



Counterpoint Southeast Asia

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Should ASEAN walk away from the South China Sea Code of Conduct process?

By Evan A. Laksmana

The South China Sea disputes remains one of the enduring flashpoints between China and Southeast Asia. On November 2002, China and all 10 ASEAN members states agreed to the **Declaration on the Conduct of Parties in the South China Sea** (DoC) as the first region-wide step to manage the long-standing maritime tensions. While only Brunei, Vietnam, Malaysia, and the Philippines are claimant states in the disputed waters around the Spratly and Paracel Islands against China, all of ASEAN were committed to peacefully managing the disputes.

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Counterpoint Southeast Asia is published regularly by the Centre on Asia and Globalisation at the National University of Singapore's Lee Kuan Yew School of Public Policy. It seeks to answer major questions of strategic significance for Southeast Asia by bringing in diverse voices from around the region. Each issue will tackle one question from three different perspectives.

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In general, the DoC includes a series of confidence-building steps to de-escalate tensions while allowing all parties to continue engaging in negotiations to eventually adopt a broader—stronger and perhaps legally-binding—Code of Conduct (CoC) for the South China Sea. The process of negotiating the CoC and the eventual final document would, so the argument goes, be the basis for future maritime delimitation talks between the claimants, as prescribed by the United Nations Convention on the Law of the Sea (UNCLOS).

In short, the CoC process was never explicitly designed as a final “dispute resolution” (in maritime delimitation terms) for the South China Sea. It was instead developed as a regional tension-management tool from which the process of engaging one another could lead to a peaceful resolution down the line. The DoC-CoC process, in other words, was a strategic wager on the part of Southeast Asia that confidence-building measures and habits of dialogue would be sufficient to manage the South China Sea disputes with its great power neighbour.

Has that wager paid off? The developments over the past decade seem to suggest so—for China at least, but less so for Southeast Asia. China has effectively asserted administrative and military control over key parts of the area, including building and militarising artificial islands, while challenging if not interfering, with the sovereign rights of

Southeast Asian claimants to explore and exploit resources within their Exclusive Economic Zones (EEZs).

China has also ignored major international legal decisions such as the 2016 UNCLOS tribunal ruling that, among others, invalidated its so-called “nine-dashed line” claim over the South China Sea. All the while, the presence of the CoC has allowed Beijing to push the narrative that the South China Sea disputes should only be managed “internally” between China and Southeast Asia without the involvement of extra-regional powers like the United States.

Southeast Asian claimants on the other hand continue to struggle with China’s coercive tactics in their disputed waters. This is partly due to their own domestic political constraints and economic ties with China, and partly because there is simply no other diplomatic tension-management option on the table. Over time, Southeast Asian claimants have also found it politically expedient to side-step the need to publicly clarify their own claims under UNCLOS and finalise delimitation talks with their neighbours—they quietly refer instead to the need to finish the CoC process first. The strategic wager then has become a sunk-cost and evolved into a buck-passing convenience.

With no clear end in sight to the CoC process, and with the strategic equation increasingly tilting in China’s favour, analysts have begun to wonder whether the time has come for ASEAN to abandon the process. To address

this question, we invite three Southeast Asian analysts to examine the promises and pitfalls of the CoC process.

Bich Tran, a non-resident fellow of the Center for Strategic and International Studies in Washington, argues that ASEAN should abandon the South China Sea CoC process because **“it has been neither productive nor viable”**. Southeast Asian states should instead focus on more effective measures, including pursuing international judicial means such as going through the UNCLOS tribunal route like what Manila embarked on back in 2014.

Aristyo Rizka Darmawan, an international law lecturer at the University of Indonesia in Jakarta, however, contends that ASEAN should not walk away from the CoC process because it could be **“the only way to ensure China’s compliance”** with a rules-based order. He notes however, that the support for the CoC should be conditional on its ability to develop mechanisms that respect and strengthen international law while getting China to comply with a rules-based order in the South China Sea.

Finally, **Collin Koh**, a research fellow at the Institute of Defence and Strategic Studies in Singapore, submits that while the ASEAN-China CoC process may fall short of expectations, it remains necessary to maintain confidence-building mechanisms

and keep the diplomacy functioning. He adds, however, that without effective compliance, verification, and enforcement provisions within the CoC to address possible violations in the future, the document risks becoming **“an abject failure”**.

The authors presented their arguments at a public webinar on 20 May 2022 (**video link here**). The debates during the webinar—and as you will see in the pages that follow—suggest that there is no consensus among regional analysts on whether ASEAN should back away from the CoC process.

The authors highlight the trade-offs, options, and challenges to either walking away or sticking through the process. But they also compellingly argue that simply going through the motions of performative tension-management through the CoC is no longer sufficient. It is high time that Southeast Asian policymakers re-assess the assumptions and deliverables of the two-decades-old CoC process. We hope this latest edition of Counterpoint Southeast Asia could be a small contribution to that effort.

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It has been neither productive nor viable

By Bich Tran

ASEAN should abandon the South China Sea Code of Conduct (CoC) process because it has been neither productive nor viable and should instead focus on more effective measures.

Since its inception in the mid-1990s following China's occupation of Mischief Reef, a functional ASEAN-China Code of Conduct for the South China Sea (CoC) has remained elusive. One of the key reasons why is that ASEAN is too divided. Only Brunei, Malaysia, the Philippines, and Vietnam are claimants; and non-claimant members have little interest in standing up against China. Meanwhile, China has stonewalled the process ever since it agreed to the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC).

China has tried to convince its neighbours of its peaceful rise, even as it changed the facts at sea and on the ground, as it were, in its favour. It has strengthened administrative control over the disputed waters with the establishment of hamlet administrations on Woody Island and Tree Island (2009), Sansha City (2012), and two new districts in Sansha City (2020). China has also engaged in unprecedented reclamation projects since 2013 to turn rocks and reefs into artificial islands and militarise them. Although these artificial islands do not confer additional



territorial or maritime jurisdiction, they serve as civil-military bases to significantly enhance China's long-term presence in the area.

Second, a meaningful CoC is not feasible. Southeast Asian states cling to the CoC because they believe it will constrain China. But Beijing has no reason to tie its own hands. China wants the CoC to exclude external companies from oil and gas development in the area and restrict joint military exercises with extra-regional powers, like the United States.

If the CoC is being written on China's terms, it might not be in ASEAN's interest to conclude a binding agreement. But if the agreement is not binding, then there is even less guarantee that China will uphold it. For example, despite adopting the DoC and signing the Agreement on the Basic Principles Guiding the Settlement of

Maritime Issues with Vietnam in 2011, China has interfered with the other claimants' activities within their Exclusive Economic Zones (EEZs) and intruded into Vietnam's waters on multiple occasions.

Third, the CoC is not the only option for Southeast Asian claimants. They could choose to negotiate with China bilaterally, rather than involving all ASEAN members. But given the power disparity, such moves could be counterproductive; it would be extremely difficult to get the bigger power to agree on fair terms. Anything less would be unpopular to the domestic audience.

Southeast Asian claimants therefore should opt for binding international judicial procedures. Parties to the United Nations Convention on the Law of the Sea (UNCLOS) are free to choose one or more of the following means for the settlement of disputes relating to the interpretation or application of the Convention: (1) the International Court of Justice, (2) the International Tribunal for the Law of the Sea established in accordance with Annex VI, (3) an arbitral tribunal constituted in accordance with Annex VII, or (4) a special arbitral tribunal constituted in accordance with Annex VIII.

And yet, China—a State party to UNCLOS—**declared** that it would not accept any of the compulsory procedures entailing binding decisions listed above with respect to disputes: (a) relating to sea boundary delimitations or historic bays or titles,

(b) concerning military activities, or (c) in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter.

However, under article 287 (3) of UNCLOS, China is “deemed to have accepted arbitration in accordance with Annex VII” for any dispute which is not covered by its declaration. Article 287 (5) of the Convention further specifies “If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.”

Building off on these provisions, the Philippines instituted arbitral proceedings against China under Annex VII to UNCLOS on 22 January 2013. The arbitration concerned the role of historic rights, the source of maritime entitlements, the status of specified maritime features in the Spratly Islands, and the lawfulness of certain actions by China in the South China Sea.

On 5 December 2014, Hanoi sent a statement to the Tribunal stating that it has “no doubt that the **Tribunal has jurisdiction** in these proceedings.” Vietnam’s statement also **rejected** China’s claims over the Paracel and Spratly Islands and the adjacent waters as well as the “historic rights” to the waters, seabed, and subsoil within the so-called nine-dash line. When the Tribunal issued its award in July 2016, Vietnam **welcomed** the ruling and reiterated its strong support for peaceful

settlement of disputes in the South China Sea.

China's reservations to UNCLOS noted above have hindered efforts to address boundary delimitation through judicial procedures. But Southeast Asian claimants could file other cases in accordance with Annex VII to determine the lawfulness of China's interference with their hydrocarbon resource development within their EEZs. Vietnam could also file a case similar to the Philippines but in reference to the Paracel Islands. Although China might ignore future rulings, the reputational cost could be higher.

Overall, ASEAN should walk away from the CoC process because it is neither productive nor feasible. Instead, they should spend their diplomatic energy and resources to pursue more effective measures sanctioned under international law. This will not only strengthen UNCLOS but would also boost their domestic legitimacy and support abroad.

Bich Tran is a Ph.D. candidate at the University of Antwerp, a Fellow at Verve Research, and a non-resident Fellow at the Center for Strategic and International Studies (CSIS). Her research interests include Vietnam's grand strategy, Southeast Asian states' relations with major powers, and political leadership. She tweets at [@BichTTran1](https://twitter.com/BichTTran1).

No unconditional support for the CoC

By Aristyo Rizka Darmawan

Support for the Code of Conduct process should be conditional on its ability to develop mechanisms that respect and strengthen international law while getting China to comply with a rules-based order.

Seen through the lens of international law, ASEAN should not walk away from the South China Sea Code of Conduct (CoC) negotiations process.

First, it is important for ASEAN members to uphold and make sure that the maritime domain is governed by international law. The CoC in this regard could be the only way to ensure China's compliance with a rules-based order in the South China Sea.

It is in China's interest to have the CoC "localised", keeping disputes contained between China and ASEAN, and avoiding the involvement of external powers such as the United States. As China drafted the CoC from the start, it might also be more willing to abide by it. Moreover, China is unlikely to comply with yet another international judicial mechanism brought against it, as we have seen with the [2016 UNCLOS tribunal ruling](#).



For ASEAN claimants, collectively negotiating a tension-management tool with China would increase their bargaining positions. If China negotiates bilaterally with each claimant state, the power disparity between the two could render the agreement less effective.

More broadly, the epitome of a rules-based international order in the South China Sea is compliance with the United Nations Conventions on the Law of the Sea (UNCLOS). Some of its key provisions—article 74(3) and 83(3)—allow for states to enter into “provisional arrangements” pending a delimitation agreement in the exclusive economic zone and continental shelf. The ASEAN-China CoC could become the basis for such arrangements.

Some Southeast Asian states—such as [Indonesia and Malaysia](#)—have benefited

from such arrangements by regulating some aspects of maritime law enforcement and the exploration and exploitation of resources in disputed waters. ASEAN then could strengthen UNCLOS by allowing the CoC process to build such provisional arrangements with the broader goal of avoiding dispute escalation. After all, the heart of UNCLOS' provisional arrangement clauses aligns with the spirit of the CoC process—maritime dispute tension-management.

The CoC could ensure compliance with UNCLOS in other ways too. The CoC could limit the scope of the disputes to cover only those legal claims under international law. Illegal claims such as the “nine-dashed line” then should not fall under the CoC. The CoC could also limit some maritime law enforcement measures and prohibit any excessive use of force in disputed waters.

If the CoC does not align with nor strengthen UNCLOS provisions, Southeast Asia could be seen as the region where the rule of international law dissipates. This could be a perilous path for the small and middle powers in the region who have benefitted from the current rules-based international order. For the time being, it is in China's interests to be part of, and comply with, the CoC process, which in turn, could strengthen international law.

Second, ASEAN's strategic credibility hinges on its ability to peacefully manage the South China Sea disputes as it is one of the most pressing security issues in the region. But

ASEAN has found it **difficult to establish a firm and bold position** in the CoC process.

That several ASEAN members are not parties to the dispute and that most members want to maintain their close economic ties to Beijing have pushed the group to avoid direct confrontation. But Southeast Asian leaders should not simply view the disputes and the CoC process as a strategic contest between ASEAN and China. It is instead about the process of upholding the rule of international law in the region.

Finally, it is important to note that the goal for ASEAN and China should not be to have a CoC in place under any condition, but to have a meaningful document that **respects and complies with international law**. It is important therefore that ASEAN states ensure that all the provisions and finer details of the CoC document are in compliance with international law.

One significant example is the scope of the location the CoC should apply to or be implemented in. Specifically, whether the CoC would only cover or be implemented in **overlapping maritime claims that are legally based on UNCLOS**. As noted above, the CoC should not be implemented in areas based on illegal claims under UNCLOS such as the nine-dashed line.

This is necessary because once ASEAN agrees that the scope of CoC could include the “nine-dashed line”, in whatever terminology, ASEAN may unwittingly legalise illegal claims under international law. For

Indonesia, such acquiescence not only undermines UNCLOS, but also undermines Indonesia's non-claimant position as it would imply the presence of a legal dispute with China over the EEZs in the North Natuna Sea.

Overall, not having a final CoC would be better than having one that legalises matters or claims that are against international law. Should China insist on pursuing matters or claims in violation of international law as part of the CoC process, then ASEAN states may consider “abandoning” it altogether.

Aristyo Rizka Darmawan is a Lecturer in International Law at Universitas Indonesia. His research focuses on the law of the sea and maritime security in Southeast Asia with particular focus on the South China Sea Dispute. He has been involved as consultant for the Center for Humanitarian Dialogue on the South China Sea Code of Conduct study group. He tweets at [@aristioo](https://twitter.com/aristioo).

It allows diplomacy to continue functioning

By Collin Koh

The ASEAN-China Code of Conduct process may fall short of expectations, but it remains necessary to maintain confidence-building mechanisms.

Singapore would and should continue supporting the ASEAN-China Code of Conduct in the South China Sea (CoC) process.

Singapore is not a claimant state in the disputes, but it is interested in the rule of law—especially the United Nations Convention on the Law of the Sea (UNCLOS)—as well as freedom of navigation and overflight in the area.

Singapore was one of the first few ASEAN members to **respond** to the release of the 2016 UNCLOS tribunal award on the South China Sea (SCS). This move resulted in a period of tense relations with Beijing, including a **war of words** between senior officials and the **non-invitation** of Prime Minister Lee Hsien Loong to the Belt and Road Summit. Singapore nonetheless persisted and sought to punch above its weight in managing the SCS disputes.

Under Singapore's chairmanship in 2018, ASEAN accomplished one of the most significant developments in the CoC process: the adoption of the Single Draft Negotiating Text (SDNT) as the capstone document for



ongoing negotiations. But progress has been lacklustre; partly due to the pandemic that prevented face-to-face discussions as well as the spate of Beijing's coercive acts against other claimants.

In general, the current CoC process falls short of the expected format, especially a single ASEAN position. But as reflected aptly by the SDNT, it is a collection of 10 ASEAN member states' proposals against China's. The CoC process looks to further drag on while the parties seek to assert their positions, overcome differences, and derive a consensus—not unusual for complex multilateral negotiations over topics that concern matters of sovereignty and rights.

Nevertheless, Singapore would support the CoC process because it would serve as a form of confidence-building measure (CBM) to help ameliorate tensions that erupt from time to time. ASEAN and Beijing have

engaged in CBMs for a few decades now. While these instruments have failed to roll back efforts by some to consolidate their physical possessions in the SCS, the CoC process continues to be useful in bringing all parties to the same table.

Given that ASEAN is a cornerstone of Singapore's foreign policy, it is important to ensure the grouping remains viable, geopolitically relevant, and retains its centrality in the regional security architecture. The CoC therefore serves as an ASEAN litmus test.

For now, Beijing is enthused about the code after having dragged its feet for years. The 2016 tribunal award handed a heavy blow to China's claims, thus forcing it to reinvigorate the process. Beijing then wanted to bolster its narrative that the SCS begs no foreign interference, and that the CoC was proof that ASEAN and China could manage their own disputes. However, some Southeast Asian claimants have been concerned about negotiating with Beijing from a position of relative weakness. Not only has there been a yawning asymmetry in military power, but China has not demonstrated good faith in the CoC talks as seen by its continued coercive moves.

The talks may therefore go on for an indefinite length of time. The parties have stopped harping on timelines—a clear sign that the negotiators themselves are less than certain. This has added to concerns that allowing “committed timelines” to lapse without an agreement speaks ill of the

process and creates more scepticism.

However, the fact that all 11 parties remain, at least rhetorically, willing to continue the CoC process is itself comforting. It shows that diplomacy continues to function. The political cost of calling off the CoC process could have been unimaginable for ASEAN considering the amount of effort and time invested thus far. In other words, the CoC process is not likely to be reversible at a minimum cost to the bloc's credibility.

For Singapore, it is also important not to compromise on the CoC's substance. Ideally, to distinguish it from the 2002 Declaration on the Conduct of Parties in the South China Sea (DoC), the CoC must be more than just “DoC-plus”. The CoC needs to have clear and unambiguous provisions on the dos-and-don'ts for signatories. The worry is that out of the political expediency of hastily finalising the CoC, ASEAN and China may agree to a suboptimal CoC—one that does not effectively prevent or mitigate flareups in the SCS.

Without effective compliance, verification, and enforcement provisions to address possible violations, the CoC risks becoming an abject failure. The CoC needs prescriptive provisions that oblige signatories to refrain from actions unambiguously considered to be in violation of the code, including giving the authority to verify such acts to have taken place and impose penalties. Without such provisions, the CoC would have fared no better than the DoC.

While one can argue we should have an effective CoC or no code at all, others believe an imperfect CoC is better than none at all. The concern is that an ineffective CoC will do more lasting damage to ASEAN's credibility. One should also not harbour illusions that the CoC would serve as a panacea to the simmering SCS tensions. The SDNT currently amounts to nothing more than a set of general principles and proposals without a clear action plan.

Until a final CoC is agreed upon, pre-existing CBMs such as the Code on Unplanned Encounters at Sea could serve as a useful firebreak against untoward incidents between naval forces in the SCS. While focusing on the CoC is important, ASEAN member states, China, and other concerned stakeholders should not lose sight of the utility of such operational mechanisms.

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