

This paper focuses on the formulation of the DOC between ASEAN and China, contributing factors to the decisions of the parties concerned and analysis of the outcome.



On 4 November 2002, ASEAN and the People's Republic of China signed the Declaration on the Conduct of Parties in the South China Sea (DOC). Although the declaration fell short of a binding Code of Conduct as ASEAN had been seeking and did not go very far in implementation, the DOC was regarded within the Association as a turning point in the South China Sea issue. Since China had previously insisted on bilateral negotiations with claimant states and declined multilateral negotiations, the DOC indicated China's change in its approach to the dispute and the success of ASEAN in getting China involved. This paper focuses on the formulation of the DOC between ASEAN and China, contributing factors to the decisions of the parties concerned and analysis of the outcome.

THE FORMULATION OF THE DOC

Prior to the DOC, the Treaty of Amity and Cooperation in Southeast Asia (TAC) and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone concluded in 1976 and 1995 respectively were the main legal instruments governing behaviours of the parties concerned in the South China Sea. The fundamental principles guiding the contracting parties in the TAC include the settlement of differences by peaceful means, non-resort to the threat or use of force and the promotion of effective cooperation among the concerned parties [\[1\]](#).

ASEAN members first adopted their common stance on the South China Sea dispute in the ASEAN Declaration on the South China Sea signed in Manila in 1992. The declaration demonstrated ASEAN's concerns over the tension between Vietnam and China after the latter licensed the Creston Energy Corporation (from the United States) to exploit oil in Vanguard Bank on Vietnam's continental shelf and passed its Law on the Territorial Sea on 25 February 1992 stipulating China's absolute sovereignty over both the Paracel and the Spratly archipelagoes. The Declaration called on the parties concerned to settle the dispute by peaceful means, exercise restraint and cooperate in applying the principles enshrined in the TAC as a basis for establishing a code of international conduct over the South China Sea. In addition, all parties concerned were invited to subscribe to this Manila Declaration [\[2\]](#). Vietnam, a non-ASEAN country at the time, supported Manila Declaration. China, however, reiterated its position on its refusal to accept multilateral discussion of the issue and its view that the Paracels and Spratlys dispute did not concern ASEAN.

Bilaterally, China and the Philippines reached an agreement on an eight-point Code of Conduct in their Joint Statement on Consultations on the South China Sea and other Areas of Cooperation in August 1995. The fourth annual bilateral consultative dialogue between Vietnam and the Philippines also produced a nine-point Code of Conduct in October 1995 [\[3\]](#).

The 1995 Chinese occupation of Mischief Reef in the Spratlys, an island well within the Philippines' Exclusive Economic Zone, marked a change in China's policy toward the South China Sea. Previously, China only resorted to force twice, namely in 1974 and 1988 against Vietnam, a non-ASEAN country. After the Mischief Reef incident, ASEAN sought initiatives that could prevent existing disputes from escalating into conflicts.

The idea of a regional Code of Conduct (COC) was officially endorsed at the 29th ASEAN Ministerial Meeting (Jakarta, 21-27 July 1996) in the hope that it would provide the foundation for long-term stability in the area and foster understanding among the countries concerned [\[4\]](#). The ASEAN Foreign Ministers expressed their concerns over the situation in the South China Sea in the joint communiqué and underlined that the parties concerned should apply the principles of the Treaty of Amity and Cooperation in Southeast Asia (TAC) as the basis for a regional code of conduct in the South China Sea to build a secure and stable regional environment. 'Recent developments affirmed the need of a COC in the South China Sea and this will lay a foundation for long term stability and foster understanding among claimant countries', stated the Communiqué

[\[5\]](#)

. At the 6th ASEAN Summit (Hanoi, 15-16 December 1998), ASEAN leaders agreed to formulate the Code of Conduct in the South China Sea. Vietnam and the Philippines were tasked with co-preparing a draft of this document for the ASEAN Senior Official Meeting (SOM) in Singapore in March 1999

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. Vietnam and the Philippines, however, failed to co-produce this draft since Vietnam's request to put the Paracels within the scope of application of the COC was not met.

The two countries, then, presented their first individual versions at the ASEAN SOM in May 1999. Vietnam wanted the Code to apply to the Paracels. Malaysia opposed the Philippine version since it gave the impression of a binding agreement. Indonesia also shared the view of a non-binding COC with Malaysia.

The first ASEAN draft was presented at the Ministerial Meeting and ARF meeting in July 1999. ASEAN Foreign Ministers, however, did not approve the draft. Malaysia demanded that it be discussed at the senior level. Malaysian Foreign Minister Syed Hamid Albar criticized the Philippine version for failing to reflect the spirit widely agreed earlier [7].

The Philippines, then, submitted its second draft to ASEAN in September 1999. This time, ASEAN did not reach a consensus on the scope of application of the COC. The Philippines suggested the whole South China Sea, which was opposed by Malaysia. From Malaysia's point of view, part of its claimed sovereignty in the South China Sea is not in the disputed area and part of the South China Sea is overlapping with its territorial sea of the states of Sabah and Sarawak. If the COC covered the Spratlys only, Malaysia would consolidate its occupied posts on several islands within its continental shelf and avoid direct dispute with China. Vietnam, on the other hand, supported the phrase 'disputed areas in the South China Sea' because the COC, then, would also cover the Paracels [8].

ASEAN eventually reached a proposed draft COC to negotiate with China based on the 3rd Philippine draft prior to the Informal ASEAN Meeting of Heads of State and Government. The basic principles of the ASEAN draft include: the COC is purely a political, thus non-binding, document; the COC sets forth confidence-building measures and does not affect the current sovereign stance and rights of parties concerned; the COC only suggests general principles to govern the settlement of the dispute in the South China Sea, to ensure peace and stability in the region like peaceful solutions to the dispute, self-restraint and consensus from all parties concerned before undertaking any activities [9].

Previously, due to increasing pressure from ASEAN, China proposed its own draft at the meeting between Chinese Deputy Foreign Minister Wang Yi and Philippine counterpart Lauro Baja in Beijing [10].

China's draft contained three major differences from that of ASEAN. First, China insisted that the dispute over the Paracels remained solely a bilateral issue between Vietnam and China while ASEAN wanted to cover this archipelago in the COC. Second, China's draft did not contain any provision on the halt of new occupation and construction on reefs or islets in the disputed areas like those in the ASEAN's. Third, China demanded that all parties concerned stop military reconnaissance activities near the disputed areas and limit patrol activities, referring to U.S. attempts to gather intelligence and conduct joint military exercises with its allies in the South China Sea.

China rejected ASEAN-proposed draft at the SOM held on 25 November 1999. Apart from the above differences in the two drafts, China would never accept any code of conduct prepared without its participation [\[11\]](#).

The end of 1999 marked a turning point for ASEAN and China in finalizing a COC. Instead of proposing separate drafts, the two sides began negotiating on a common COC. The process started with an informal dialogue between ASEAN and China in Hua Lin, Thailand, in March 2000. At the 6th China-ASEAN Senior Official Meeting held in Kunching (Malaysia) on 25-26 April 2000, the two sides agreed to establish a joint research team to formulate a COC. The first session of the team in May 2000 (in Kuala Lumpur) ended with two major differences in the issue, namely the geographical scope the COC and the provision related to the new occupation and construction. The Philippines threatened to withdraw from the negotiation if Beijing did not take the principle of 'no new occupation' seriously [\[12\]](#).

Within ASEAN, especially among the parties directly concerned with the dispute, there remained great obstacles also. Four existing major problems after the 3rd meeting of the working group on COC in Hanoi (October 2000) were as follows: the scope of the COC; the issue of new occupation; joint military exercises and humane treatment of habitants in the disputed areas. Among those, the scope of the code was the most heated. Vietnam supported the scope of application for the whole South China Sea, i.e. including both the Paracels and the Spratlys. If this provision is endorsed, Vietnam could mobilize ASEAN support in its negotiations on the Paracels. Though other ASEAN members did not oppose Vietnam's stance, Malaysia supported the scope limited to the Spratlys only [\[13\]](#). ASEAN also failed to reach a common stance on the issue of new occupation and military exercise since they were sensitive and dependent on the perspectives from the military force in individual member state [\[14\]](#).

In order to break the deadlock, at the 35th ASEAN Ministerial Meeting hosted by Brunei in July 2002, Malaysian Foreign Minister Syed Hamid Albar proposed a Declaration on the Conduct of Parties in the South China Sea (DOC) instead of a code of conduct [\[15\]](#), which was welcomed by other members. As a result, in the framework of the 8th ASEAN Summit in Phnom Penh (Cambodia), ASEAN and China signed a Declaration on the Conduct of Parties in the South China Sea on 4 November 2002.

SUBSTANCE OF THE DOC

The first and foremost aim of the Declaration stated in its introduction is to consolidate and develop the existing friendship and cooperation as well as to create favourable conditions for a peaceful and durable solution of disputes in the South China Sea among the signatories [\[16\]](#).

The DOC is composed of three main components, namely the basic norms governing state-to-state relations and dispute settlement, confidence-building measures, and cooperation activities.

The first point of the DOC reaffirms the commitment of the parties to the purposes and principles of the Charter of the United Nations, the 1982 UN Convention on the Law of the Sea, the 1976 Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law.

In point 2, the parties are committed to exploring ways for building trust and confidence on the basis of equality and mutual respect. It seems that mutual trust is a foundation for any peaceful settlement of dispute while confidence-building measures reduce the risk of provoking conflict or misunderstanding of activities in the South China Sea.

Point 4 underlines the duties of the parties concerned to resolve their territorial 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. For ASEAN, this point is considered the most important since this Association, especially the members directly involved, is concerned about the possible use of force from China as in the past. Therefore, China's official acceptance to give up the military option partially meets

ASEAN's expectations. For China, on the other hand, this point will prevent ASEAN from filing the case to an international arbitration body or involving another outsider in the case as a mediator or an intermediary.

Concrete measures are listed in point 5 in which the parties concerned undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from inhabiting the currently uninhabited islands, reefs, shoals, cays, and other features.

Point 7 in the DOC underlines the need for the parties concerned to continue their consultations and dialogues concerning relevant issues, including respecting the Declaration, to promote good neighbourliness and transparency and establish harmony, mutual understanding and cooperation. This point allows the parties concerned to consult among themselves through either bilateral or multilateral channels. It is also seen as a legal framework for ASEAN-China mechanism for the DOC implementation.

Concerning cooperative activities, the DOC states five areas, including a) marine environmental protection; b) marine scientific research; c) safety of marine navigation and communication; d) marine search and rescue; and e) combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms. These areas, which are considered of less sensitivity, can help the parties concerned build mutual trust and confidence. Originating from the 1982 UN Convention on the Law of the Sea, these are also actual fields of cooperation at both bilateral and multilateral levels between and among the countries involved. It is stressed in point 6 that 'The modalities, scope and locations, in respect of bilateral and multilateral cooperation should be agreed upon by the Parties concerned prior to their actual implementation', which shares the essence of the 'consensus' principle of ASEAN. This principle, however, may retard the decision-making procedure since it requires consent from every party.

Points 8, 9 and 10 reaffirm the parties' commitments to respect the DOC and take actions consistent herewith. The DOC is also seen as a step toward the adoption of a more binding COC which defines the rights and responsibility of the parties concerned to further promote peace, stability and development in the region. This, in turn, implies that the DOC is insufficient to govern the relations among the parties in the dispute.

The DOC, therefore, is not a document to resolve disputes but to create favourable condition

and opportunities for the parties concerned to seek resolutions. The DOC can help build a cooperative and friendly environment by confidence-building measures, paving the way for a long-term solution.

Though representing the spirit of cooperation between ASEAN and China, the DOC receives considerable criticism. A political declaration among countries presents the political will of their leaders. Therefore, if these nations enjoy friendly relationship, the political will can be respected. On the other hand, if these ties get strained, for instance as a result of actual behaviour threatening other claimants' legitimate interest or sovereign right in the case of this DOC, the political will shall be bent since it is not a binding document. Every political declaration shares this characteristics, especially this DOC since the South China Sea dispute is delicate and complicated.

The signatories to the DOC can make good use of its loose provisions to either condemn any unilateral act of other claimants or justify their own move. Mark Valencia anticipated that the Declaration was doomed, considering it a half-way effort to reduce the heat over territory in the South China Sea. The DOC, in his view, is just 'a self-deceiving exercise that satisfied ASEAN's thirst for political accomplishment, but did not offer profound changes in the security situation in the South China Sea'. He also emphasized that no loose agreement would prevent claimants from positioning themselves strategically in the lingering dispute [\[17\]](#) .

FACTORS CONTRIBUTING TO THE SIGNING OF THE DOC

That China signed the DOC marked a major change in its approach to the South China Sea dispute. Previously, China had advocated only bilateral negotiations to take advantage of its position as a regional power and avoid any unified ASEAN front against its interest. In response to the pressure from the Association after the Mischief incident in 1995, China agreed to discuss the South China Sea issue with ASEAN. During the ARF meeting in July 1995, Qian Qichen, the then Chinese Foreign Minister, announced that Beijing was prepared to negotiate for the settlement of the South China Sea dispute by peaceful means in accordance with international law, particularly the 1982 UN Convention on the Law of the Sea. This, however, was seen as a tactic from the Chinese side to preserve its position after a new successful occupation, or a tactic of making 'two steps forward, one step back'.

With the DOC, China also wanted to gain political and economic benefit and alleviate ASEAN's concern about China. Southeast Asia is the focus of China's friendly policy. In

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response to the 'China's threat' theory, China advocated 'peaceful-rise' and 'peaceful-development' policies as its national development guidelines to calm its neighbours. The signing of the DOC partly helped China gain trust and confidence of ASEAN members, laying the foundation for further development in economic and trade ties. Better ASEAN-China relations opened more windows of opportunities for China to enter the dynamic ASEAN market. In order to serve its economic development, China needed to expand its market, thus expanding its sphere of influence in the region.

Furthermore, the DOC presented a change in China's approach to the settlement of the South China Sea from bilateralism to 'bilateralism under the umbrella of multilateralism' [18]. Though China was determined to claim sovereignty in the disputed areas, it seemed prepared to join multilateral organisations as well as respect the rules and values of the game. China's decision to join the DOC was part of its 'new security theory' announced at its annual talks with ASEAN in August 2002, prior to the DOC signing ceremony. 'The new security concept is, in essence, to rise above one-sided security and seek common security through mutually beneficial cooperation. It is a concept established on the basis of common interests and is conducive to social progress... In China's view, the core of such new security concept should include mutual trust, mutual benefit, equality and cooperation'

[19]

, stated a document distributed at the meeting.

In addition, China intended to take the advantage of the COC/DOC negotiations to divide ASEAN. In the drafting process, for instance, China urged ASEAN to decide the controversial issue concerning the scope of the DOC and this country would accept either it was 'the South China Sea' or 'the Spratly islands'. This move was seen as a wedge to ASEAN. Moreover, while discussing the COC with ASEAN in 2000, China used the deadline of the end of that year to put this association under pressure with the implication that it was the division within ASEAN that impeded the finalization of the COC/DOC. If ASEAN could solve its problem, China would be willing to make concession on issues like new occupation, military exercise, and humane treatment to fishermen in the disputed areas [20].

The regional security situation in the wake of September 11 also contributed to the signing of the DOC in 2002. After the incident, the United States declared that Southeast Asia was the second front of its war against terrorism, which aroused China's concerns over the U.S. geo-political position in the region [21]. With the relatively large Muslim community in Southeast Asia and possible links between Al Qaeda and regional terrorist groups like Moro Islamic, Abu Sayyaf, Kampulan Mujadihin and Jeemaah Islamiah, the region took on greater significance in the U.S. anti-terrorism war. Immediately after September 11, the Philippines supported the U.S. and allow this country to gain access to Clark Air Base and Subic Naval Base. In November 2001, Philippine President Arroyo visited the U.S. to commemorate the 50th anniversary of the

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U.S.-Philippine Mutual Defence Treaty. The two sides agreed that the terrorist attack in the U.S. and the activities of Abu Sayyaf terrorist group (which abducted American and Philippine citizens in the Southern part of the Philippines) led to the need for greater military cooperation between the two countries [\[22\]](#) . Previously, the Philippines had also tried to enlist U.S. support, signing the Visiting Forces Agreement in 1998 and conducting joint military exercises off Palawan in the South China Sea in February and March 2000.

The relations between the U.S. and Malaysia were also enhanced after September 11. Malaysia not only sped up the intelligence-sharing process but strengthened security for U.S. ships in the Strait of Malacca. On 14 May 2002, the U.S. and Malaysia signed an Anti-Terrorism Declaration in which the two sides were committed to further cooperation in various fields, including military matters, intelligence, border control, transportation, law enforcement, and banking [\[23\]](#) . Prime Minister Mahathir then paid a visit to the United States on 15-17 May 2002 and held talks with President Bush.

The relations between the United States and Vietnam were also strengthened. Vietnam supported the U.S. in its war against terrorism, provided assistance in checking suspicious financial transactions and allowed U.S. planes to enter Vietnam's airspace. In May 2002, the U.S. invited Vietnam to observe its combined Cobra Gold military exercise in the region.

The Philippines, Malaysia, and Vietnam, all of them ASEAN members, were directly involved in the South China Sea dispute with China. Other ASEAN members like Thailand, Singapore and even Indonesia, the world's biggest Muslim country, supported the U.S. in its anti-terrorism war. In August 2002, the ASEAN-U.S. Joint Declaration for Cooperation to Combat International Terrorism was signed [\[24\]](#) .

The increased cooperation between the U.S. and its Southeast Asia allies exerted an influence on China's strategic calculations. China was concerned that greater military presence of the U.S. in the region might lead to its engagement in the South China Sea issue. As a result, China feared that the issue would be multilateralized and internationalized. Chinese Ambassador to the Philippines Guan Dangming warned Manila about the U.S. factor and stated that a third party should not interfere [\[25\]](#) . Chinese delegates constantly voiced their concerns over U.S. involvement in certain issues at ASEAN meetings. At the ASEAN-China Senior Ministerial Meeting held in Cha-am, Thailand, in March 2000, the head of Chinese delegation, Councilor Yangi Yi expressed his country's opposition to an ASEAN-U.S. military alliance, stating that the current confidence-building process in the region should not be meddled in by an outsider [\[26\]](#) . According to Leszey Buszynski, the

main reason leading to China's participation in the DOC was that this country realized the significance of a regional code of conduct in discouraging ASEAN member countries from further enhancing their political and military relations with the U.S., thus avoiding U.S. interference in the South China Sea dispute as well as its possible advantage in the Taiwan issue [\[27\]](#) .

With the DOC, China managed to exclude outside interference since an internal issue should be dealt with by the parties concerned. This was clear at the ASEAN-China SOM on the DOC implementation held on 7 December 2004 in Malaysia. China consistently opposed the option of inviting experts and scholars from countries outside the region in the regulations of the joint working groups.

Furthermore, the DOC, a political and non-binding document, did not affect any China's sovereignty claims. It also projected the role and image of China in the eyes of others as a country with a political goodwill to solve its existing dispute. At the same time, the DOC would not provoke any negative reaction from within China itself who always claimed absolute sovereignty over the whole South China Sea.

More importantly, the signing of the DOC conformed to China's guidelines and policy towards the South China Sea and was considered a step toward the process of 'shelving dispute for joint development'. China was driven by the great need of the marine resources, especially the energy, to serve its fast growing economy. China has become an oil-importer since 1996, therefore ensuring a constant supply and secure transportation routes played a decisive role in maintaining its sustainable economic development. A cooperative and relatively stable environment in the South China Sea would enable China to enhance its cooperation with other countries in the field it enjoyed advantage under the signboard of 'shelving dispute for joint development'. The Joint Marine Seismic Understanding between China and the Philippines in 2004 is a case in point.

From ASEAN's perspective, China's economic growth was seen as an opportunity for its member countries. On 5 November 2002, in Phnom Penh, an ASEAN-China Framework Agreement on Comprehensive Economic Cooperation was signed, paving the way for an ASEAN-China Free Trade Area in 2010. This represented an important step forward in ASEAN-China relations [\[28\]](#) . The potential profit from their two-way trade contributed to the signing of the DOC. 'From a political angle, the realization of a China-ASEAN free trade zone agreement indicates that historical fraud and political clashes between ASEAN member states and China are no longer one of the most important factors influencing ASEAN-China relations', quoted Amitav in his studies [\[29\]](#) .

The ASEAN member countries directly involved in the dispute joined the COC/DOC to maintain the status-quo and stability, avoid differences and conflict through cooperative and confidence-building measures. This, therefore, could bolster cooperation in the South China Sea. Their ultimate goal is to foster the legal foundation for their legitimate rights in the area, including the utilization of and benefit from resources in the South China Sea. For other ASEAN members not directly involved, the DOC enhanced their position, strengthened their relations with claimants, and benefited from the South China Sea cooperation. These differences from the two groups might weaken ASEAN as a group.

“ASEAN member states have different relations with China and hold conflicting views over their potential threat. The lack of unity in the Association stems from the fact that the sovereignty rights over the Spratly Islands do not pose a direct threat to the national defence of ASEAN members”, goes a comment on the DOC by Dr. Ralf Emmers from the Institute of Defence and Strategic Studies, Nanyang Technological University, Singapore [\[30\]](#) .

Differences in interests and priorities made ASEAN accept the DOC since it was the only way to save the face of the Association and project its unity image. On the other hand, it reflected existing division over substance in ASEAN. Pending a solution to the differences, ASEAN has chosen a middle-way document, a DOC, with watered-down commitment and vague scope of application.



CONCLUSION

Although a binding code of conduct had been considered the primary goal, ASEAN eventually accepted a political document due to the differences among its member countries over national interests and priorities in foreign policies in general and with regard to China in particular. The DOC, therefore, was not a document to resolve territorial disputes but to create a friendly environment through confidence-building measures and cooperation activities for a long-term solution.

The DOC, however, indicated a change in China's approach to the South China Sea dispute. Although China insisted on its sovereignty over the disputed areas and favoured bilateralism in the settlement of the issue, it was prepared to participate in multilateral mechanisms to enhance its role, maximize its profit and sow division in a possible anti-China coalition in the region. China accepted legally non-binding regulations to protect its fundamental interests.

A relatively 'softer' China's policy toward the South China Sea might be resulted from certain factors, including i) ASEAN's consensus and unity; ii) an increasing engagement from outside forces, especially the United States, in the South China Sea issue; and iii) China's need to project a good image and promote its relations with other countries in the region.

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