

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](#).



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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.

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