a confrontation, firing live ammunition warning shots at unarmed fishermen, and other tactics. ASEAN and China also need to determine the legal status of fishermen and the crew of state-owned tugboats who act either as state militia or state proxies in territorial disputes in the South China Sea.

**Self-Restraint.** Paragraph 5 of the DOC calls on the signatories 'to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability.' Due to activities undertaken in the South China Sea by claimant states since the DOC was signed, ASEAN and China should specify in detail what types of activities should also be included in the phrase 'including, among others.'

The COC should include self-restraint on the following types of activities:

1. inhabiting islands and other features that are currently uninhabited;
2. erecting new structure on islands and land features – presently occupied or not;
3. conducting activities that pollute the environment;
4. conducting activities that threaten navigational safety;
5. intentionally interfering with communication systems of other ships or aircraft.
6. conducting military exercises, military surveillance, or other provocative actions in the South China Sea;
7. simulating attacks by aiming guns, missile launchers, torpedo tubes or other weapons in the direction of other vessel/aircraft;

8. launching objects or firing signal flares in the direction of any ship or aircraft so as to pose a danger, constitute a hazard, or interfere with navigation and flight of other ship or aircraft.
9. using lasers in such a manner so as to cause injury to personnel or damage to equipment aboard of other ship or aircraft.

**Voluntary Exchange of Information.** The purpose of the DOC is to build confidence and trust. The intention and purpose behind ‘land reclamation’ activities should be made transparent. Paragraph 5(d) calls for the voluntary exchange of relevant information. ASEAN and China should agree that all claimant states should be called upon to provide an account of ‘land reclamation’ and construction activities undertaken since the 2002 DOC was adopted. Following the procedures in the South East Asia Nuclear Weapon Free Zone (SEANWFZ) Treaty,<sup>6</sup> states should be entitled to ask questions about and receive a timely reply to their concerns over ‘land reclamation’ and construction activities. States should be encouraged to invite observers to inspect their ‘land reclamation’ and construction activities.

**Notification of Military Exercises.** Paragraph 5(c) calls for ‘notifying, on a voluntary basis, other Parties concerned of any impending joint/combined military exercise.’ ASEAN and China should reinforce this clause by operationalizing a notification process. In addition, in order to build confidence and trust, military observers from neighboring states should be invited to attend these exercises.

**Protecting the Marine Environment.** Paragraph 6 (a and b) of the DOC makes provision for the protection of the marine environment and marine scientific research. In light of China’s claims that it conducted an environmental impact study prior to embarking on its present ‘land reclamation,’ and Philippine allegations that China’s ‘land reclamation’ has damaged the marine environment (coral reefs), ASEAN and China should assign high priority for its first joint scientific study of the impact of all so-called ‘land reclamation’ efforts in the South China Sea on the marine environment.

**Safety of Navigation and Communication.** Paragraph 6(c) makes provision for confidence building in the area of safety of navigation and communication at sea. The ASEAN-China JWG should immediately set up a working group on safety of navigation and communication at sea to address how to manage and prevent dangerous actions by naval and maritime law enforcement agencies operating in the South China Sea. In particular, ASEAN and China should commit themselves to the effective implementation of the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs), the International Convention for the Safety of Life at Sea (SOLAS), and the

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<sup>6</sup> The SEANWFZ Treaty makes provision for report and exchange of information (Article 11), request for clarification (Article 12), request for fact finding mission (Article 13) and remedial measures (Article 14); <http://www.asean.org/news/item/treaty-on-the-southeast-asia-nuclear-weapon-free-zone>.

Code for Unplanned Encounters at Sea (CUES) among other international conventions and norms.<sup>7</sup>

**Duty to Cooperate.** The DOC specified five areas of cooperation:

- a. marine environmental protection;
- b. marine scientific research;
- c. safety of navigation and communication at sea;
- d. search and rescue operation; and
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

So far working groups have been set up in four of the above five areas of cooperation (a, b, d and e). A working group on safety of navigation and communication at sea should be set up and draw up obligations of state parties for safety of navigation to include: safe speed, safe distance, modes of communication, and assistance to persons and vessels in distress at sea.

The above five cooperative activities should be included in the COC as the obligations states assume as signatories to UNCLOS. UNCLOS Part IX, for example, states with respect to enclosed and semi-enclosed seas that state parties 'should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.'<sup>8</sup>

## Crucial, Difficult and Complicated Issues

**Operative Provisions and Principles.** The ASEAN-China Code of Conduct in the South China Sea should incorporate 'ASEAN's Proposed Elements of a Regional Code of Conduct in the South China Sea (COC) between ASEAN Member States and the People's Republic of China' adopted on July 9, 2012.<sup>9</sup> These are crucial elements in a final COC:

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<sup>7</sup> CUES was adopted on a voluntary basis by the Western Pacific Naval Symposium in April 2014; see: Jeremy Page, "Pacific Navies Agree to Code of Conduct for Unplanned Encounters," *The Wall Street Journal*, April 22, 2014.

<sup>8</sup> Part IX continues: To this end they shall endeavour, directly or through an appropriate regional organization:

(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article [emphasis added].

<sup>9</sup> Carlyle A. Thayer, 'ASEAN's Code of Conduct (Unofficial),' *Thayer Consultancy Background Brief*, July 11, 2012. <http://www.scribd.com/doc/101698395/Thayer-ASEAN's-Code-of-Conduct-Unofficial>. The preamble to 'ASEAN's Proposed Elements of a Regional Code of Conduct in the South China Sea (COC) between ASEAN Member States and the People's Republic of China', included references to previous

Article I of the ASEAN draft COC contains its operative provisions and calls on the parties to 'respect and adhere to the United Nations Charter, 1982 UNCLOS, Treaty of Amity and Cooperation in Southeast Asia, the 2002 ASEAN-China Declaration on Conduct of Parties in the South China Sea and the Five Principles of Peaceful Co-existence.' The ASEAN draft listed four principles:

- (1) to develop modalities and arrangements for the promotion of settlement by peaceful means of disputes and prevent their escalation...;
- (2) to respect the provisions of and take actions consistent with the COC;
- (3) to encourage other countries to respect the purposes and principles contained in the COC; and
- (4) to establish an effective mechanism to monitor the implementation of the COC.

**Obligations.** Article II of the ASEAN draft enumerates eight obligations:

1. establishment of a ministerial level mechanism to monitor the implementation of the COC on a regular basis;
2. prohibition on reservations to the COC;
3. provisions of entry into force;
4. mechanism for settling disputes (see below)
5. amendment of the COC;
6. provisions for other countries to respect the COC;
7. indefinite duration of the COC; and
8. registration of the COC with the ASEAN Secretary General and Secretariat of the United Nations

**Dispute Settlement.** Article III(4) is more contentious; it requires signatories to 'establish a mechanism for settling disputes relating to the interpretation and application of the Code of Conduct.' Two dispute settlement mechanisms are included to address a breach or violation of the COC. The first is the dispute settlement mechanism included in the ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC).<sup>10</sup> The TAC provides for a ministerial-level ASEAN High Council and empowers it to recommend to parties in dispute, subject to their prior agreement, such measures as good offices, mediation, inquiry or conciliation. The High Council also is given the authority to 'recommend appropriate measures for the prevention of a deterioration of

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agreements reached between ASEAN and China, including the 1997 Joint Statement of the meeting of heads of government/state of ASEAN members and China, the 2006 Joint Declaration on Strategic Partnership for Peace and Towards an Enhanced ASEAN-China Strategic Partnership, the 2002 DOC and its commitment to develop a COC and protection of the environment and biodiversity.

<sup>10</sup> 'Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976.' <http://www.aseansec.org/1217.htm>.

the dispute...’ The People’s Republic of China acceded to the TAC in 2003 and undertook in writing ‘faithfully to perform and carry out all the stipulations therein contained.’<sup>11</sup>

In the event that parties are unable to resolve their dispute within the ASEAN framework, the ASEAN COC sets out a second mechanism: the disputants ‘may resort to dispute settlement mechanism provided under international law, including UNCLOS.’ This could include taking their case to an international court for adjudication.

In addition to the above, the following crucial, difficult and complicated issues need to be addressed:

**Area of Application.** The area of application in the South China Sea needs to be specified.

In December 1995, ASEAN adopted the Treaty on the South East Asia Nuclear Weapons Free Zone (SEANWFZ). This was the first time that ASEAN collectively defined the geographical limits of Southeast Asia as follows:

(a) "Southeast Asia Nuclear Weapon-Free Zone", hereinafter referred to as the "Zone", means the area comprising the territories of all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, *and their respective continental shelves and Exclusive Economic Zones (EEZ)* [emphasis added];

(b) "territory" means the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them [emphasis added].<sup>12</sup>

The area of application of the COC should include the entire South China Sea as defined by the International Hydrographic Organization including the geographic area specified in the SEANWFZ Treaty.<sup>13</sup>

<sup>11</sup> Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia, October 8, 2003, <http://www.aseansec.org/15271.htm>.

<sup>12</sup> "Treaty on the Southeast Asia Nuclear Weapon-Free Zone," <http://www.asean.org/news/iter/treaty-on-the-southeast-asia-nuclear-weapon-free-zone>.

<sup>13</sup> The International Hydrographic Organization defines the South China Sea as including the following area: *On the South.* The Eastern and Southern limits of Singapore and Malacca Straits [A line joining Tanjong Datok, the Southeast point of Johore (1°22'N 104°17'E) through Horsburgh Reef to Pulo Koko, the Northeastern extreme of Bintan Island (1°13.5'N 104°35'E). The Northeastern coast of Sumatra] as far West as Tanjong Kedabu (1°06'N 102°58'E) down the East coast of Sumatra to Lucipara Point (3°14'S 106°05'E) thence to Tanjong Nanka, the Southwest extremity of Banka Island, through this island to Tanjong Berikat the Eastern point (2°34'S 106°51'E), on to Tanjong Djemang (2°36'S 107°37'E) in Billiton, along the North coast of this island to Tanjong Boeroeng Mandi (2°46'S 108°16'E) and thence a line to Tanjong Sambar (3°00'S 110°19'E) the Southwest extreme of Borneo. *On the East.* From Tanjong Sambar through the West coast of Borneo to Tanjong Sampanmangio, the North point, thence a line to West points of Balabac and Secam Reefs, on to the West point of Bancalan Island and to Cape Buliluyan, the Southwest point of Palawan, through this island to Cabuli Point, the Northern point thereof, thence to the Northwest point of Busuanga and to Cape Calavite in the island of Mindoro, to the Northwest point of Lubang Island and to Point Fuego (14°08'N) in Luzon Island, through this island to Cape Engano, the Northeast point of Luzon, along a line joining this cape with the East point of Balintang Island (20°N) and to the East point of Y'Ami Island (21°05'N) thence to Garan Bi, the Southern point of Taiwan (Formosa), through this island to Santyo (25°N) its North Eastern Point.



**Clarification of Territorial and Maritime Claims.** The COC should contain an obligation for all parties to clarify the basis of their claims to specific features and maritime zones in the South China Sea on the basis of international law including the United Nations Convention on the Law of the Sea (UNCLOS).

**Without Prejudice.** The COC should be applied to all disputed maritime boundary areas in the South China Sea ‘without prejudice to territorial claims.’ Territorial claims in the South China Sea should contain the following legal disclaimers:

1. Nothing contained in this COC shall be interpreted as:
  - Renunciation by any Party of previously asserted rights of or claims to territorial sovereignty in the South China Sea;
  - Prejudicing the position of any Party as regards its recognition or non-recognition of any others State’s right of or claim or basis of claim to territorial sovereignty in the South China Sea.
2. No acts or activities taking place while the present COC is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the South China Sea or create any rights of sovereignty in the South China Sea.
3. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea (DOC).

**Monitoring and Reporting.** The COC should contain precise monitoring and reporting mechanisms for its provisions including multiagency hotlines.

### **An ASEAN Proactive Dual Track Approach**

ASEAN-China are currently committed to consulting on the COC within the framework of implementing the DOC. At present ASEAN and China have not yet initiated a single cooperative activity under the DOC.

In order to gain some political leverage over China ASEAN should address persistent and newly arising tensions from maritime disputes in the South China Sea through a proactive dual track approach. The first track involves ASEAN acting as a corporate body

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*On the North.* From Fuki Kaku the North point of Formosa to Kiushan Tao (Turnabout Island) on to the South point of Haitan Tao (25°25'N) and thence Westward on the parallel of 25°24' North to the coast of Fukien.

*On the West.* The Mainland, the Southern limit of the Gulf of Thailand and the East coast of the Malay Peninsula.

to manage territorial disputes between its members and China in the South China Sea. The second track involves ASEAN cooperation with its dialogue partners.

**Track 1 – ASEAN and China.** ASEAN must be more proactive in using legal, diplomatic and political means that would reinforce Southeast Asia’s autonomy and ASEAN centrality in order to manage tensions in the South China Sea. ASEAN’s dogged pursuit of promoting confidence-building measures under the DOC and a binding COC with China, while an important goal, is fundamentally flawed for five reasons:

First, this approach reinforces divisions in ASEAN between (a) front line claimant states the Philippines and Vietnam and the other claimant states, Brunei and Malaysia, and (b) claimant and non-claimant states, thus undermining ASEAN unity.

Second, China will not agree to a binding COC that has treaty status; this will result in a compromise COC that falls short of meeting the security and other concerns of Southeast Asia’s claimant states.

Third, because ASEAN and China have agreed to proceed with consultations on the drafting of a COC on the basis of consensus, China can delay these proceedings indefinitely.

Fourth, because there is no agreed road map and time limit on this process, China can continue to consolidate its presence on artificial islands and elsewhere in the South China Sea and extend its de facto control over waters that overlap with the EEZs of littoral states such as Malaysia and Indonesia.

Fifth, the geographical area of ASEAN’s proposed COC cannot be defined until China either clarifies or withdraws its nine-dash line claim to the South China Sea.

ASEAN’s present diplomatic course, if unaltered, runs the risk of marginalizing ASEAN’s centrality in the political-security affairs of Southeast Asia. This approach is characterized in the conclusion as ‘foolish consistency.’ ASEAN should continue its consultations within the ASEAN-China JWG framework. At the same time ASEAN should develop a corporate stance on the South China Sea and work with its Dialogue Partners to gain political leverage with China.

**Track 2 – ASEAN and Its Dialogue Partners.** ASEAN should adopt an ASEAN Treaty of Amity and Cooperation in Southeast Asia’s Maritime Domain (hereafter the ASEAN Treaty) among its members.<sup>14</sup> This Treaty would bind ASEAN members to resolve territorial disputes among themselves and set an example to the East Asian and global

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<sup>14</sup> This proposal is a modification of an idea first presented by the author to “Maritime Security: Towards a Regional Code of Conduct,” 8<sup>th</sup> CSCAP General Conference, Dangers and Dilemmas: Will the New Regional Security Architecture Help?, sponsored by the Council for Security Cooperation in the Asia-Pacific, Hanoi, November 21-22, 2011. This proposal was refined in two subsequent presentations: Thayer, “Positioning ASEAN between Global Powers,” Presentation to the 14<sup>th</sup> Regional Outlook Forum, Institute of Southeast Asian Studies, Singapore, January 5, 2012 and Thayer, “Beyond Territoriality: Managing the Maritime Commons in the South China Sea,” Paper delivered to the 28<sup>th</sup> Asia-Pacific Roundtable, International Institute of Strategic Studies, Kuala Lumpur, June 2-4, 2014.

community. ASEAN should enlist the support of its dialogue partners to support this initiative. The Treaty should set out the geographical boundaries of Southeast Asia's maritime domain; following SEANWFZ these should include the respective continental shelves and EEZs of all ASEAN members (and future members).<sup>15</sup> This Treaty should have a protocol of accession inviting all ASEAN Dialogue Partners to sign.

There are five reasons why ASEAN should adopt a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain:

First, security of Southeast Asia's maritime domain is indivisible for all ASEAN members, whether coastal or landlocked states.

ASEAN's proposed COC, because it is focused solely on the South China Sea, does not cover maritime approaches to the Malacca Straits or the western seabords of Myanmar, Thailand and Indonesia, the Gulf of Thailand, the waters surrounding the Indonesian archipelago and waters to the north, east and south of the Philippines archipelago.

Second, international law, including UNCLOS, applies equally throughout Southeast Asia's maritime domain and not just the South China. It is applicable to all states.

Third, the treaty would incorporate the norms and legal obligations that may be stumbling blocks in consultations between ASEAN and China on a COC but would appeal to ASEAN's other Dialogue Partners.

Fourth, China would be put under pressure to join other Dialogue Partners in acceding to the treaty or bear the political costs of remaining outside its provisions.

Fifth, the treaty would reinforce ASEAN unity and Southeast Asia's autonomy by placing ASEAN at the centre of relations with outside maritime powers. The ASEAN Treaty would overcome differences between claimant and non-claimant states by making all ASEAN members stakeholders, including Cambodia, Myanmar and landlocked Laos.<sup>16</sup> The Treaty would also reinforce ASEAN's corporate and legal identity and enhance its ability to deal with external powers.

What should be included in a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain?

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<sup>15</sup> Such as Timor-Leste.

<sup>16</sup> Cambodia and Myanmar were the only two members of ASEAN to remain silent when maritime security/South China Sea issues were first raised at the November 2011 East Asia Summit Leaders' Retreat. Cambodia played a spoiling role when it was ASEAN Chair in 2012 by preventing any mention of South China Sea issues in the customary joint statement; none was issued. Cambodia and Laos both demurred when ASEAN foreign ministers held a retreat in early 2015 to discuss China's 'land reclamation' activities in the South China Sea. On Cambodia's role in 2012 see: Carlyle A. Thayer, "ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?," *The Asia-Pacific Journal*, 10(34), No. 4, August 20, 2012, 1-23.

The Treaty's Preamble should include pledges by all ASEAN members to bring their maritime boundaries and claims into accord with international law, including UNCLOS with particular attention to eliminating excessive baselines and clearly distinguishing islands from rocks for purposes of maritime delimitation.

The Treaty should include provision for setting up an independent panel of technical and legal experts who could be called on to assist in determining base lines and the classification of islands and rocks.

The Treaty should commit all signatories to renounce the threat of and use of force to settle their disputes over sovereignty and sovereign rights and disruption of good order at sea including safety of navigation and over flight.

The Treaty should include a pledge to resolve all outstanding disputes regarding land features in Southeast Asian waters, overlapping EEZs and delimitation of continental shelves between and among ASEAN members.<sup>17</sup>

The Treaty should incorporate references to previous ASEAN treaties such as the TAC and SEANWFZ and international maritime conventions such UNCLOS, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Convention on the International Regulations for Preventing Collisions at Sea, Code for Unplanned Encounters at Sea, and other relevant conventions.

The Treaty should include a binding commitment to resolve all disputes through peaceful means.

The Treaty should define militarization and include provisions for the demilitarization of islands and rocks and prohibit the deployment of specified types of weapon systems, such as land based anti-ship and anti-air craft missiles.

The Treaty should contain a provision requiring all signatories to cooperate in marine scientific research, marine pollution, fisheries management, search and rescue, anti-piracy and other agreed areas.

Finally, the Treaty should make provision for setting up a mechanism to handle complaints and disputes that may arise. Such a mechanism should include the ASEAN High Council or third party mediation or international legal arbitration.

### **Shoring up the ASEAN Political-Security Community**

ASEAN must be more proactive in shaping consensus among its member as part of the ASEAN Political-Security Community-building process.

ASEAN should hold its members who are claimant states to the highest standards of transparency with respect to three areas:

1. bringing their maritime zones into conformity with international law including

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<sup>17</sup> Note the recurrent tensions between Indonesia and Malaysia over the waters around Ambalat; "Jet fighters, war boats ready to launch attack," *Jakarta Post*, June 19, 2015.

UNCLOS;

2. clarifying their claims to features and maritime zones in the South China Sea;<sup>18</sup> and
3. providing a detailed account of the chronology of when features in the South China Sea were occupied and report on the extent and purpose of all infrastructure developments, including so-called 'land reclamation,' undertaken since the DOC was adopted in November 2002. ASEAN should review these accounts and assess whether they violate the letter and spirit of the DOC regarding 'self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability' in the South China Sea.

In addition, ASEAN's Political-Security Community Council should develop a whole-of-ASEAN approach to South China Sea issues by directing its subordinate agencies (ASEAN Defense Ministers, ASEAN Navy Chiefs, ASEAN Coast Guards, etc.) to develop effective policies to address security challenges arising from South China Sea disputes. Once ASEAN has established a common position, ASEAN officials should take its policy proposals to ASEAN-centric multilateral institutions such as the ASEAN Regional Forum, Expanded ASEAN Maritime Forum (EAMF),<sup>19</sup> ASEAN Defense Minister's Meeting Plus and to the East Asia Summit for endorsement.

### **Conclusion: Foolish Consistency or Holy Grail**

ASEAN's current approach towards consulting with China to reach a Code of Conduct in the South China Sea may be characterized as either 'foolish consistency' or ASEAN's search for the 'Holy Grail.'

The expression 'foolish consistency' is adapted from the essay entitled 'Self-Reliance' written by American philosopher Ralph Waldo Emerson. Emerson wrote, 'A foolish consistency is the hobgoblin [*tin h nghich*] of little minds, adored by little statesmen and philosophers and divines.' Emerson argued that individuals should eschew conformity and 'false consistency' and pursue their own ideas and instincts.

If ASEAN's efforts are an example of 'foolish consistency' then the end result will be Chinese hegemony over the South China Sea through its slow and deliberate excision of the maritime heart out of Southeast Asia.

The 'Holy Grail' is adapted from Anglo-Saxon legend. In the context of this paper the 'Holy Grail' refers to an object that is greatly desired or sought after because it would

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<sup>18</sup> See the discussion in Robert Beckman, "The UN Convention on the Law of the Sea and Maritime Disputes in the South China Sea," *The American Journal of International Law*, 107(1), January 2013, 142-163.

<sup>19</sup> See the author's suggestions to the EAMF: Carlyle A. Thayer, "Navigating Uncharted Waters: Maritime Confidence Building Measures and the Expanded ASEAN Maritime Forum," Presentation to "Enhancing Regional Maritime Security, Freedom of Safety of Navigation through Practical Implementation of Confidence Building Measures as well as Regional Instruments to Prevent and Manage Incidents at Sea," 3<sup>rd</sup> ASEAN Expanded Maritime Forum, Furama Resort Hotel, Da Nang, Vietnam, August 28, 2014.

provide eternal rewards to its finder. In other words, ASEAN's quest for a binding COC in the South China Sea with China, like the 'Holy Grail' would result in perpetual peace, cooperation and development between China and Southeast Asia.

If ASEAN pursues the COC with China as a kind of 'Holy Grail' it will be as frustrated as King Arthur's Knights of old in their endless quest. Southeast Asia's security landscape will witness greater major power rivalry and intervention. There will be no perpetual peace, cooperation and development due to great power rivalry and intervention.

To escape from these dilemmas ASEAN should play a more proactive role in managing territorial disputes in the South China Sea, prevent their militarization, and dampen great power rivalry by asserting to a greater extent than heretofore Southeast Asia's regional autonomy and ASEAN's centrality.

When SEANWFZ is coupled with the ASEAN Charter and ASEAN Political-Security Council it appears inescapable that ASEAN as a regional multilateral institution has the legal personality and political authority to act on behalf of its member states in managing territorial disputes in the South China Sea. ASEAN does not have to take sides over sovereignty disputes but it has an obligation to support its members in the peaceful resolution of maritime disputes on the basis of international law including UNCLOS.

At the same time ASEAN has a corporate responsibility to politically and diplomatically protect its individual members from intimidation, coercion, and threats and the use of force by external powers to alter the maritime geography of Southeast Asia. By drawing up and ratifying a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain ASEAN can then reach out and solicit support from its Dialogue Partners and other members of the international community to gain leverage in its consultations with China.

# The Code of Conduct in the South China Sea and Beyond: Foolish Consistency or Holy Grail?

**Emeritus Professor Carlyle A. Thayer**  
**Presentation to Session 6 The Way Forward**  
**The 7<sup>th</sup> South China Sea International Conference**  
**The Imperial Hotel, Vung Tau, Vietnam**  
**November 23-24, 2015**

# Outline

1. Introduction
2. Full Implementation of the DOC
3. Crucial, Difficult and Complicated Issues
4. An ASEAN Proactive Dual Track Approach
5. Shoring up the ASEAN Political-Security Community
6. Conclusion: Foolish Consistency or Holy Grail?



# 1. Introduction

- Code of Conduct mentioned in 2002 DOC
- Terms of Reference drawn up
- Key elements of ASEAN COC adopted (2012)
- 26<sup>th</sup> ASEAN Summit
  - consultations be intensified, to ensure the expeditious establishment of an effective COC
- 9<sup>th</sup> ASEAN Senior Officials Meeting (2015)
  - address crucial, difficult and complicated issues

## 2. Full Implementation of the DOC

### Need to operationalize Paragraphs 4, 5 and 6

- Threat or Use of Force
- Self-Restraint
- Voluntary Exchange of Information
- Notification of Military Exercises
- Protecting Marine Environment
- Safety of Navigation & Communication at Sea
- Duty to Cooperate

### 3. Crucial, Difficult and Complicated Issues

- Operative Provisions and Principles
- Obligations
- Dispute Settlement
- Area of Application
- Clarification of Maritime and Territorial Claims
- Without Prejudice
- Monitoring and Reporting

## 4. An ASEAN Proactive Dual Track Approach

- Track 1 – ASEAN and China
  - Continue with ASEAN-China Joint Working Group process
  - Why COC is fundamentally flawed
- Track 2 – ASEAN and Its Dialogue Partners
  - Treaty Amity and Cooperation in Southeast Asia's Maritime Domain
  - SEANWFZ Treaty & ASEAN Charter

# Geographic Scope of South East Asia

- (a) "Southeast Asia Nuclear Weapon-Free Zone", hereinafter referred to as the "Zone", means the area comprising the territories of all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, *and their respective continental shelves and Exclusive Economic Zones (EEZ)*;
- (b) "territory" means the land territory, internal waters, territorial sea, archipelagic waters, *the seabed and the sub-soil thereof and the airspace above them.*
  - - South East Asia Nuclear Weapons Free Zone Treaty 1995 ,  
emphasis added

## 5. Shoring up the ASEAN Political-Security Community

- Create corporate identity
- Highest standards of transparency
- Whole-of-ASEAN approach
  - ASEAN Defense Ministers, ASEAN Navy Chiefs, ASEAN Coast Guards, etc.

### Expanded ASEAN approach

- ASEAN Regional Forum, Expanded ASEAN Maritime Forum, ASEAN Defense Minister's Meeting Plus and the East Asia Summit

## 6. Conclusion: Foolish Consistency or Holy Grail?



# Foolish Consistency is the hobgoblin [*tin h nghich*] of little minds

- Foolish consistency
  - Consultations for consultations sake
- Holy Grail
  - COC will result in perpetual peace, cooperation and development
- Proactive ASEAN
  - Oppose militarization
  - Ward off great power rivalry and intervention



# Conclusion

- **ASEAN has a corporate responsibility** to politically and diplomatically protect its individual members from intimidation, coercion, and threats and the use of force by external powers to alter the maritime geography of Southeast Asia. By drawing up and ratifying a Treaty Amity and Cooperation in Southeast Asia's Maritime Domain ASEAN can then reach out and solicit support from its Dialogue Partners and other members of the international community **to gain leverage in its consultations with China.**

# Conclusion

- When SEANWFZ is coupled with the ASEAN Charter and ASEAN Political-Security Council it appears inescapable that **ASEAN as a regional multilateral institution has the legal personality and political authority to act on behalf of its member states** in managing territorial disputes in the South China Sea. ASEAN does not have to take sides over sovereignty disputes but it has an obligation to support its members in the peaceful resolution of maritime disputes on the basis of international law including UNCLOS.

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