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South China Sea in Regional Politics:

Indonesia's Efforts to Forge ASEAN Unity on a Code of Conduct

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Introduction

In July 2012 the foreign ministers of the Association of Southeast Asian Nations (ASEAN) failed to reach consensus on the wording of South China Sea issues in their joint statement following their 45th Annual Ministerial Meeting (AMM) in Phnom Penh. This development was unprecedented in ASEAN's forty-five year history. Later in the year, in November, internal ASEAN disagreements were put on public display when Cambodia, as ASEAN Chair, attempted to insert a reference in the ASEAN Summit joint communiqué that ASEAN leaders agreed not to internationalize the South China Sea dispute. The Philippines objected and the offending reference was dropped.

In late March this year a Washington-based think tank offered this assessment:

...ASEAN appears no closer to concluding a binding Code of Conduct. And it is divided over whether any such Code of Conduct should be first agreed to by all ASEAN members or crafted with China from the start.

Indeed, the process appeared to go in reverse while Cambodia held the ASEAN chair in 2012, as the countries were unable to issue even a joint declaration for the first time in its history. The disputes in the South China Sea have divided ASEAN between the four claimant states of Vietnam, the Philippines, Malaysia and Brunei on one side, and the six non-claimant states on the other... While many hope Brunei will do a better job at addressing the dispute while it holds the ASEAN chair this year, that is a lot to ask of a small country with few defences and significant economic interests at stake with China.¹

The controversy over the failure of ASEAN to issue a joint communiqué and the public disagreement over the ASEAN Summit Chair's Statement have overshadowed the fact that the ASEAN foreign ministers unanimously reached agreement on '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' on 9th July at the plenary session of the 45th AMM. Further, during the contretemps at the AMM Retreat over the wording of the joint statement, Indonesia offered to produce a non-paper on the Code of Conduct (COC).

¹ Patrick M. Cronin, "Flashpoints: The Way Forward in the East and South China Seas," *East and South China Seas Bulletin* [Center for a New American Security] #12, March 28, 2013, 3-4.

In sum, despite initial pessimistic assessments ASEAN's disarray has proven to be a temporary phenomenon. In January 2013 Brunei assumed the ASEAN Chair and placed priority on kick-starting discussion with China on a Code of Conduct. By all accounts Cambodia has ceased its obstruction of ASEAN efforts to forge a unified position.² Indonesia has seized the initiative and secured the endorsement of all of ASEAN's foreign ministers on Six-Point Principles on the South China Sea. Indonesia's Foreign Minister Marty Natalegawa presented a Zero Draft COC to ASEAN Foreign Ministers on the sidelines of the United Nations General Assembly in September 2012 and consensus was reached to further develop this document as a basis of discussion with China. At the 9th ASEAN-China Senior Officials Meeting it was agreed to commence discussions on the COC later in the year.

This presentation revisits these developments with a focus on Indonesia's efforts to forge ASEAN unity on a draft Code of Conduct in the South China Sea.

ASEAN's Proposed Elements of a Regional Code of Conduct

On 9 July ASEAN foreign ministers unanimously adopted the key elements of their draft Code of Conduct for the South China Sea at the plenary meeting of the 45th AMM. The preamble to "ASEAN's Proposed Elements of a Regional Code of Conduct in the South China Sea (COC) between ASEAN Member States and the People's Republic of China",³ included references to previous agreements reached between ASEAN and China, including the 1997 Joint Statement of the meeting of heads of government/state of ASEAN members and China, the 2006 Joint Declaration on Strategic Partnership for Peace and Towards an Enhanced ASEAN-China Strategic Partnership, the 2002 Declaration on Conduct of Parties in the South China Sea (DOC) and its commitment to develop a COC and protection of the environment and biodiversity. The ASEAN draft calls for a 'comprehensive and durable solution of disputes'.⁴

² S. Ramesh, 'ASEAN has ambitious agenda which it is in process of fulfilling: PM Lee', Channel News Asia, April 25, 2013.

³ Carlyle A. Thayer, 'ASEAN's Code of Conduct (Unofficial)', *Thayer Consultancy Background Brief*, July 11, 2012. <http://www.scribd.com/doc/101698395/Thayer-ASEAN's-Code-of-Conduct-Unofficial>.

⁴ 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 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,

Article I of the ASEAN draft COC contains its operative provisions and calls on the parties to ‘respect and adhere to the United Nations Charter, 1982 UNCLOS, Treaty of Amity and Cooperation in Southeast Asia, DOC and the Five Principles of Peaceful Co-existence’. The ASEAN draft listed four principles:

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

Article II of the ASEAN draft enumerates 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) requires signatories to ‘establish a mechanism for settling disputes relating to the interpretation and application of the Code of Conduct’. Two dispute settlement mechanisms are included to address a breach or violation of the COC.⁵ The first is the dispute settlement mechanism included in the ASEAN Treaty of Amity and Cooperation in Southeast Asia (TAC).⁶ 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

which China signed (<http://www.aseansec.org/13163.htm>). See: ‘Ian Storey Comments,’ *The Nelson Report*, July 31, 2012.

⁵ 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.

⁶ ‘Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976.’ <http://www.aseansec.org/1217.htm>.

2003 and undertook in writing ‘faithfully to perform and carry out all the stipulations therein contained’.⁷

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.

Indonesia Promotes ASEAN’s Six Principles on the South China Sea.⁸

Following the recriminations sparked at the Retreat, Indonesia’s Foreign Minister Marty Natalegawa 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.⁹ Marty conducted an intense round of shuttle diplomacy flying to five capitols (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 to complete the diplomatic formalities. On July 20, Hor Namhong, acting in his capacity as ASEAN Chair, officially released ASEAN’s Six-Point Principles on the South China Sea.¹⁰

In 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;

⁷ Instrument of Accession to the Treaty of Amity and Cooperation in Southeast Asia, October 8, 2003, <http://www.aseansec.org/15271.htm>.

⁸ 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 occasions to lay the blame for ASEAN's failure to issue a joint communiqué on Vietnam and the Philippines.

⁹ Carlyle A. Thayer, ‘ASEAN Unity Restored by Shuttle Diplomacy?’ *Thayer Consultancy Background Brief*, July 24, 2012, <http://www.scribd.com/doc/101075293/Thayer-ASEAN-Unity-Restored-by-Shuttle-Diplomacy>.

¹⁰ 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 occasions to lay the blame for ASEAN's failure to issue a joint communiqué on Vietnam and the Philippines.

- continued exercise of self-restraint and non-use of force by all parties; and
- peaceful resolution of disputes in accordance the universally recognized principles of international law including the 1982 UNCLOS.

The 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)'.

In response, China dispatched its Foreign Minister Yang Jiechi on a visit to Indonesia, Brunei and Malaysia for talks with his counterparts. Yang stated at a joint press conference in Jakarta 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.¹¹ Yang held discussions with Malaysian Foreign Minister Y.B. Dato' Sri Anifah Hj Aman in Kuala Lumpur. Although there was no joint press conference Anifah Aman was quoted as observing, '[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'.¹²

Indonesia's Zero Draft Code of Conduct

As noted above, at the 45th AMM Retreat Foreign Minister Marty promised, 'Indonesia will circulate a non paper [on] possible and additional elements of [the] COC. It is meant to be more prescriptive and operational'. This 'non paper' was quickly dubbed the Zero Draft Code of Conduct.

On September 27, 2012, Indonesia presented its 'Zero Draft A Regional Code of Conduct in the South China Sea'¹³ to ASEAN Foreign Ministers on the sidelines of the annual UN General Assembly session in New York. Indonesia's Regional Code of Conduct draws

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

¹² Agence France-Presse, 'Malaysia urges ASEAN to unite over South China Sea,' August 12, 2012.

¹³ The author has a copy in his possession. The Zero Draft is marked confidential; the name of the recipient country appears on the first page and as a watermark on all pages. Mark Valencia provided the first public analysis of this document, see: Valencia, 'Navigating Differences: What the 'Zero draft' Code of Conduct for the South China Sea Says (and Doesn't Say)', *Global Asia*, 8(1), Spring 2003, 72-78.

heavily on three sources: the 2002 DOC, ASEAN's Proposed Elements of a Regional Code of Conduct, and ASEAN's Six-Point Principles on the South China Sea.¹⁴ The Zero Draft highlights those portions drawn verbatim from the Proposed Elements; these comprise thirty-two percent of the text. In other words Indonesia's Zero Draft represents a substantial development of ASEAN's position on the COC.

Articles 1-3 are drawn almost entirely from the Proposed Elements. Article 2 identifies two objectives: (1) promoting confidence and preventing incidents and (2) managing and resolving incidents.

Article 4 (Areas of Application) is entirely new; it stipulates 'without prejudice to territorial claims, the COC shall be applied in all unresolved maritime boundary areas of the parties concerned in the South China Sea'.

Article 5 (Territorial claims in the South China Sea) is also new; it contains the following legal disclaimers:

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

Article 6 (Implementation of the Code of Conduct) which runs to three and a half pages out of a total of eight pages (44%) is a substantial new developments. It contains two very detailed and possible contentious points. The first deals with rules/norms and procedures in carrying out confidence-building measures. The draft text states:

The Parties concerned agreed to enhance mutual trust and confidence by, among others, refraining from:

¹⁴ Extensive extracts from ASEAN's Proposed Elements of a Regional Code of Conduct are highlighted in grey on Indonesia's Zero Draft.

- conducting military exercise, military surveillance, or other provocative actions in the South China Sea;
- occupying or erecting new structure on the islands, and land features – presently occupied or not – by the parties concerned;
- inhabiting the presently uninhabited islands and other land features;
- conducting activities that threaten navigational safety and/or polluting the environment;

The Parties agreed to encourage efforts to clarify disputes in accordance with international law, in particular the UNCLOS. Encourage the parties concerned to work together to define and clarify the territorial and maritime disputes in the South China Sea, based on international law, including UNCLOS.

Article 6 also contains detailed provisions for preventing incidents and collisions at sea including complying with the 1972 International Regulations for Preventing Collisions at Sea (COLREGS) and other unspecified relevant international instruments. Article 6 states:

The Parties further agreed to refrain from the following:

- simulating attacks by aiming guns, missile launchers, torpedo tubes or other weapons in the direction of other vessel/aircraft;
- launching objects or firing signal flares in the direction of any ship or aircraft so as to pose a danger, constitute a hazard, or interfere with navigation and flight of other ship or aircraft.
- using laser in such a manner so as to cause injury to personnel or damage to equipment aboard of other ship or aircraft;
- intentionally interfering with communication systems of other ship or aircraft.

Article 6 set out considerable details governing breakdown, safe speed, safe distance, modes of communication, mutually assisting persons and vessels in distress at sea, and reporting mechanisms (including a hot line).

Article 7, also new, contains two lines. It left the precise monitoring and reporting mechanism to be agreed in future between China and ASEAN.

Article 8 repeated verbatim the two dispute mechanisms contained in the Proposed Elements discussed above: the ASEAN TAC's ASEAN High Council and the dispute settlement mechanisms provided under international law, including UNCLOS.

Article 9 calls for a ministerial level review mechanism every five years 'if it so required, on the basis of consensus by all parties concerned'. Article 9 repeats provisions of the Proposed Elements concerning no reservations by the Parties, entry into force, amendment (to be determined), respect for the COC by other countries (to be

determined), indefinite duration, registration with the UN Secretariat and ASEAN Secretary General.

Straws in the Wind: Rescheduling China-ASEAN Talks on the COC

On January 22, 2013 the Philippines lodged a formal legal claim with the United Nations to establish an Arbitral Tribunal under UNCLOS.¹⁵ China rejected this claim. These developments immediately raised concern among ASEAN members, not least because the Philippines unilaterally submitted its claim without prior consultation with other ASEAN members. There was also concern that the Philippine action would delay discussions with China on a Code of Conduct. Diplomatic sources in Southeast Asia reported in March 2013 that the Philippine actions ‘have breathed all the life out of the COC process’ and reported that Beijing was putting diplomatic pressure on ASEAN states to lobby the Philippines to drop its legal action with the UN in return for restarting talks on the COC.¹⁶

Despite negative assessments on the prospects for a COC, there are some straws in the wind that ASEAN efforts to engage China in discussions on a COC are bearing fruit.¹⁷ In January 2013, after the ASEAN Chair passed from Cambodia to Brunei, for example, Brunei and ASEAN’s new Secretary General, Le Luong Minh, both pledged to give priority to reviving discussions on the COC.¹⁸ Brunei’s Sultan raised the issue of the COC with President Xi Jinping when they met on the sidelines of the Boao Forum in April.

¹⁵ Carlyle A. Thayer, “South China Sea: China Rejects Arbitration Claim by the Philippines,” *Thayer Consultancy Background Brief*, March 3, 2013. Available at Scribd.com.

¹⁶ Based on off-the-record discussions held on March 12-13, 2013.

¹⁷ For a pessimistic view on the prospects for a COC see: Ian Storey, “Slipping Away? A South China Sea Code of Conduct Eludes Diplomatic Efforts,” *East and South China Seas Bulletin* [Center for a New American Security], no. 11, March 20, 2013. For discussion on ASEAN’s most recent draft COC and a possible “ASEAN Troika” see: Mark Valencia, “Navigating Differences: What the ‘Zero Draft’ Code of Conduct for the South China Sea Says (and Doesn’t Say),” *Global Asia*, 8(1), Spring 2013, 72-78 and Michael A. McDevitt and Lew Stern, “Viet Nam and the South China Sea,” in Michael A. McDevitt, M. Taylor Fravel, Lewis M. Stern, *The Long Littoral Project: South China Sea*, CNA Strategic Studies, March 27, 2013, 61-74.

¹⁸ “New ASEAN chair Brunei to seek South China Sea code of conduct”, *GMA News*, 14 January 2013; “New ASEAN chief seek to finalise Code of Conduct on South China Sea”, *Channel News Asia*, 9 January 2013; Termsak Chalermphanupap, “Toward a code of conduct for the South China Sea”, *The Nation*, 22 January 2013,

Brunei, perhaps over optimistically, has set October 2013 as a target date for completion of the COC in advance of the ASEAN-China Summit.¹⁹ ASEAN Secretary General Minh requested Indonesia's President Susilo Bambang Yudhoyono to assist in addressing the South China Sea dispute.²⁰ Thailand, as ASEAN's designated coordinator for dialogue relations with China, also has pledged to take up the matter with Beijing.²¹

After this year's 23rd ASEAN Summit (April 14-15), leaders' discussion on the South China Sea was summarized succinctly in the Chair's Statement issued by Brunei. The operative paragraphs read:

59. We discussed the situation in the South China Sea and reaffirmed the importance of peace, stability and maritime security in the region. We underscored the importance of the Declaration on Conduct of Parties in the South China Sea (DOC), ASEAN's Six-Point Principles on the South China Sea, and the Joint Statement on the 10th Anniversary of the DOC. In this regard, we reaffirmed the collective commitments under the DOC to ensuring the peaceful resolution of disputes in accordance with universally recognised principles of international law, including the 1982 United Nations Convention on the Law of the Sea, without resorting to the threat or use of force, while exercising self-restraint in the conduct of activities.

60. We looked forward to continued engagement with China in implementing the DOC in a full and effective manner, including through mutually agreed joint cooperative activities and projects. Taking into account the importance of the 10th anniversary of the ASEAN-China Strategic Partnership in 2013, and the positive momentum following the 9th ASEAN-China Senior Officials' Consultations, we tasked our Ministers to continue to work actively with China on the way forward for the early conclusion of a Code of Conduct in the South China Sea (COC) on the basis of consensus.²²

The ASEAN Summit endorsed a proposal by Thailand to host a special meeting of foreign ministers in Bangkok prior to the ASEAN-China Summit scheduled for October.²³ Later in

¹⁹ "Philippine legal move stirs South China Sea Disputes."

²⁰ Bagus BT Saragih, "ASEAN chief pushes RI to act on South China Sea dispute," *The Jakarta Post*, April 9, 2013.

²¹ "No immediate solution for South China Sea dispute: Shanmugam", *Channel News Asia*, 14 January 2013; "Thailand seeks talks on South China Sea", *Bangkok Post*, 15 January 2013; "Sihesak seeks South China Sea parley", *Bangkok Post*, 25 January 2013 and Greg Torode, "Manila's lonely path over South China Sea", *South China Morning Post*, 11 February 2013.

²² Chairman's Statement of the 22nd ASEAN Summit, 'Our People, Our Future Together', Bandar Seri Begawan, April 24-5, 2013.

²³ Kyodo News International, 'ASEAN leaders discuss how to deal with China on South China Sea', *GlobalPost.com*, April 30, 2013.

April ASEAN's Secretary General Le Luong Minh announced that ASEAN and China would meet at ministerial level later in the year to discuss the COC.²⁴

In late April/early May China's new Foreign Minister Wang Li made a visit to Thailand, Indonesia, Singapore and Brunei. During Li's visit to Jakarta there were conflicting media reports on what was agreed. According to Foreign Minister Marty Natalegawa, agreement was reached to hold a meeting of the ASEAN-China working Group on the DOC 'in the near future' to discuss the COC. Marty also endorsed Li's proposal to set up an Eminent Persons Group to complement the government-to-government talks.²⁵ When Li met ASEAN Secretary General Le Luong Minh, Minh reported that agreement had been reached to hold a special meeting of foreign ministers in August to discuss the COC.²⁶

Conclusion

Media reporting on ASEAN's failure to produce a joint communiqué following its 45th Annual Ministerial Meeting in Phnom Penh in July 2012 overshadowed the fact that the ASEAN Foreign Ministers unanimously reached agreement on 'Proposed Elements of a Regional Code of Conduct in the South China Sea' at the opening plenary session of the AMM on 9 July.

During the recriminations between Cambodia and the Philippines at the 45th AMM and later in the year Indonesia stepped in and played a crucial role in forging consensus among ASEAN members on a Regional Code of Conduct in the South China Sea. During the heated debate at the 45th AMM Retreat Indonesia offered to submit a 'non paper' on the COC. Indonesia and Singapore both attempted to broker a compromise over the wording of the controversial AMM joint communiqué.

²⁴ Xinhua, 'ASEAN to enter South China Sea talks with China as a group: Le Luong Minh', April 25, 2013.

²⁵ Kyodo News International, 'ASEAN leaders discuss how to deal with China on South China Sea', *GlobalPost.com*, April 30, 2013; Kyodo News International, 'China, Indonesia suggest talks on binding rules in S. China Sea', *GlobalPost.com*, May 1, 2013; and Bagus BTSaragh, 'China closer to South China Sea Code of Conduct, Marty says', *The Jakarta Post*, May 3, 2013.

²⁶ Kyodo News International, 'ASEAN leaders discuss how to deal with China on South China Sea', *GlobalPost.com*, April 30, 2013.