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ASEAN'S Code of Conduct in the South China Sea: A Litmus Test for Community-Building?

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In October 2003, the summit meeting of the heads of government of the Association of Southeast Asian Nations (ASEAN) issued a major statement that declared, "[a]n ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation…"[1] Each successive ASEAN Summit and Annual Ministerial Meeting (AMM) of foreign ministers has advanced this goal. It was expected that the 45th AMM, held under the motto "ASEAN: One Community, One Destiny," would follow its predecessors by adopting further measures to make the ASEAN Community a reality. As events transpired, differences among ASEAN states over how to manage territorial disputes in the South China Sea emerged as a litmus test of their ability to achieve an ASEAN Political-Security Community by 2015.

Leaders at the 20th ASEAN Summit in Phnom Penh, April 3, 2012

This article analyses internal ASEAN differences on the South China Sea by offering new insights provided by three documents: Philippine Working Draft, Philippines Draft Code of Conduct; 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; and Summary of Cambodia Chair's intervention at the AMM Retreat, 9 July 2012.[2]

This article is divided into five parts. The first part briefly presents the historical background to the evolution of ASEAN's policy on a Code of Conduct in the South China Sea. It then sharpens the discussion by comparing the Philippine Working Draft, Philippines Draft Code of Conduct drawn up in early 2012 with ASEAN's Proposed Elements of a Regional Code of Conduct in the South China Sea approved by the 45th AMM in July. Part two examines internal discussions by ASEAN foreign ministers at their 45th AMM Retreat. These discussions reveal the issues that prevented the foreign ministers from reaching consensus on the wording of a single paragraph on the South China Sea and the unprecedented decision by the ASEAN Chair to withhold issuing the customary joint communiqué. Part three details the public recriminations that followed, while part four discusses Indonesia's shuttle diplomacy to restore ASEAN unity. Part five offers an evaluation of the implications of these developments for ASEAN unity, the prospects for an ASEAN-China COC, and an ASEAN Political-Security Community.

ASEAN's Code of Conduct

The genesis of ASEAN's 2012 draft COC may be traced back to 1995 when China occupied Mischief Reef, a maritime feature claimed by the Philippines. The Mischief Reef incident marked a turning point. ASEAN foreign ministers issued a statement expressing their "serious concern" and urged the concerned parties "to refrain from taking actions that de-stabilize the situation."[3] The Philippines, as the aggrieved party, sought the backing from its fellow ASEAN members for a Code of Conduct in the South China Sea that would constrain China from further encroachments on Philippines sovereignty. In late 1999 ASEAN members finally reached agreement on a COC.[4]

In March 2000, ASEAN and China exchanged their respective drafts and agreed to consolidate them into one document.[5] Four major areas of disagreement were identified: the geographic scope, restrictions on construction on occupied and unoccupied features, military activities in waters adjacent to the Spratly islands, and whether or not fishermen found in disputed waters could be detained and arrested. A formal ASEAN-China COC proved a bridge too far. In November 2002, ASEAN member states and China signed a non-binding political statement known as the Declaration on Conduct of Parties in the South China Sea (DOC). This document set out four trust and confidence building measures and five voluntary cooperative activities. The parties to the DOC reaffirmed "that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective."[6]

The DOC was stillborn. It took a further twenty-five months before senior officials reached agreement on the terms of reference for the ASEAN-China Joint Working Group (JWC) to implement the DOC.[7] In August 2005, ASEAN tabled draft Guidelines to Implement the DOC at the first meeting of the JWC. Point two called for ASEAN consultations prior to meeting with China.[8] China objected and repeated its long-held position that the relevant parties should resolve sovereignty and jurisdictional disputes bilaterally. This proved such a sticking point that another six years of intermittent discussions and twenty-one successive drafts were exchanged before final agreement was reached.

In July 2011, the Guidelines to Implement the DOC were adopted after ASEAN dropped its insistence on prior consultation and agreed instead to promote dialogue and consultation among the parties. A new point was added to the Guidelines specifying that activities and projects carried out under the DOC should be reported to the ASEAN-China Ministerial Meeting.[9] All the other points in the 2011 Guidelines remained unchanged from the original ASEAN draft tabled in 2005.

ASEAN and Chinese senior officials commenced discussions on the implementation of the Guidelines. At a meeting held in Beijing from January 13-15, 2012, agreement was reached to set up four expert committees on maritime scientific research, environmental protection, search and rescue, and transnational crime. These committees were derived from the five cooperative activities mentioned in the 2002 DOC. Significantly no expert committee on safety of navigation and communication at sea was established due to its contentious nature.

The agreement on DOC Guidelines led to the revival of the long-standing proposal by the Philippines for a COC that was included in the 2002 DOC. ASEAN senior officials began drafting the COC with the intention of reaching a common ASEAN position before

presenting it to China for discussion. China initially took the position that the implementation of the DOC Guidelines should be given priority over the COC. China stated it would discuss the COC with ASEAN at an "appropriate timing" or when "appropriate conditions" were met.[10]

In January 2012, the Philippines circulated an informal working draft simply titled, Philippines Draft Code of Conduct. The document was eight pages in length and comprised ten articles. In line with official Philippine foreign policy promoting the South China Sea as a Zone of Peace, Freedom, Friendship and Cooperation (ZOPFF/C), the draft COC proposed a Joint Cooperation Area in the South China Sea (Article III), a Joint Permanent Working Committee to implement the ZOPFF/C (Article IV), the Application of Part IX of the 1982 United Nations Convention on Law of the Sea in the South China Sea (Article V),[11] and Dispute Settlement Mechanisms (Article VI). The remaining articles contained standard provisions such as principles (Article I), objectives (Article II), reservations (Article VII), signature and ratification (Article VIII), entry into force (Article IX) and review and amendments to the code (Article X). In discussions held by ASEAN senior officials during the first quarter of 2012 it became apparent that ASEAN members were divided on Articles III-VI in the Philippines draft. Some ASEAN members also shared reservations about being too prescriptive concerning dispute settlement mechanisms.[12]

It was at this point that China changed tack and sought a seat at the ASEAN discussions. The timing of China's involvement with ASEAN in drafting a COC quickly became a contentious issue within ASEAN. These tensions surfaced at the 20th ASEAN Summit held in Phnom Penh from April 3-4. Cambodia, the ASEAN Chair, pushed for China's inclusion in ASEAN discussions. The Philippines and Vietnam objected strongly and a compromise was reached. ASEAN would proceed on its own to draft a COC, while communication with China would take place through the ASEAN Chair at the same time.[13]

The ASEAN Senior Officials Meeting (SOM) Working Group on the COC concluded its discussions on June 13, 2012 at its seventh meeting. According to an official statement, "The meeting agreed to submit the draft ASEAN proposed key elements of the regional Code of Conduct in the South China Sea to the ASEAN SOM for consideration."[14] The ASEAN SOM met in Phnom Penh from July 6-7 and forwarded the agreed draft to the ASEAN foreign ministers for deliberation at their 45th AMM on July 9. At the end of the AMM formal discussions Kao Kim Hourn, Secretary of State in the Cambodian Ministry of Foreign Affairs, told reporters that the ASEAN foreign ministers had adopted the "key elements" of the COC and "agreed to have the ASEAN senior officials meet with the senior official from China to discuss the (code of conduct) from now on."[15]

According to the document ASEAN's Proposed Elements of a Regional Code of Conduct in the South China Sea, the original Philippine Working Draft was heavily pruned. Articles III-VI were dropped entirely. The ASEAN "key elements" were reduced to a preamble and two articles. A comparison of the Philippine draft preamble with the agreed ASEAN preamble reveals that two items contained in the former were dropped. The first was a reference to "the principles and norms of international law applicable to maritime space, in particular the principles on the peaceful uses and cooperative management of the oceans." The second and more sensitive reference that was deleted referred to "the need to preserve the region from any form of increased militarization and intimidation."

Both preambles began by referencing the 1997 Joint Statement of the meeting of heads of government/state of ASEAN members and China. Next, the Philippines inclusion of the 2003 declaration of the ASEAN-China Strategic Partnership for Peace and Prosperity was replaced with a reference to the more recent 2006 Joint Declaration on Strategic Partnership for Peace and Towards an Enhanced ASEAN-China Strategic Partnership. Both preambles included a reference to the 2002 DOC and its commitment to develop a COC. Both preambles also referred to protection of the environment and biodiversity. The ASEAN draft altered the formulation in the Philippine draft from "advance a lasting and durable solution of disputes" to read "comprehensive and durable solution of disputes."[16] The Philippines original proposal for a "zone of peace, freedom, friendship and cooperation" was modified to read "an area of peace, stability, friendship and cooperation."

Article I of the ASEAN draft COC contained its operative provisions and called on the parties to "respect and adhere to the United Nations Charter, 1982 UNCLOS, Treaty of Amity and Cooperation in Southeast Asia, DOC and the Five Principles of Peaceful Co-existence. However, five of the principles contained in the Philippine draft were deleted in their entirety: respect for freedom of navigation and over flight; the need to define, clarify and segregate disputed areas from the non-disputed areas; full resolution of the territorial and jurisdictional disputes; refrain from undertaking activities that may disrupt the peace and endanger the environment; and build trust and confidence on the basis of equality and mutual respect.

The ASEAN draft contained 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.

Article II of the ASEAN draft enumerated eight obligations: a ministerial level mechanism to monitor the implementation of the COC; prohibition on reservations to the COC; provisions of entry into force; mechanism for settling disputes; amendment of the COC; provisions for other countries to respect the COC; indefinite duration of the COC; and registration of the COC with the ASEAN Secretary General and Secretariat of the United Nations

Article III(4) required signatories to "establish a mechanism for settling disputes relating to the interpretation and application of the Code of Conduct." The ASEAN draft, following deletion of any mention of the joint cooperation area, also dropped reference to a dispute settlement mechanism in the joint cooperation area.

Two dispute settlement mechanisms were included that closely reflected the wording in the Philippine Working Draft on disputes arising from a breach or violation of the COC.[17] The first mechanism is the dispute settlement mechanism included in the ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC).[18] 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 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."[19]

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. UNCLOS, however, does not contain any provisions for the settlement of sovereignty disputes over islands and rocks. It does provide for an International Tribunal for the Law of the Sea (ITLOS) to adjudicate disputes over maritime jurisdiction.[20] Under international law "the land dominates the sea" and before disputants can take their case to ITLOS they would first have to determine sovereignty over disputed islands and rocks on which their maritime claims are based.

At the 45th AMM Retreat, the Cambodian foreign minister reported that, "ASEAN-China met twice recently to discuss informally the drafting of [the] COC" and that "Cambodia will host another formal ASEAN China SOM on the COC in the near future."[21] An informal senior-level working meeting was held on July 8 and Japanese media sources reported "ASEAN and China had agreed to start talks on a legally-binding maritime code of conduct to manage the disputes."[22]

A day later the Cambodian Foreign Minister told his ASEAN counterparts that Vice Foreign Minister Fu Ying stated that China was willing to commence talks on the COC in September.[23] Also on July 9, Foreign Minister Yang Jiechi met with Secretary of State Hillary Clinton to discus the South China Sea. After these talks, U.S. officials revealed that "foreign minister Yang gave Secretary Clinton 'a careful indication' that Beijing is willing to join a dialogue on the code as soon as September, ahead of November's ASEAN summit."[24] On July 10, ASEAN Secretary General Surin Pitsuwan also confirmed that the first formal meeting between ASEAN and Chinese senior officials on the COC would take place in Phnom Penh in September.[25]

China's commitment to meet in September to discuss the COC may be in doubt. According to Japanese sources, "on July 11, China's attitude suddenly shifted and it refused to begin talks."[26] Ian Storey argues that Vice Foreign Minister Fu Ying's agreement with ASEAN to begin talks on a COC in September "was overruled by Foreign Minister Yang… At present there is no timetable to discuss a CoC though both sides will meet in September or October to talk about implementing cooperative projects in areas outlined in the DoC."[27]

The document, 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, has not been officially released and remains an internal draft ASEAN document. At the 45th AMM Retreat Marty Natalegawa promised that "Indonesia will circulate a non paper [on] possible and additional elements of [the] COC. It is meant to be more prescriptive and operational." In other words, ASEAN members will have to meet to approve any further additions to their draft COC before meeting with Chinese senior officials.

Why Was There No Joint Communiqué?

Cambodia, as the ASEAN Chair for 2012, hosted the 45th AMM and related meetings in Phnom Penh from July 8-13.[28] In his opening address Prime Minister Hun Sen stated that "realising the ASEAN Community by 2015 is the top priority for ASEAN."[29] With respect to the ASEAN Political-Security Community, Hun Sen declared, "we should give emphasis to the implementation of the DOC [Declaration on Conduct of Parties in the South China Sea], including the eventual conclusion of *'Code of Conduct (COC) in the South China Sea'* emphasis in original]."[30]

The AMM has a busy agenda that extends well beyond South China Sea issues. In 2011, for example, the joint communiqué issued at the end of the 44th AMM listed 120 items and ran to twenty-nine pages. At the 45th AMM Cambodia's Foreign Minister, Hor Namhong, assigned responsibility for drafting the joint communiqué summarizing the AMM deliberations to a working party of four foreign ministers: Marty Natalegawa (Indonesia), Anifah Aman (Malaysia), Albert del Rosario (Philippines) and Pham Binh Minh (Vietnam).[31] Their 132-paragraph draft summarized the wide range of issues taken up by the AMM including the terms of reference for the ASEAN Institute of Peace and Reconciliation, the ASEAN Human Rights Declaration and the nomination of Mr. Le Luong Minh as the next Secretary General. The draft communiqué also summarized discussions on the South China Sea including the stand off at Scarborough Shoal between China and the Philippines and Vietnam's concerns about the award of oil exploration leases by the China National Offshore Oil Company within Vietnam's Exclusive Economic Zone (EEZ).

The wording of one paragraph in the South China Sea section of the joint communiqué became such a sticking point between Cambodia and the drafters of the joint communiqué that no communiqué was issued. This was unprecedented. Since ASEAN was founded in 1967 all forty-four previous AMMs had issued joint communiqués. Indeed, a media advisory announcing the 45th AMM, released by Cambodia on July 6, 2002, concluded, "[a] Joint Communiqué will be adopted at the end of the Meeting."[32]

Cambodia argues that the failure of the AMM to adopt a joint communiqué rests squarely with the Philippines and Vietnam and their insistence on including a reference to Scarborough Shoal and EEZs in the final text. According to Cambodia, the actions by the Philippines and Vietnam prevented a consensus from being reached and Cambodia had no recourse but to withhold the joint communiqué. The leaked record of the foreign ministers' retreat held after the AMM reveals a different story.

Discussion on the South China Sea took place in the plenary session under the agenda item "preparation for the upcoming ministerial meetings." All ten foreign ministers spoke in turn with Cambodia speaking last. The Philippines opened the discussion. Foreign Secretary del Rosario stated that ASEAN should adopt a rules-based approach in resolving maritime disputes and territorial claims and adhere to international law to ensure maritime safety and maritime cooperation mechanisms. He noted that under the DOC the signatories were committed to promote a peaceful, friendly and harmonious environment in the South China Sea. He argued that recent events involved repeated intrusions into Scarborough Shoal, violating the principles of the DOC and universally recognized principles of international law, including the United Nations Convention on Law of the Sea (UNCLOS).

China's territorial waters claims in the South China Sea

Del Rosario then provided examples of Chinese "expansion and aggression" since the 1990s, including its occupation of Mischief Reef, and numerous intrusions in the Philippines' EEZ all before the confrontation at Scarborough Shoal. China's expansion was premised on ownership of the whole of the South China Sea, he argued. China employed overwhelming force thus preventing "the Philippines from enforcing its laws and forcing the Philippines to retreat from its own EEZ."

Del Rosario stated that the Philippines responded to Chinese actions by exercising patience and restraint under the terms of the DOC. The Philippines entered into negotiations to peacefully resolve the situation at Scarborough Shoal. But China acted in bad faith when it failed to honour its commitment to withdraw its vessels.[33] Del Rosario argued that China's actions challenged ASEAN centrality, leadership and solidarity. The Philippines, as the aggrieved party and one of the founding members of ASEAN, failed to understand the lack of concern by some other members and their "seeming silence" on their commitment to the principles of the DOC, he concluded. Del Rosario then asked rhetorically, "what would be the real value of the COC if we could not uphold the DOC; in Scarborough Shoal the DOC is violated?" He stated that it was "important that ASEAN [make a]

collective commitment to uphold the DOC [and this] be reflected in the joint communiqué of the AMM."

Del Rosario then quoted the remarks by Prime Minister Hun Sen at the opening of the AMM: "ASEAN should further demonstrate its ability and role as a driving force for the promotion of dialogue and cooperation on the political and security issues for the cause of peace, stability and prosperity in the region." Del Rosario asserted, "[t]o operationalize this principle [it is] necessary for the joint communiqué to acknowledge the problem rather than ignore [it]. We strongly recommend the [inclusion] of Scarborough Shoal, EEZ and continental shelf in the joint communiqué draft. [There must be] concerted action to address the threat to peace and stability in he region."

Del Rosario thanked ASEAN member states that supported the ASEAN Foreign Ministers' Statement on the Situation in Scarborough Shoal,[34] and in particular he expressed great appreciation for the ASEAN founding fathers. With the creation of the ASEAN Community in 2015, ASEAN members would be "more conscious of our role to ensure peace and security." Finally, Del Rosario concluded his remarks by quoting from the German anti-Nazi theologian, Martin Neimöller:

> First they came for the communists, and I didn't speak out because I wasn't a communist.
>
> Then they came for the trade unionists, and I didn't speak out because I wasn't a trade unionist.
>
> Then they came for the Jews, ?and I didn't speak out because I wasn't a Jew.
>
> Then they came for me, and there was no one left to speak out for me.

The Thai Foreign Minister Surapong Tovichakchaikul spoke next. He observed that the South China Sea had attracted a lot of attention. Surapong stated that after discussions with Chinese officials he concluded that they did not want this issue to affect the excellent relations between ASEAN and China. "What is important is for all parties concerned to scale down, calm things down," he said.

Surapong asserted that, "the issue of territorial claims will have to be resolved between the claimant states through negotiation. But we have to recognize the broader implications. Apart from that, there is room for greater dialogue between both sides. Rather than being seen as source of conflict, the South China Sea should be seen [as an opportunity] for cooperation. [ASEAN and China] should build trust and [a] win-win situation." Surapong noted that as the ASEAN Dialogue Coordinator for China (2012-15), "Thailand will try its best towards this end. We will push ahead with concrete implementation of the DOC, while ensuring the COC drafting process that is inclusive and comfortable for all sides. We must get it right from the start."

Surapong concluded, "Last and most important: ASEAN unity; the whole world is watching ASEAN with high expectations; major powers want to be part of this fast growing region; we must ensure that this competition is a healthy one." ASEAN should have a "positive influence on regional and international issues; ASEAN need[s] to speak more with one voice. Our collective voice does matter internationally. Bali Concord II: [ASEAN] unity would enhance credibility and [its] centrality in [the] regional architecture."

Pham Binh Minh, Vietnam's Foreign Minister spoke next. He began by noting, "[o]ver recent months the situation has [been] aggravated due to [a] series of Chin[ese] moves to impose their 9 dash claim. Apart from Scarborough Shoal, China announced the establishment of Sansha City [Hainan, to administer an area] which covers almost all the South China Sea… [The China National] Offshore [Oil] Company invited bidding for nine oil and gas blocks [lying] within Vietnam's EEZ and continental shelf with several points only sixteen miles off Vietnam's coast. [These are] serious violations of Vietnam's sovereignty and jurisdiction over its EEZ and continental shelf [under] UNCLOS. [China's actions] go against the spirit of the DOC, create a serious concern for the maintenance of peace and stability, bring[ing] about long term consequences and implications."

Binh noted, "we have discussed the South China Sea many times [and] agree that territorial disputes should be solved by the parties [directly] involved. But this issue has a much broader implication for maritime security, peace, stability and security in the region. [It is] important for ASEAN to show [a] central role in regional peace and security [and] promote dialogue and cooperation. [ASEAN should] speak with one voice, maintain unity… with agreed common points."

Foreign Minister Binh also quoted approvingly from Prime Minister Hun Sen's remarks at the opening of the 45th AMM on ASEAN's role as the "driving force for the promotion of dialogue and cooperation" in the region and Hun Sen's emphasis on the implementation of the DOC, including the eventual conclusion of a Code of Conduct. Binh then argued "that the joint communiqué should reaffirm further the importance of universally recognized principle[s] of international law, including respect of territorial integrity, sovereignty and sovereign rights and jurisdiction of coastal states in [their] EEZ and continental shelf as stipulated in UNCLOS." Binh noted that the incidents that took place earlier in the year occurred within the EEZs of ASEAN member states. Binh added that "all disputes should be settled through peaceful means through dialogue in accordance with international law, [including] UNCLOS and [the] DOC."

Binh concluded by noting that the ASEAN Senior Officials' Meeting had completed the ASEAN paper on key elements of the COC. He reiterated the COC was an "important legal document [that] contributed to peace, maritime security and safety in the South China Sea; ensuring that disputes will be settled by peaceful means. Based on [the] ASEAN paper, ASEAN should decide to initiate consultations with China on the COC through existing mechanisms, namely the ASEAN-China SOM on the DOC as it is quite appropriate." Binh ended his remarks by re-emphasizing "that during consultations ASEAN should maintain close coordination, unity and speak with one voice, based on the agreed paper."

Indonesia's Foreign Minister spoke next and observed that developments in the South China Sea had been discussed in the past, would likely be discussed in the future, and were unlikely to go away. Marty stated that, "we must have [an] ASEAN outlook… on the matter. It is self-evident whenever ASEAN speaks with one voice we are able to maintain our centrality [and] ensure that we deliver results." He gave as an example ASEAN's contribution to developing the Guidelines to Implement the DOC and the work of the ASEAN SOM in identifying the key elements of the COC. Marty further noted that while the diplomatic process of implementing the DOC was underway, "the situation on the ground at sea is showing signs of concern for all of us. We have been following what has been transpiring. All those developments reinforce the need to get the COC concluded as soon as possible." If there is no progress on the COC "the situation [will] become more destabilizing. [This is] not in our common interest."

Marty further noted that ASEAN's proposed key elements on the COC were "well crafted and well thought through." He asked rhetorically to what extent would the COC guide ASEAN when it faced the situation with China over Scarborough Shoal? Marty concluded: "We want to be sure that the COC is operational in nature, and not simply repeat statements and principles that are available in the DOC. [The] COC must be prescriptive, [provide] rule[s] to avoid incidents in the South China Sea, and provide [the] means whereby the conduct of countries can be better regulated…"

Malaysia's Foreign Minister Anifah Aman spoke on two issues, the DOC and the COC. With respect to the former he noted, "ASEAN and China should continue close consultation and coordination through existing mechanisms [to] fully implement [the] DOC." He proposed that ASEAN "should consider fully utilizing the ASEAN-China Maritime Cooperation Fund[35] [and] look[ed] forward to seeing the details of the fund from China."

With respect to the COC, Anifah Aman noted that ASEAN had concluded a draft of the key elements of the COC. He thanked Cambodia for convening informal consultations with China on this draft. This would contribute to "build[ing] mutual trust and confidence towards peace and stability. As we embark on [the] intergovernmental process on [the] COC [ASEAN and China] should first discuss the [key] elements before discussing the text of the COC [because it was] more practical to do so before the actual drafting begins."

Anifah Aman then turned to a proposal by China, presented to the ASEAN Summit earlier in the year by Cambodia as ASEAN Chair, to establish an Eminent Persons and Expert Working Group. "We should not prevent [the ASEAN-China] SOM from seeking inputs from experts as the need arise[s] on certain technical and legal matters."[36] Malaysia's Foreign Minister then argued that ASEAN should reiterate its position that the "COC aim[s] to create [a] rules based framework; it should not serve as an instrument to resolve territorial disputes. Existing disputes should be resolved between [the] parties concerned based on existing mechanism[s], including UNCLOS."

Next Anifah Aman focused on the proposed paragraph on the South China Sea in the draft joint communiqué. He agreed with Indonesia: "We must talk with a single voice; ASEAN must show [its] united voice; [otherwise] our credibility will be undermined. We must refer to the situation in the South China Sea, particularly any acts that contravene the international law on EEZ and continental shelves. It is totally unacceptable that we can't have it in the joint communiqué."

Brunei's Foreign Minister, Prince Mohamed Bolkiah, spoke briefly. He noted with approval ASEAN's engagement with China on the COS. He then indicated that the proposed key elements in the ASEAN draft COC were acceptable. As for the joint communiqué, Brunei would be "guided by your [ASEAN Chair] decision, [Brunei] can support the statement." It was important for ASEAN and China to have "mutual trust and confidence."

Thongloun Sisoulith, the Laotian Foreign Minister followed Brunei. He noted that there was no doubt the South China Sea was an important issue. "All efforts," he argued, "should be made in order to maintain and promote peace and stability in this part of the world." He was pleased that "ASEAN and China have been engaging in dialogue to contribute to further confidence building and mutual trust. The 5th ASEAN-China SOM on [the] DOC agreed on various activities to implement the DOC including the convening of the joint workshop.[37] Laos fully supports these activities."

The Lao Foreign Minister noted that working toward the eventual adoption of the COC was part of the implementation of the DOC. Thongloun said he was pleased to take note of the proposed key elements in ASEAN's draft COC and these should be for internal ASEAN reference. The Lao Foreign Minister fully concurred "with the proposal that it is time to start the consultation with China on the COC and the upcoming Post-Ministerial Conference should task the ASEAN-China SOM to start talks. The convening of [the] informal ASEAN-China SOM on [the] COC demonstrated the readiness of ASEAN and China to work towards the eventual adoption of the COC." He concluded by noting that "[t]he implementation of the DOC has gained good impetus [and] we should maintain and further strengthen it and therefore contribute to making the South China Sea the sea of peace, cooperation and partnership and prosperity."

Myanmar's Foreign Minister Wunna Maung Lwin spoke briefly on the South China Sea. He reiterated his country's desire that territorial disputes be settled peacefully through dialogue and engagement. He noted the importance of the DOC and its aim to build confidence among the parties and to settle disputes by peaceful means. Myanmar fully supported the Guidelines to Implement the DOC and welcomed the proposal by ASEAN and China to undertake cooperative projects in the South China Sea.

Maung Lwin concluded that Myanmar would "[c]ontinue to support the full and effective implementation of the COC, and support all efforts that ensure [the] peaceful resolution of disputes." He also noted ASEAN's formal engagement with China on the COC and wished "to emphasize that we [ASEAN] have gained positive achievements with China and should keep the momentum of the achievements."

Foreign Minister K. Shanmugam opened his remarks by noting that Singapore was not a claimant state and that "specific claims have to be resolved among [the] parties concerned." Singapore, however, had an interest in seeing that the South China Sea "must be shared by all states, claimant and non claimant," and it was in the common interest to the maintain peace and stability in the region.

Shanmugam asserted that "freedom of navigation [is] very important to all of us. Freedom of navigation can not be respected if the rule of law is not observed." He noted that "recent developments were of special concern" because they "invoke novel interpretations of international law that could undermine the entire UNCLOS regime" and create uncertainty over the future of UNCLOS.

Shanmugam said that Singapore welcomed "the internal agreement of ASEAN on possible elements of [the] COC" and suggested empowering the SOM to begin discussions with China. These discussions should proceed in parallel with the implementation of the DOC. He also noted that negotiations on the COC would not be easy, but it was important that ASEAN begin a dialogue with China. Shanmugam concluded by asserting, "it is important that ASEAN has a clear expression of our concerns on the South China Sea in the joint communiqué," and he shared the points made by previous speakers. It would be "damaging to us if we don't say anything. If ASEAN is not united, our negotiations with China will be more difficult and protracted."

Cambodia's Foreign Minister Hor Namhong rounded off the discussion on the South China Sea by bluntly declaring, "[t]here is no consensus, [we should] bracket the entire paragraphs 14-17 for our decision. The most difficult is paragraph 16. It is a complex problem."[38]

According to the Summary of the Cambodia Chair's intervention at the AMM Retreat, Hor Namhong made the following points:

> *On Scarborough Shoal*, we all know it is situated in the South China Sea, and we are talking here about the South China Sea. So why should we specify the Scarborough Shoal precisely in the South China Sea. Up to now, we all know the disputes among the concerned parties [are] in Spratlys and Paracels, but we never mention these name[s] in our talks with China. We always mention only the South China Sea.
>
> *On the inclusion of the wording on EEZ and continental shelf*, we believe that every one is perfectly aware that the 1982 UNCLOS have precisely defined the EEZ and continental shelf, and other issues related to the sea. Why should we repeat again?

> In case we [do] not find a way out, Cambodia as Chair has no more recourse to deal with this issue. So the problem we are facing now is either we have compromise text, [that will] not satisf[y] everyone. If we cannot agree on [the] text, there should be no text at all. For the Joint Communiqué, countries should not try to impose [their] national position, but the common view in spirit of compromise.
>
> ASEAN-China met twice recently to discuss informally the drafting of COC. Cambodia [is] to host formal SOM on COC in near future. All the meetings are steps forward to de-escalate tension… in the South China Sea. We should not take position that may lead in creating or escalating tension in the SCS. What I propose now is in line with what my Prime Minister has proposed, that we have to work for peace, security and stability in the region.

The remarks by Cambodia as ASEAN Chair provoked an interchange with the foreign ministers of Indonesia, Malaysia, Vietnam, and the Philippines. Marty Natalegawa took the floor first and suggested it would be better if the foreign ministers could address paragraph 16 now so they could conclude the AMM Retreat. Malaysia immediately endorsed Indonesia's proposal. Hor Namhong responded by stating that Cambodia was not "talking against anybody or for anybody. We want to move forward the COC to de-escalate the tension. If we put strong wording in the joint communiqué it is not preferable for the solution."

Marty Natalegawa (left) and Hor Namhong

Malaysia's Anifah Aman noted that the 2011 AMM joint communiqué did not reflect the decisions reached at that time. Malaysia was concerned over "how to settle our disputes [and] respect freedom of navigation." With respect to freedom of navigation Anifah Aman argued that the joint communiqué "does not specifically mention the settlement of disputes through international law and UNCLOS. I am concerned that we have left out the most important concern: all disputes must be settled in international law. We have to be mindful of the disputes. UNCLOS and international law should be the mechanism."

Hor Namhong interjected, "now or [in] the near future we can't expect to resolve the disputes. Not ASEAN." Anifah Aman responded: "[the] DOC and COC are the main frameworks. [They are] rules-based frameworks, [they] are not meant to settle the disputes, the mechanisms are based on UNCLOS. We are not happy…"

Vietnam's Pham Binh Minh broke in to raise a question of procedure. "We should discuss this issue right now. Every year the joint communiqué has a paragraph on the South China Sea, [some are] stronger and [other are] milder… There is no question that the joint communiqué does not have that one. Around the table here we have the discussion and [the] ministers already indicated that the joint communiqué must have a paragraph on the South China Sea. Every year we have to update the situation, the development over the South China Sea. This year what happened to the South China Sea? Those incidents occurred not only in the South China Sea but deeper in the EEZs, [these were] new developments. That is why in the draft we have to update the new developments in there. We put here [words] calling [for] the respect of EEZs and continental shelves, these [are] new developments in the South China Sea."

Hor Namhong responded. "We can never achieve [consensus] even though we stay here for the next four or five hours…" Indonesia's Foreign Minister broke in to ask "how detailed are we [going to be in our] references to Scarborough Shoal and EEZs and continental shelves?" Apparently referring to paragraph 16 in the draft joint communiqué Marty read out:

> In this context, we discussed in-depth recent developments in the South China Sea, including the situation in the affected Shoal / disputed area, exclusive economic zones and continental shelves of coastal states, particularly those contrary to the provisions of the 1982 UNCLOS. In this connection, we call upon all parties to respect the universally recognized principles of international law including the 1982 UNCLOS. Further [we call] upon all the parties to resolve the disputes in accordance with universally recognized principles of international law.

Hor Namhong replied, "Up to now there have been disputes in the Paracels and Spratlys but we have never mentioned the names of these. But now why do we include these in the joint communiqué? Second if we need again paragraph 16…"

Del Rosario interjected, "There is no clarity that the disputes must be settled peacefully and in accordance with international law, especially UNCLOS. You refer to freedom of navigation and over flight, it [the joint communiqué] does not mention disputes. Right now there are two gross violations of the DOC. They are in [Scarborough] Shoal and in the oil service contract of the EEZ and continental shelf. These are very clear distinct violations of the DOC. If we are going to be protecting peace and stability and freedom of navigation in the South China Sea we should deal with the problem as it present[s] itself at this point in time. We are also ignoring the fact that there are gross violations of the DOC in the EEZs in the Philippines and Vietnam. It is a challenge to ASEAN's leadership, centrality and solidarity. Why are we ignoring these gross violations instead of identifying them so that we can deal with them?"

Hor Namhong responded: "We are not a tribunal, [we should] not escalate tension but diffuse tension. When we refer to shoal where is the shoal? Are the Spratlys or Paracels shoals? When you say violation of Scarborough Shoal, we have to know to whom it belongs. We are not a tribunal. Maybe it belongs to the Philippines, I don't know. I still don't understand, when we said disputed areas that covers all the areas [that are] disputed. Why should we add the shoal and EEZ and continental shelf? Before we go to [the] concluding session, I propose we delete the South China Sea in the joint communiqué, and [proceed] without paragraph 16. I have no other recourse. Or claimant states will deal directly with China."[39]

Indonesia's Marty then asked the Chair to "read again the formulation." Hor Namhong responded, "[where] we refer to [the] shoal?" He then asked if the joint communiqué should include actions contrary to UNCLOS. "UNCLOS already defines the EEZs and continental shelves, should we repeat it again?" he asked.

Del Rosario took up the discussion. "With due respect," he stated, "the first sentence [reads:] 'in this context we discussed in depth the developments [in the South China Sea], including the situation in the Scarborough Shoal and expressed serious concern over such developments in the area, particularly those provisions in the UNCLOS related to Exclusive Economic Zones and continental shelves.' Nowhere in that sentence is ASEAN [taking a] position as to who owns the shoal. We are just calling attention that they are violating the DOC. We are not looking at the resolution of territorial claims here. There is no reference [to] who is owning what."

Malaysia's Anifah Aman declared, "It [violations] is happening. Nowhere did we mention that it [Scarborough Shoal] belongs [to one country or another]. Instead of 'affected shoal' we [should] put it as 'disputed area'." Del Rosario retorted, "There are many disputed areas in the South China Sea but not in the Scarborough Shoal. All we are saying [is] discussion in conflict areas." Anifah Aman replied, "We are trying to find… I don't think we can progress forward if we specifically mention an area… It reflects the united stand of ASEAN to encompass all disputed areas." Marty Natalegawa responded, "We [Indonesia] are not one of those claimant states. We suggested earlier to use the word 'affected shoal.' [We are] trying to be sensitive; affected shoal [is] without prejudice to national claims. Be we can agree to [use the term] disputed area. We don't think that this issue is impossible to resolve. We have discussed in depth the situation [in the South China Sea].

Hor Namhong stated, "I can support the disputed areas, disputed areas covers everything." Vietnam's Pham Binh Minh then interjected, "Disputed area, the EEZ is not a disputed area, certainly not. Some countries [try] to turn an undisputed are into a disputed area. That's for sure [an EEZ is not a disputed area] in accordance with international law." Minh then proposed a break for small group discussion. The notes on the discussions at the AMM Retreat end at this point.

Media and other reporting reveal that discussions on the wording of the South China Sea paragraphs continued until the morning of July 13 without breaking the impasse.[40] Ernest Bower, who spoke to diplomats in Phnom Penh, wrote that after the four-member ministerial committee came up with a draft communiqué, "[r]epeatedly, however, after taking the draft under consideration, Hor Namhong consulted with advisers outside of the meeting room and came back rejecting language referring to Scarborough Shoal and the EEZs, even after multiple attempts to find compromise. He said Cambodia's view was that those were bilateral issues and therefore could not be mentioned in the joint statement."[41] By one account, the original AMM joint communiqué went through a total of eighteen drafts.[42]

Over the four days following the AMM Retreat, the Indonesian and Singaporean foreign ministers made a last-ditch effort to broker a compromise. They persuaded Vietnam and the Philippines to agree to a compromise on the wording. But repeated attempts to persuade Cambodia's Hor Namhong failed. At their last meeting Foreign Minister Hor Namhong "picked up his papers, and stormed out of the room" arguing it was a matter of principle for ASEAN not to take sides in bilateral disputes.[43] Finally, according to an account by a Philippine official who attended the meetings in Phnom Penh: "[t]he text of the proposed Joint Communiqué's item/subhead on the "South China Sea" was drafted by the ASEAN foreign ministers and several revisions were made to make the text acceptable to all. However, the Cambodian Chair consistently rejected any proposed text that mentions Scarborough Shoal.[44]

Blame Game

The failure of ASEAN foreign ministers to issue a joint communiqué at the conclusion of the 45th AMM led to immediate public recriminations. On the morning of the last day, immediately after a special meeting failed to reach an eleventh hour compromise, the Philippines issued a statement taking "strong exception" to the decision by the ASEAN Chair not to issue a joint communiqué. Foreign Minister Hor Namhong hit back accusing the Philippines of attempting to "hijack" the AMM and declaring that the "joint communiqué has become hostage to a bilateral issue."[45] The Philippine Undersecretary for Foreign Affairs, Erlinda Basilio, penned a personal account entitled, "Why There Was No ASEAN Joint Communiqué" that provoked a Cambodian diplomatic response (see below).[46]

Unnamed diplomatic sources leaked information to the press suggesting collusion between China and Cambodia. One senior diplomat was quoted as stating, "China bought the chair, simple as that" and pointed to comments by Foreign Minister Yang thanking Prime Minister Hun Sen for supporting China's "core interests."[47] A veteran journalist reported that when the first draft of the joint communiqué was submitted to the ASEAN Chair "the Cambodians, in a breach of ASEAN protocol, showed it to the Chinese, who said it was unacceptable unless the South China Sea reference was removed. So the Cambodians sent it back for amendment."[48]

ASEAN's failure to issue a joint communiqué attracted widespread media coverage and critical commentary by academics and other observers. On July 26-27 Cambodia hit back with a barrage of three letters to the editors.[49] The first was written by Kou Kuong, spokesperson for Cambodia's Ministry of Foreign Affairs and International Cooperation. This letter was addressed to the Editor-in-Chief of *The Cambodia Daily* in response to a story that quoted critical comments on Cambodia's role as ASEAN Chair by the International Crisis Group. Kou Kuong argued that "two countries…tried to sabotage and hijack our meetings" and held the 45th ASEAN Foreign Ministers' Joint Communiqué "hostage to its [sic] national interests."[50]

The second letter was written by the Cambodian Ambassador to Thailand in response to an opinion piece by Thitinan Pongsudhirak, a well-known academic, published in the *Bangkok Post*. Ambassador You Ay first corrected a common media misperception that the Peace Palace, where the 45th AMM was held, was funded by China.[51] She then targeted her remarks on comments that were critical of Cambodia's relations with China. Ambassador You pointed out that "China provided assistance only for the construction of the adjacent building and not the Peace Palace. Next, the Ambassador rejected Thitinan's assertion that China was an "open patron state" of Cambodia as a result of providing U.S. $10 billion in aid and investment. Finally, the Ambassador dismissed (but did not directly deny) as "extremely disparaging and slanderous" Thitinan's claim that Cambodia "shared the draft version of the joint statement with the Chinese, who then vetoed it."[52]

The third letter was written by Cambodia's Ambassador to the Philippines to the editor-in-chief of *The Philippines Star*.[53] Ambassador Hos' letter took direct issue with Undersecretary Basilio's article mentioned above. Ambassador Hos reiterated Cambodia's argument that the failure to achieve consensus at the 45th AMM was due to the "inflexible and non-negotiable position" of "two countries" [the Philippines and Vietnam]. Cambodia's Ambassador further argued that the "two countries wanted to sabotage and hijack the JC [joint communiqué]" in retaliation for Cambodia's refusal to issue an ASEAN Statement on the Situation in the South China Sea."[54] The Ambassador's parting shot - accusing "the two countries" of "dirty politics" - resulted in two summons by the Philippine Department of Foreign Affairs. The Ambassador failed to appear for either reportedly on the ground of ill health.[55] Shortly after it was announced that Ambassador Hos was being recalled.[56]

Analysts are divided on the details of and extent to which China influenced Cambodia's decision to block the AMM joint communiqué, but few analysts argue that Cambodia's acted independently. Kishore Mahbubani, a former senior Singaporean diplomat, wrote "the whole world, including most ASEAN countries, perceived Cambodia's stance as the result of enormous Chinese pressure."[57] Amitav Acharya wrote, "[t]here is little question that Hun Sen's refusal to accommodate Philippines and Vietnam resulted at least partly from Chinese pressure. According to a highly placed source, the Chinese specifically reminded the Cambodians that [Norodom] Sihanouk… had accepted the Chinese claims to the South China Sea."[58] A Chinese scholar close to the Ministry of State Security revealed, "[w]e co-ordinated very well with Cambodia in that case [blocking objectionable wording in the 45th AMM joint communiqué] and… prevented an incident which would have been detrimental to China."[59]

Shuttle Diplomacy

In the midst of the above recriminations, Indonesia's Foreign Minister initiated consultations with the nine other members of ASEAN in an effort to restore unity in ASEAN ranks and commit ASEAN to a common position.[60] Foreign Minister Marty conducted an intense round of shuttle diplomacy flying to five capitals (Manila, Hanoi, Bangkok, Phnom Penh and Singapore) over a two-day period (July 18-19). Marty and del Rosario agreed to a six-point proposal that Marty put to his other ASEAN counterparts. When he obtained their agreement Marty left it to Cambodia's Hor Namhong, as ASEAN Chair, to complete the diplomatic formalities.

On July 20, Hor Namhong, acting in his capacity as ASEAN Chair, officially released ASEAN's Six Principles on the South China Sea.[61] Under the terms of this statement all ASEAN Foreign Ministers reaffirmed their commitment to: the full implementation of the DOC; Guidelines for the Implementation of the DOC; the early conclusion of a Regional COC in the South China Sea; full respect of the universally recognized principles of international law including the 1982 UNCLOS; continued exercise of self-restraint and non-use of force by all parties; and peaceful resolution of disputes in accordance with the universally recognized principles of international law including the 1982 UNCLOS. The ASEAN statement concluded: "The ASEAN Foreign Ministers resolve to intensify ASEAN consultations in the advancement of the above principles, consistent with the Treaty of Amity and Cooperation in Southeast Asia (1976) and the ASEAN Charter (2008)."

A Chinese Foreign Ministry spokesperson, Qin Gang, responded to these developments by introducing a pre-condition linking compliance with the DOC and discussions on the COC. Qin Gang stated:

> What concerns people now is that some individual countries, showing no respect for or compliance with the DOC, have time and again resorted to provocative means, which undermined the basic principles and spirit of the DOC and created difficulties for discussing a code of conduct (COC) in the South China Sea. Therefore, while being open to discussing a COC with ASEAN countries, China believes that all parties concerned must act in strict accordance with the DOC to create the necessary conditions and atmosphere of a COC.[62]

China then dispatched its foreign minister for a fence-mending visit to Indonesia and Malaysia for talks with his counterparts. Foreign Minister Yang Jiechi stated at a joint press conference that China was willing to work with ASEAN to implement the DOC and "on the basis of consensus" to work toward the eventual adoption of the COC.[63] Foreign Minister Yang held discussions with Malaysian Foreign Minister Anifah Aman in Kuala Lumpur. There was no joint press conference. Anifah Aman stated he was "confident we can resolve this matter [disputes in the South China Sea]… through peaceful means." He then observed, [t]here are overlapping claims by member countries. Let us discuss these among ASEAN countries first before we talk to China. We can only achieve this objective in the South China Sea if all parties agree. Then China can appreciate this and realise it is ASEAN's wish."[64] This statement seemed to imply that ASEAN-China discussions on the COC, if and when they take place, would be a protracted process.

Conclusion

ASEAN's objective of creating an ASEAN Political-Security Community by 2015 is predicated on the assumption that ASEAN members share a common identity and a common responsibility for contributing to "peace, stability and security" in Southeast Asia. The *ASEAN Political-Security Community Blueprint* states that one of its goals is to "[e]nsure full implementation of the DOC for peace and stability in the South China Sea." In order to achieve this objective the *Blueprint* calls for a continuation of "ASEAN's current practice of close consultation among Member States to achieve full implementation of the DOC… and [w]ork towards the adoption of a regional Code of Conduct in the South China Sea."[65] The *ASEAN Charter* calls for "[e]nhanced consultations on matters seriously affecting the common interest of ASEAN."[66] ASEAN's failure to issue a joint communiqué after its 45th AMM poses procedural questions about the fate of 128 paragraphs in the draft that recorded decisions on a range of issues other than the South China Sea, including ASEAN community-building and the appointment of a new Secretary General. It also raises questions about the status of ASEAN's agreement on key principles in its draft COC.[67]

The analysis presented in part one clearly shows that the Philippines has made major concessions in its discussions with fellow ASEAN members in order to reach consensus on the key principles in the COC. The Philippines has been diplomatically circumspect about this. There were no public recriminations when the Philippines proposals for a ZOPFF/C and a joint development area were stripped from its draft COC. As a result, ASEAN was able to reach agreement on the key principles of its COC and approach China informally to discuss the way ahead. ASEAN still has to fine-tune its draft by considering inputs from Indonesia in the form of a "non-paper."

Part two provided a detailed insight into internal ASEAN dynamics as its foreign ministers discussed and debated the South China Sea question and how to word its members' concerns in a joint communiqué. The analysis clearly demonstrates that the Philippines, as a founding member of ASEAN, expected support on an issue that touched not only on its national sovereignty but regional security as well. The analysis also demonstrates that there was a "majority consensus" to include reference to disputes concerning Scarborough Shoal and oil leasing in Vietnam's Exclusive Economic Zone.

The record indicates that the failure to achieve consensus was the result of Cambodia's handling of its role as ASEAN Chair. Foreign Minister Hor Namhong was not conciliatory at the AMM Retreat and his subsequent actions in rejecting repeated attempts at compromise appear obstinate. At the same time, it is revealing that ASEAN foreign ministers acquiesced to Cambodia's high-handedness in vetoing the draft joint communiqué drawn up by four of their colleagues. No minister directly challenged Hor Namhong's handling of the discussion/debate at the AMM Retreat.

Part three dealt with the recriminations that followed the failure of ASEAN to issue a joint communiqué. It is clear that Chinese influence played a major role in influencing Cambodia to play an obstructionist role. Cambodia's actions indicate that the idea of an ASEAN Community played second fiddle to its relations with China. In the short run the Philippines (and Vietnam) will be hyper sensitive to Cambodia's role as ASEAN Chair in any discussions with China on the South China Sea. In the longer term some ASEAN members will be concerned about China's ability to influence Laos and Myanmar who will assume the ASEAN Chair in 2014 and 2015, respectively. In this respect the events at the 45th AMM may serve as a wake up call and result in amended decision-making procedures.

Part four dealt with Indonesia's decision to engage in a round of shuttle diplomacy in order to obtain unanimous agreement on ASEAN's Six-Point Principles on the South China Sea. Foreign Minister Marty Natalegawa's diplomatic initiative provided a much-needed boost to ASEAN morale. His efforts also helped to dispel the perception outside of Southeast Asia that there was disunity among ASEAN members on how to deal with the South China Sea issue. More importantly, Indonesia's intervention served notice to Cambodia that as ASEAN's chair for 2012 it could not unilaterally control ASEAN's agenda. Natalegawa's intervention was unprecedented in assuming a leadership role that normally would fall to the ASEAN chair and signalled that Indonesia is willing to play a more proactive role in regional affairs.

Current indications are that ASEAN will pursue the implementation of the DOC and discussions on the COC with China in tandem. ASEAN will seek to obtain agreement with China on the key principles and then move on to drafting the final text. China will have to take Indonesia's new role into account and this may prove a positive factor in addressing current tensions in the South China Sea.

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Notes

[1] "Declaration on ASEAN Concord II (Bali Concord II)," October 7, 2003. .

[2] Each of these documents was provided to the author by sources that must remain confidential.

[3] Statement by the ASEAN Foreign Ministers on the Recent Developments in the South China Sea 18 March 1995. This was ASEAN's second statement on the South China Sea in response to Chinese activities. The first was ASEAN Declaration On The South China Sea, Manila, Philippines, 22 July 1992.

[4] For further background consult: Carlyle A. Thayer, "Challenges to ASEAN Cohesion: The Policy of Constructive Engagement and a Code of Conduct for the South China Sea," Paper to international workshop on Regionalism and Globalism in Southeast Asia, Department of Political Science and International Relations, University of Tampere and the Centre for Southeast Asian Studies, Åbo Akademi University, Marienhamn, Åland, Finland, June 2-4, 2000, 31-44.

[5] Association of Southeast Asian Nations, "Regional Code of Conduct in the South China Sea (Draft)," March 2000 and People's Republic of China, "Code of Conduct on the South China Sea (Draft of the Chinese Side)," March 2000.

[6] Point 10, Declaration on Conduct of Parties in the South China Sea, November 4, 2002.

[7] ASEAN-China Senior Officials Meeting on the Implementation of the Declaration on the Conduct of Parties in the South China Sea, Kuala Lumpur, 7 December 2004 and 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; see here and here.

[8] Tran Truong Thuy, "Recent Developments in the South China Sea: From Declaration to Code of Conduct," in Tran Truong Thuy, ed., *The South China Sea: Towards a Region of Peace, Security and Cooperation* (Hanoi: The Gioi Publishers, 2011), 104.

[9] Guidelines to Implement the DOC.

[10] Carlyle A. Thayer, "Sovereignty Disputes in the South China Sea: Diplomacy, Legal Regimes and *Realpolitik*," Presentation to International Conference on Topical Regional Security Issues in East Asia, co-sponsored by the Faculty of Asian and African Studies and the Ho Chi Minh Institute, St. Petersburg State University, St. Petersburg, Russian Federation, April 6-7, 2012, 7.

[11] Part IX of UNCLOS is headed Enclosed or Semi-Enclosed Seas. It contains two articles, Article 122 (definition) and Article 123 (cooperation of states bordering enclosed or semi-enclose seas).

[12] Carlyle A. Thayer, "Is the Philippines an Orphan?" *The Diplomat*, May 2, 2012.

[13] Thayer, "Is the Philippines an Orphan?"

[14] Estrella Torres, "Manila tack on China row wins Asean nod," *Business Mirror*, July 13, 2012.

[15] Michael Lipin, "Cambodia Says ASEAN Ministers Agree to 'Key Elements' of Sea Code," Voice of America, July 9 2012; Michael del Callar, "DFA chief: ASEAN agrees on key elements for Code of Conduct in West PHL Sea," GMA News, July 11, 2012; and Associated Press, "Asean to take up code of conduct with China," *Manila Standard Today*, July 10, 2012 quotes Liu Weimin, spokesperson for China's Ministry of Foreign Affairs, as stating "When conditions are ripe, China would like to discuss with Asean countries the formulation of the COC."

[16] Ian Storey argues that the inclusion of the words "comprehensive and durable" settlement of the dispute represented a partial victory for Vietnam and the Philippines and a rejection of Deng Xiaoping's proposal to "shelve sovereignty disputes and engage in joint exploration." In fact the words "comprehensive and durable" were first used in the 2002 Declaration on Conduct of Parties in the South China Sea, Point 6, which China signed. See: "Ian Storey Comments," *The Nelson Report*, July 31, 2012.

[17] A comparison of the two drafts does not support the conclusion reached by Storey that "the language was watered down." See: "Ian Storey Comments," *The Nelson Report*, July 31, 2012.

[18] "Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976."

[19] Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia, October 8, 2003.

[20] United Nations Commission on Law of the Sea, Annex VI, International Tribunal for the Law of the Sea. See also UNCLOS, Part XI,The Area, Section 5, Settlement of Dispures and Advisory Opinions, Articles 186-191 and Part XV, Settlement of Disputes, Articles 279-299.

[21] Summary of Cambodia Chair's intervention at the AMM Retreat, 9 July 2012, 1 and 25.

[22] "Divisions serve to weaken ASEAN," *The Japan Times*, July 21, 2012. A Chinese Foreign Ministry spokesperson stated that on July 8 the ASEAN-China SOM agreed to carry out the DOC "in a comprehensive and effective manner, as well as carry out cooperation projects under the DOC framework…"; "China expects co-op on South Chins Sea," *China Daily*, Juy 10, 2012.

[23] Summary of Cambodia Chair's intervention at the AMM Retreat, 9 July 2012, 25 and Channel News Asia, "Element of confidence building between ASEAN and China," July 10, 2012.

[24] Scott Stearns, "China Ready to Join South China Sea Talks," Voice of America July 12, 2012.

[25] According to Surwin, "They [the senior officials] have to decide in the next day or two whether this process is going to be formalized with certain specific schedule. Is this going to be needed in the future when we discuss whenever we come together, or are we going to have a regular schedule of meetings between both sides?" Channel New Asia, "Element of confidence building between ASEAN and China," July 10, 2012 and Agence France-Presse, "Asean reaches out to Beijing over sea code," *Gulf Times*, July 10, 2012.

[26] "Divisions serve to weaken ASEAN," *The Japan Times*, July 21, 2012.

[27] "Ian Storey Comments," *The Nelson Report*, July 31, 2012. Storey used more guarded language in earlier accounts where he wrote that Foreign Minister Yang "seems to have ruled out" the September meeting on a code of conduct until "when time was ripe." Storey's interpretation may be a misreading of China's position as it has used the expression "when conditions are ripe (or mature)" well before the 45th AMM. A Chinese spokesperson also used this expression on July 9 two days before Yang spoke. See: Lipin, "Cambodia Says ASEAN Ministers Agree to 'Key Elements' of Sea Code" and Ian Storey, "Little hope of South China Sea Code of Conduct," *South China Morning Post,* July 27, 2012; Storey, "China Pushes on the South China Sea, ASEAN Unity Collapses," *China Brief*, XII(15), August 4, 2012, 8-11; and Storey, "China bares claws in maritime dispute," *Asia Times Online*, August 8, 2012.

[28] The ASEAN-related meetings included: the ASEAN Post-Ministerial Conference with dialogue partners, the 19th ASEAN Regional Forum, ASEAN Plus 3 Foreign Ministers Meeting and the 2nd East Asia Summit Foreign Ministers Meeting.

[29] "Opening Address By Samdech Akka Moha Sena Padei Techo HUN SEN Prime Minister of the Kingdom of Cambodia At the Opening of the 45th ASEAN Foreign Ministers' Meeting," Phnom Penh, 9 July 2012.

[30] Martin Abbugao, Australian Associated Press, "ASEAN pushed on South China Sea code," *Herald Sun*, July 9, 2012 and Agence France-Presse (AFP), "Hun calls for ASEAN South China Sea code," *The Australian*, July 10, 2012.

[31] Ernest Z. Bower, "China Reveals Its Hand on ASEAN in Phnom Penh," *Southeast Asia from the Corner of 18th and K Streets*, vol. III, No. 14, July 19, 2012, 2.

[32] Cambodia, Ministry of Foreign Affairs, "The Forty-fifth ASEAN Foreign Ministers' Meeting," Media Advisory, July 6, 2012.

[33] This is an allusion to an agreement by the Philippines and China to simultaneously withdraw their vessels from Scarborough Shoal and for China to remove its barrier from the entrance to the shoal. The Philippines withdrew its vessel on June 4 but China did not reciprocate. Erlinda F. Basilio, "Why there Was No ASEAN Joint Communiqué," Republic of the Philippines, Department of Foreign Affairs, Public Information Services Unit, July 19, 2012; and Erlinda Basilio, "What happened in Phnom Penh?" *The Philippine Star*, July 19, 2012.

[34] This is a reference to consultations between the Philippines and other ASEAN members that resulted in the drafting of this statement on May 24. On the following day Secretary for Foreign Affairs del Rosario wrote to the ASEAN Chair requesting that the statement be referred to all ASEAN foreign ministers for consideration. See: Basilio, "Why there Was No ASEAN Joint Communiqué" and Basilio, "What happened in Phnom Penh?." According to Cambodia's Ambassador to the Philippines, "Cambodia, as ASEAN Chair, wrote to all ASEAN Foreign Ministers to ask for responses in writing on this issue. But, after waiting for several weeks, it was clear that ASEAN had no consensus on this matter of Scarborough Shoal. Therefore, no one could blame Cambodia for not issuing the ASEAN statement…" See: Ambassador Hos Sereythonh, Letter to Ms. Ana Marie Pamintuan, Editor-in-Chief, *The Philippines Star*, July 26, 2012.

[35] China announced a three billion yuan (US $476 million) Maritime Cooperation Fund at the 2011 East Asia Summit to finance cooperative activities under the DOC.

[36] This is a reference to China's proposal to form an Eminent Persons and Experts Working Group (EPEWG) comprised of ten members, five from China and five from ASEAN, to discuss the draft COC. China later agreed to a fifteen-member EPEG, ten from ASEAN and five from China. ASEAN reportedly insisted that the EPEWG should be formed only after negotiations on the COC had commenced. See: Don Emmerson, "ASEAN Stumbles in Phnom Penh," *Asia Times Online*, July 17, 2012 Extracts were published in Emmerson, "ASEAN Stumbles in Phnom Penh," PacNet #45, July 19, 2012 and "ASEAN Stumbles in Phnom Penh," *East Asia Forum*, July 23, 2012.

[37] The 5th ASEAN-China Senior Officials' Meeting on the DOC and the 7th ASEAN-China Joint Working Group on the Implementation of the DOC met in Beijing from January 13-16, 2012.

[38] Cambodia's Ambassador to the Philippines claimed that "eight out of ten ASEAN Member States agreed to all 132 points in the Joint Communique of he AMM, including the three paragraphs (14, 15, 17) related to the South China Sea, except paragraph 6 which is the bilateral disputes between the Philippines and China and Vietnam and China…" See: Ambassador Hos Sereythonh, Letter to Ms. Ana Marie Pamintuan, Editor-in-Chief, *The Philippines Star*, July 26, 2012.

[39] Summary of Cambodia Chair's intervention at the AMM Retreat, 9 July 2012, 1. The second part of this document records Hor Namhong as stating, "If you cannot agree on the text of the joint communique we have no more recourse to deal with this issue as the Chair of ASEAN," 28.

[40] Zsombor Peter and Kuch Naren, "Cambodia Criticized for Asean Meeting Failure," *The Cambodian Daily,* July 14-15, 2012.

[41] Bower, "China Reveals Its Hand on ASEAN in Phnom Penh."

[42] Greg Torode, "ASEAN Left on a Knife Edge," *South China Morning Post*, July 21, 2012.

[43] Jane Perlez, "Asian Leaders at Regional Meeting Fail to Resolve Disputes Over South China Sea," *The New York Times*, July 12, 2012.

[44] Basilio, "Why there Was No ASEAN Joint Communiqué" and Basilio, "What happened in Phnom Penh?"

[45] Zsombor Peter and Kuch Naren, "Cambodia Criticized for Asean Meeting Failure," and Prak Chan Thul and Stuart Grudgings, "SE Asia meeting in disarray over sea dispute with China," Reuters, July 13, 2012.

[46] Basilio, "What happened in Phnom Penh?"

[47] Jane Perlez, "Asian Leaders at Regional Meeting Fail to Resolve Disputes Over South China Sea," *The New York Times*, July 12, 2012.

[48] Roger Mitton, "ASEAN Struggles for unity," *The Phnom Penh Post*, July 23, 2012.

[49] David Boyle, "Goverment fires back on South China Sea," *The Phnom Penh Post*, July 31, 2012.

[50] Koy Kuong, Letter to Mr. Kevin Doyle, Editor-in-Chief, *The Cambodian Daily*, July 26, 2012.

[51] For example, Perlez, "Asian Leaders at Regional Meeting Fail to Resolve Disputes Over South China Sea," wrote "the Peace Palace… was built for the occasion by the Chinese government."

[52] Ambassador You Ay, Letter to Mr. Pichai Chuensuksawadi, Edior in Chief of the *Bangkok Post*, July 27, 2012.

[53] Ambassador Hos Sereythonh, Letter to Ms. Ana Marie Pamintuan, Editor-in-Chief, *The Philippines Star*, July 26, 2012.

[54] See note 24 above.

[55] Michael del Callar, "DFA demands explanation from Cambodian envoy for caustic remarks," GMA News, July 31, 2012; and "Cambodia envoy still a no-show," ABS-CBN News, August 2, 2012.

[56] Carlyle A. Thayer, "Cambodia-Philippine Diplomatic Tiff Continues," *Thayer Consultancy Background Brief*, August 7, 2012.

[57] Kishore Mahbubani, "Is China Losing the Diplomatic Plot?" Project Syndicate, July 26, 2012.

[58] Amitav Acharya, "The end of ASEAN centrality?," *Asia Times Online*, August 8, 2012.

[59] Chen Xiangyang, China Institutes of Contemporary International Relations, quoted by Kathirn Halle, "Bejing considers stronger foreign ties," *The Financial Times*, August 15, 2012.

[60] Carlyle A. Thayer, "ASEAN Unity Restored by Shuttle Diplomacy?" *Thayer Consultancy Background Brief*, July 24, 2012.

[61] Statement of ASEAN Foreign Ministers on ASEAN's Six-Point Principles on the South China Sea, July 20, 2012. Cambodia's Foreign Minister could not resist using this occasion to lay the blame for ASEAN's failure to issue a joint communiqué on Vietnam and the Philippines.

[62] Statement by Spokesperson Qin Gang of the Ministry of Foreign Affairs of China on the US State Department issuing a So-called Press Statement on the South China Sea, August 4, 2012. I am grateful to Greg Torode of the *South China Morning Post* for pointing out the significance of this statement.

[63] Tarra Quismundo, "China says it's willing to ease Asean rift on sea," *Philippines Daily Inquirer*, August 11, 2012.

[64] Agence France-Presse, "Malaysia urges ASEAN to unite over South China Sea," August 12, 2012.

[65] *ASEAN Political-Security Community Blueprint* (Jakarta: ASEAN Secretariat, June 2009), 7.

[66] Charter of the Association of Southeast Asian Nations, Novemer 20, 2007, 5.

[67] Emmerson, "ASEAN Stumbles in Phnom Penh."