Partnership for Peace in the South China Sea

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This working paper is derived from a research collaboration between the Centre for Strategic and International Studies (CSIS), the National Institute of South China Sea (NISCSS), and the Rajaratnam School of International Studies (RSIS), through three main conferences in 2015 and 2016. The objective of the project is for the Track 1 to be able to grasp our main points and allow them extra room to detail and flesh out the more general points included in the policy recommendations. The report attached on the annex.

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By Gilang Kembara

Abstract

The peaceful resolution and stability of the South China Sea is of utmost importance to the countries of Southeast Asia. A peaceful resolution will also be the guarantee for a positive and conducive future relation between China and Southeast Asia. As such, through the project “Partnership for Regional Peace: Operationalizing ASEAN-China Strategic Partnership in Southeast Asia,” we seek to find ways and means to bridge out the differences between claimant states and open paths of cooperation through the recommendations made. Four policy recommendations on these areas were thus made: (1) Legal Principles to Promote Cooperation and Minimise Tensions in the South China Sea, (2) Confidence Building Measures, (3) Preventive Diplomacy, and (4) Crisis Management. This report is intended to serve as an input and feedback to the various governments of ASEAN member states and China, and to contribute to an everlasting solution in the South China Sea.

Keywords: South China Sea, ASEAN, China, Preventive Diplomacy

Latest developments in the SCS

Philippines-China Relationship

The geopolitical landscape over the South China Sea post-2016 PCA Ruling has seen a complete change of actions by most (but not all) of its claimants. The most palpable changes came from one of the staunchest critics of China in the region, the Philippines. Under the current president, Rodrigo Duterte, the Philippines have reverted its confrontational policies against China to a more diplomatic overtone. It has been indicated that the Duterte administration seeks to advance itself from a “tactical (short-term) to a strategic or long-term appeasement of China.”¹ President Duterte rose to

prominence by criticising the Aquino’s administration’s policy of balancing China in the South China Sea. Although there have been several alterations of tones from President Duterte, observers have noted that the president “would follow former President Gloria Macapagal Arroyo’s national security policy of gravitating toward China while ignoring territorial defense and focusing on neutralising domestic security challenges such as terrorism and insurgencies.”

Dr. Aileen Baviera further noted “it may be anticipated that under Duterte, the Philippines may revert to (the) hedging strategy on China, in contrast to Aquino who had edged too close to (the) balancing/containment policy.” Despite Duterte’s desire to sever the alliance between the Philippines and the US, he has managed to found several obstacles along the way to achieve his goal. First, Duterte failed to calculate the reaction he received from members of the AFP (Armed Forces of the Philippines) of his intention to cut off Philippines-US military relationship. Even with his firebrand rhetoric to cancel all military exercises with the US, the Philippines ultimately managed to salvaged about half of the exercises last year, albeit conducted on a smaller scale.

Second, the Battle of Marawi caught Duterte and the AFP completely by surprise. None has predicted that the Islamist Insurgents would bring the fight into an urban environment within the country. The AFP is experienced in fighting insurgencies over in the jungle and in various natural environment. However, it has little to no experience in conducting urban warfare. As such, Marawi was a wake-up call for President Duterte who realised that the alliance with the US is still very much needed to counter the threat of insurgencies and extremism in the country. This was shown during the battle where US Armed Forces provided technical assistance and intelligence to the AFP.

**Code of Conduct Negotiation**

On August 6 2017, foreign ministers of the ten ASEAN member states and China have agreed to adopt a framework for a Code of Conduct (CoC) in the South China Sea. The

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adoption of the framework was seen as a breakthrough considering that any discussions on the CoC has been in hiatus over the past 15 years. China’s Foreign Minister Wang Yi commented on the progress by saying that the framework “brings stability to the issue, demonstrating a positive momentum. This shows our common wish to protect the peace and stability in the South China Sea.”

About a year after the adoption of the framework, the ten-member states of ASEAN and China has released a Single Draft South China Sea Code of Conduct Negotiating Text (SDNT), which would serve as the basis for the adoption of the CoC.

This 19-page long document is structured according to the previously adopted Framework Agreement on the Code of Conduct whereby it contains three sections – preambular provisions, general provisions, and final clauses. The document made it clear that it is “not an instrument to settle territorial disputes or maritime delimitation issue,” just as it was laid out within the Framework. It should be noted though that despite describing the document as a CoC on South China Sea, the document doesn’t clearly define the geographic scope of the South China Sea. Although this may be considered in the near future.

Looking into the document itself, there is a very large portion of it devoted to the prevention, management, and settlement of disputes in the South China Seas among parties. Indonesia offered, with respect to dispute settlement, that “the parties agreed, as appropriate, to resort to the High Council of the Treaty of Amity and Cooperation (TAC) at the consent of the Parties concerned…” and that “the parties agreed that any unresolved incident may be referred to an appropriate international disputes mechanism, at the consent of the concerned parties.” On the other hand, Vietnam proposed that parties settle their disputes “through friendly negotiations, enquiry, mediation, conciliation, and other means as may be agreed by the disputing Contracting Parties.”

The document also contains two options for monitoring implementation. The first option places responsibility with the ASEAN-China Senior Officials’ Meeting, which is

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supported by Brunei, Cambodia, China, Malaysia, and Singapore. The second option calls for setting up a Commission led by foreign ministers or their representatives as proposed by Vietnam.

On cooperation and confidence building, China’s proposal coincides with that of the other ASEAN states, albeit with more detail. On the cooperation for marine economy for example, China includes areas such as aquaculture and oil & gas exploration. It states that marine economy cooperation is to be carried out by the littoral states and “shall not be conducted in cooperation with companies from countries outside the region.” In addition to that, China calls for regular “military exercises and exchange of relevant information” as promotion of trust and confidence. It also expressed that “Parties shall not hold joint military exercises with country from outside the region, unless the parties concerned are notified beforehand and express no objection.” There are also passages within the document that are proposed by China that called for the “just and humane treatment of all persons who are in either danger or in distress in the South China Sea.”

Furthermore, the document does not make any reference about accession to the CoC by third parties. However, Brunei proposed that “following Entry into Force of the CoC, the Parties can jointly propose an UNGA (United Nations General Assembly) biennial resolution which would ensure all other countries respect the principles contained in the CoC. The SDNT also houses no reference to the CoC as a treaty under international law. Yet, it does contain a proposal by Vietnam that the Contracting States “have consented to be bound by the present Code of Conduct…” There’s also a suggestion by Vietnam to have the CoC be “subject to ratification” and the instrument of ratification be deposited with the ASEAN Secretary General who “shall register” the CoC pursuant to Article 102 of the Charter of the United Nations.

Policy Recommendations

*Legal Principles to Promote Cooperation and Minimise Tensions in the South China Sea*

It is important for all parties to fulfil a duty of obligation towards the adherence of international law. All forms of activities and cooperation within the South China Sea must take into account relevant international regulations set aside by the UN Convention on
the Law of the Sea (UNCLOS), respect agreements made within the Declaration of Conduct (DoC) and the Treaty of Amity and Cooperation (TAC). First among most is for states to fulfil its duty to exercise self-restraint, as laid out in paragraph five of the DoC.\(^7\) Rising tensions within the South China Sea has led to several instances of tense standoffs between claimant states. Chief among them in the past being the 2012 Scarborough Shoal standoff and the 2014 HYSY 981 standoff, which led to worsening relationship between China and the Philippines, and Vietnam.\(^8\) This reason invariably connects to Article 301 of the UNCLOS on the peaceful uses of the ocean, which express that “States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State…inconsistent with the principles of international law.”\(^9\)

States should also exercise good faith and avoid abusing rights of other states as declared in Article 300 of the UNCLOS.\(^10\) This entails that all activities need to be carried out in a manner that respects the principles agreed within the convention, with no intention to interfere in the rights of other states. Moreover, states that border an enclosed or semi-enclosed sea should find ways to cooperate with each other as stipulated within Article 123 of the UNCLOS.\(^11\) Three aspects of cooperation are covered within the article, which include the exploration and exploitation of living resources, protection and preservation of the maritime environment, and coordinate scientific research policies in the area. The article also point out that states may invite other states or international organisations to cooperate in the development of the provisions in the article.

Taking into account that territorial disputes between claimant states are still unsettled, it is recommended that states take into account the provisions set out in Article 74 on the delimitation of the exclusive economic zones between states, and Article 83 on the delimitation of the continental shelf between states. In particular, as stated within Article

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\(^7\) Association of Southeast Asian Nations (ASEAN), *Declaration on the Conduct of Parties in the South China Sea*, (2002)
74 and also Article 83, states shall make every effort to enter into provisional arrangement of practical nature under a spirit of understanding and cooperation, as well as to not jeopardise or hamper the reaching of final resolution to the disputes.\textsuperscript{13,14} In addition to that, any efforts made to conduct negotiation and make any arrangement to enhance cooperation should clearly express that it is made “without prejudice” to the status of any and all claims of the parties. This includes claims to sovereignty over features or to maritime jurisdiction.

Recognising that the South China Sea amounts to a major sea line of communications for numerous states, it is important for parties to observe the necessary measures. Parties must refrain from interfering with the navigation of the vessels or aircraft of others. In this regard, parties shall observe and implement the pertinent provisions of SOLAS and COLREGS. Parties should also refrain from asserting control over the airspace above the features they occupy or control. Moreover, parties should not navigate or fly within a given distance of features occupied or controlled by others. It is also recommended that parties should take necessary measures to ensure that vessels flying their flag and/or their nationals do not engage in destructive fishing methods that constitute a part of Illegal, Unregulated, and Unreported Fishing (IUU Fishing). Such methods include, but not limited to, cyanide fishing, dynamite fishing, coral mining, and harvesting of endangered species.

In an effort to conserve the living resources within the area, parties are to agree on a joint or coordinated moratorium period/area for fishing activities in the South China Sea to promote conservation and sustainable uses of fish stocks. Furthermore, parties are to inform other parties of their planned activities to undertake projects on or in assessment thereof, and to make the result accessible to all parties. Lastly, considering that the South China Sea contain lines of submarine cables, parties must allow the repair of those cables upon receipt of prior notification by the submarine cable repair ships.

Confidence Building Measures

Since the declaration of a joint-effort to establish a Code of Conduct (CoC) by ASEAN and China in August 2016. Optimism has dwindled down as the draft, expected to be finished in mid-2017, failed to materialise. In early 2018, Singapore as the current Chairman of ASEAN expressed a more pragmatic view, stating that it is unrealistic to expect a CoC in one as stated by the Defense Minister, Ng Eng Hen, during the ASEAN Defense Minister Meeting (ADMM) Retreat on February. With that regards, to ensure an establishment of a CoC in a reasonable time span, it is imperative for ASEAN-China to include not just Track I representatives but Track II as well, especially think-tank representatives to give their input. The US-Based CSIS Expert Working Group on the South China Sea, have managed to produce a blueprint for fisheries and environmental management in the region.

Claimants of the South China Sea must change their mindset that managing fisheries and the environment cannot be based solely on the overlapping territorial and maritime claims, but through perceiving the marine ecosystem as a whole. Taking example from Australia’s effort in geo-mapping the Great Barrier Reef Marine Park surrounding the country, that can be the first start for claimants of SCS to follow. Another notable example to follow is the OSPAR Convention that includes 15 countries surrounding the North-East Atlantic region. A secretariat regarding the management of fisheries and management should be made to further elaborate the rules of conduct, according to CSIS, several of the conducts that can be applied are:

a. The creation of a patchwork of fishery zones that includes a no-catch zone for depleted fish population to replenish and the creation of specific types fishing zones.

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17 Salvador, Susana, “Introduction from the Executive Secretary,” OSPAR Commission, https://www.ospar.org/about/introduction
b. Determination of the types of fishing allowed should be based on scientific criteria that takes into account the marine environmental condition.

c. The secretariat or multilateral body established should involve independent experts relevant to the marine sector both from the public or scientific area.

d. A clear division of responsibility between occupier and flag states where claimants should take responsibility for monitoring ships that violates mutually agreed upon fishing zones within 12 nautical miles of the outpost. If the 12 nautical miles overlap, a median line should be use to separate two areas of responsibility.

e. An agreement between claimants should be made not to encourage subsidized fishing to reduce overfishing in SCS.

f. Claimants should avoid activities that can damage the marine ecosystem such as dredging and land reclamation on unoccupied reefs and coordinate efforts to reintroduce threatened marine species in SCS.

g. A cooperation should be made to introduce marine scientific research to manage the health of the marine ecosystem in SCS.

With continuing land reclamation and militarization of most features in the South China Sea, it is imperative for parties to halt further development to de-escalate tensions between other countries. Further along the step is the law enforcement activities that is a vital aspect of CoC in SCS. All parties must adhere to international regulations, regardless of whether it is in opposite of the state’s national’s interest. As such, any actions conducted by a state’s law enforcement agency must not be in conflict with other state’s sovereignty and must strictly observe a good conduct behavior.

Enforcing good conduct over SCS can be further emphasized with Article 220 of UNCLOS relating to marine environment enforcement. Coastal states are required to enforce physical compliance to vessels that caused major damage to the coastline or related interest to the coastal state that includes detention of the vessel.\(^\text{18}\) Aside from

development of features, increasing military presence must also be halted. Increase of naval ships have resulted in several incidents of collision, such as one that involves a Chinese vessel and a Vietnamese coast guard ship in 2014.\(^\text{19}\) Not only that such incident could be deemed as provocative, but it also endangers the lives of the people on board.

In order to ensure such dangerous encounter to ever happen again, ASEAN and China must recall and strengthen their commitment to the Code for Unplanned Encounter at Seas (CUES). If such circumstance were to happen in the future, it is imperative for all parties to refer to the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) under the UN’s International Maritime Organization.\(^\text{20}\) COLREGs will be the guideline to ensure that no dangerous maneuvers will be done by vessels with the reason of a defensive response to a perceived threat by other parties’ vessel. Enforcing international laws such as UNCLOS, CUES, and COLREGs are required in order to prevent a build-up of militaristic action-reaction that can escalate to dangerous situations.

To promote multilateral joint-exercises between ASEAN-China, ranging from table-top simulations to field exercises, both parties can and should focus on non-traditional challenges such as piracy and terrorism. Such initiative had been welcomed by China stating on two occasion on the ADMM retreat this February, and in June during a Chinese joint naval exercise this 2018 with the purpose of enhancing mutual trust and safeguard peace and stability.\(^\text{21}\) From 2012 to 2016 there were seven actual or attempted pirate attacks in the South China Sea.\(^\text{22}\) Aside from that, there has been link to the recent Marawi siege in Philippines where IS gained their source of fighters from Indonesia and Malaysia, possibly travelling from the Malacca Strait crossing parts of the SCS.\(^\text{23}\) Existing agreement such as the ‘Regional Cooperation Agreement on Combatting Piracy and Armed Robbery


against Ships in Asia (‘ReCAAP’) and joint-exercise between China and Laos, Myanmar, Thailand’s police force since 2011 can be one of the example of model to follow.

**Preventive Diplomacy**

One possible method to pursue on preventive diplomacy is through the Code for Unplanned Encounters at Sea (CUES). Currently, CUES apply only to several naval forces but many have called to extend it to civilian coast guards. The proposals were issued by both Singapore’s Foreign Minister during a visit to China (2016) and the Philippines during 2016 ASEAN Defense Ministers Meeting (ADMM). However in the proposal, CUES will not cover non-naval maritime law enforcement agency (LEA) vessels that are heavily armed. CUES is not legally binding, yet it will form the basis of negotiations between ASEAN and China on other code of conducts (COCs).

There are several conditions that urged the extension of CUES to maritime LEA. First, Washington-based CSIS stated in their study that Chinese maritime law enforcement vessels were involved in two-thirds of 45 major incidents in South China Sea from 2010-2016. Second, their functions and responsibilities are different from navies, so that the inclusion of civilian coast guards in CUES is necessary. This makes the approach between navy and maritime LEA different, such as the application of maximum force (military) versus minimum force (coast guards). Third, multilateral cooperation between navies are less challenging than between the civilian LEAs, because navies have clear functions and a long story of cooperation. On the other hand, the role of maritime LEA in one country might be very different to another, hence a single COC between them should exist.

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During an unplanned encounter, the regulated communication procedures will maintain professional and polite signals to other naval ships. The escalation of a problem comes when heavily-armed marines, with the doctrine of ‘maximum use of force,’ have false communication procedures. Justin Goldman quoted Cpt. Ronald Oswald of the US 7th Fleet who mentioned that “bilateral exercises for CUES might be effective, yet, it is best if countries are exploring multilateral training opportunities.”

Furthermore, teaching English for staff at operational level is also urgently needed. Captain Oswald found that over the past year CUES has become fairly standard, especially at times where language is a barrier. However, this might only be applicable to navies who abide by CUES. Hence, English would be the universal language used in a direct communication between LEAs. In that sense, a multilateral, non-binding treaty could be understood in terms of crises prevention as well as de-escalation measures.

In addition to that, the establishment of hotlines are meant to solve disputes through direct, quick response phone calls between two parties to prevent accidents and incidents, particularly at the sea. In 2015, ASEAN members set up hotlines connection between Defense Ministers, under the framework of ASEAN Defense Ministers Meeting (ADMM). Later in 2015, China and ASEAN have agreed to set up hotlines connection between the Foreign Ministers to tackle emergencies in the disputed South China Sea. The best practice came from Japan-China Defense Ministries hotlines to ease off the high tensions in East China Sea that could potentially lead to a war. This mechanism could be further improve by installing hotlines between Chief of Navies, as they have direct order over well-armed operational navies during crises times. In addition to that,

communication will be more effective rather than constantly going through Defense Ministers.

The main measure of search and rescue (SAR) cooperation between ASEAN and China includes joint maritime exercises. The idea of search and rescue table and operational joint exercises had been proposed since the 2015 ASEAN-China Transport Ministers Meeting. Later in 31st of October 2017, the largest ever joint maritime drill was held in Southern China. According to Zhuang, there are many ships navigating the SCS, hence the purpose of the drill was to explore ways of increasing maritime SAR’s successfulness. It involved maritime organizations, coast guards, maritime salvage and forces, which sought for quick and efficient response during emergencies (fire, injured victims, ship leakage, underwater exploration). The second measure includes hotlines cooperation for emergency situations. Until 2017, two ASEAN countries (Cambodia and Laos) have established hotlines connection with China for SAR.

According to Vijay Sakhuja, SAR cooperation could soothe SCS tensions in SCS. The bound between countries could be achieved through formal, face to face high level official meetings, or even from a more operational level such as external assistance (some countries might be better equipped than the others). Joint exercises could also be a way to achieve mutual understandings, such as eliminating language barrier/communication disruption during real-time crises. L.G. He also supports the idea of SAR cooperation and regular exercises, as it would enhance the trust, friendship, and confidence between ASEAN countries and China.

Crisis Management

In order to determine whether or not a crisis is unfolding, we must first define and clarify what the concept is. The concept of a crisis in international politics sparks from German literature, which notes that “where there is a crisis, there is no war, but there is no

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33 Mindef Singapore, Inaugural ASEAN-China Maritime Exercise Enhances Confidence and Practical Cooperation, 2018
peace.”34 Territorial disputes in the South China Sea “continues to be a source of tension and potential conflict between China and other countries in the region.”35 The state of the situation must be understood in order to conclude that a crisis is in place. This entails the exchange of efficient information at a multilateral level, using international agreements that are in place, such as the United Nations Convention on the Law of the Sea. The development of a multilateral, legally-binding code between China and ASEAN countries hold promise for reinvigorating a multilateral framework toward greater cooperation and conflict resolution.36 The complexity of information exchange means that boundaries need to be set to filter out the type of information shared and recognize the parties involved.

After acknowledging that a crisis is happening, the next step is to consider how to respond to it. Thus, it is essential for policy makers to have improved efficacy of communication channels. Claimant countries should also have access to hotlines that can easily be connected with one another. One of the keys to conflict resolution is communication, so this would be useful. It is also necessary to have early mediation by a Third Party, respecting sovereignty of nations involved, using international treaties such as the United Nations Charter as a guide.

Perhaps the most difficult step is formulating an exit strategy to end the crisis. Using international agreements, norms, diplomacy, and other peaceful mechanisms, the international community should encourage the reduction of maritime security vessels and have various tools handy to mediate and end the crisis. The South China Sea dispute requires ASEAN to play a bigger role in crisis mediation. In fact, according to Singaporean Defense Minister Ng Eng Hen, China and ASEAN are committed to completing code of conduct guidelines to handle disputes in the South China Sea.37

Looking forward, in order to prevent another South China Sea dispute from happening, a number of mechanisms should be utilized. There should be a promotion of crisis management awareness through empathy. Using past examples, the South China Sea can be used as a future case that may be helpful in alleviating a similar dispute. Track II can also be encouraged to organize simulation exercises for crisis management in the South China Sea. Raising crisis awareness among regional governments can also be beneficial in the prevention of another maritime dispute. According to the International Crisis Group, face-saving ways for Beijing to demonstrate its respect for international law include “incrementally backing away from the Nine-Dash line and bringing its claims closer to principles of the UNCLOS.” Building people-to-people confidence in addition to military-to-military confidence can also provide trust, confidence, and transparency among states to prevent another similar crisis from occurring.

**Conclusion**

The presence of a legally-binding international regulation doesn’t guarantee that ratifying states would ascribe to the provisions laid out within it. Thus, states should establish cooperation based upon the principle of good faith, and non-prejudice to enact the various articles laid out within the regulation. In the case of the South China Sea dispute for example, states should pursue cooperation under the spirit of the UNCLOS to enact its provisions, such as delimitation of maritime boundaries, and joint scientific exploration. Such cooperation would work well to minimize tension that might arose from misunderstanding or vagueness of information to a certain issue.

Moreover, states must exercise self-restraint, and avoid any actions that would further complicate issues within the area. In observance with the Declaration of Conduct signed in 2002, it is the duty of all states that cooperation, especially on non-traditional security issues, must be pursued in an integrated approach. This is to promote confidence building measures among the states, which could be enacted through a series of joint

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exercises on aspects such as safety of navigation, search and rescue, and humanitarian assistance and disaster relief (HADR). Furthermore, it is also important to engage relevant maritime law enforcement agencies into these exercises, as they are the principal stakeholders in enforcing and upholding the internationally agreed regulation.

Certain measures on preventive diplomacy are to be enacted to avoid further escalation of tension in the area. Implementing a Code for Unexpected Encounter at Sea (CUES) upon maritime law enforcement agencies (MLEAs) to enhance mutual understanding and ties between various MLEAs. To ensure that CUES agreement is sustained, capacity-building aspects between MLEAs staff at operational level should be taken into account. In addition to that, hotlines between various stakeholders among the claimant states must be set up to provide direct communication at the higher level. This would help to avert possibilities of miscommunication, which could increase agitation between claimants. States should also look into the possibility to foster cooperation in the field of Search and Rescue (SAR).

In the event of a conflict, four approaches to manage the conflict are set up. First, to identify an upcoming conflict, states must conduct information exchanges at the multilateral level to try to clear any confusion and avoid any misinterpretation of actions. Second, responding upon a crisis, hotlines must be use to provide a fast and direct communication between high-ranking leaders, and states should seek out early mediation by a third-party. It is advisable that Track II platforms are used to change the political mind-sets to see the bigger picture beyond national interest. Third, on ending a crisis, states should start to reduce the amount of maritime security vessels in the area, engage upon various opinions to mediate and end the crisis. Moreover, ASEAN should be engaged to play a bigger role in mediation. Fourth, to better manage future crisis, states should promote crisis management awareness at the national and regional level, engage further people-to-people, as well as military-to-military exchanges to promote confidence, and utilize Track II platforms as a forum to promote mutual understanding of lessons drawn and organize simulation exercises for crisis management in the South China Sea.
About the Authors

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Gilang Kembara is currently a Researcher at the Centre for Strategic and International Studies (CSIS) in Jakarta, Indonesia. He specialises in the field of strategic & security studies, and has an interest in maritime policy. He began his career with CSIS in 2015, and have since then been assisting various research projects on various issues. Gilang has collaborated with a variety of domestic and regional think-tanks. He has spent time as a fellow at the National Institute for South China Sea Studies (NISCSS) in China, helping to establish the China Southeast Asia Research Centre on South China Sea (CSARC). Gilang has had his works published in local journals and newspapers.
Annex
Partnership for Regional Peace:
Operationalizing ASEAN-China Strategic Partnership in Southeast Asia

A Project on
Finding A Resolution to the Issues on the South China Sea

Project Background

For the countries of Southeast Asia, the peaceful resolution and stability of the South China Sea is critical to assure the establishment of a peaceful region. A peaceful resolution will also be the guarantee for a positive and conducive future relation between China and Southeast Asia.

At the Government-to-Government level, the Association of Southeast Asian Nations (ASEAN) and China are conducting dialogues on the South China Sea in at least two frameworks, namely the Joint Working Group (JWG) and the Senior Official Meeting (SOM), both of which include the deliberation and negotiation of the implementation of the Declaration of Conduct (DOC) and the formulation of the Code of Conduct (COC).

A lot has been discussed and important issues have been agreed upon. Some insights to the Track 1 proceedings show that there was at a point the intention to quicken the process and to give more authority to the JWG. In fact, there was a common idea earlier between ASEAN and China to go straight to the content of the DOC and to use the approaches and communalities agreed earlier as the basis for formulating the COC. But that resoluteness has softened somewhat after the reactions expressed by ASEAN on the construction of artificial islands. In the JWG meeting in Tianjin there was the proposal to use the Code for Unplanned Encounters at Sea (CUES), which has been approved by the Asian-Pacific naval chiefs in Qingdao in April 2014, as agreed points for the COC.

Project Objectives

The project seeks to achieve two main objectives:

To provide a Track 1.5 venue, led by Indonesia and China, to forge common understanding between China and ASEAN on the importance of maritime security and good order at sea.

To generate ideas on how maritime challenges could be managed through the effective implementation of cooperation agenda between China and ASEAN, especially in managing the South China Sea.

Important note:
Overlapping claims existing on the South China Sea is not the main focus of this conference.
ASEAN and China have worked closely in contributing to peace and stability in East Asia, but they still have some works to do on the details and implementation which is always more complicated. Indeed, cooperation in regional affairs constitutes an important element of a strategic partnership, especially in ensuring and maintaining peace and stability in maritime domain. Both sides should be able to quicken the process, now that the basic issues had been discussed and would be taken up and finalized in the negotiations. Eminent Persons and Experts Group (EPEG) that is to be established hopefully can help the process in supporting them.

The EPEG will support and assist the proceedings in Track 1, and can be useful to a certain extent. But, since it is a government creation, it cannot be expected to come up with creative ideas and vision. A Track 2 (or Track 1.5) effort between think tanks is highly relevant in the generation of new ideas and new thinking for creating the regional order in the South China Sea. Indeed, there are already many efforts by think tanks all over the world to contribute. Some are useful, others less so, but in the meantime if ASEAN-China cooperation should be the centre-piece of finding a resolution to peace and stability as has been shown possible at the government level, a real big effort is needed to fill the gap.

In this project, ASEAN and China think tanks made the effort to propose some clear recommendations to the Track 1 on pertinent issues in the South China Sea. National Institute for South China Sea Studies (NISCSS) is the coordinator on the Chinese side, and relevant ASEAN think tanks under the coordination of the Centre for Strategic and International Studies (CSIS), assisted by the RSIS of Singapore are the ASEAN counterpart. Here, we convened wisdom from representatives from various countries and communities, and many kinds of ideas and thinking were debated, though not everything can be agreed upon, just like a multilateral mechanism for dispute settlement. All participants, including representatives from Track 1, came together to explore commonalities and reach consensus for effective implementation.

Conference participants

The meetings create an opportunity for regional thinkers, especially between ASEAN and Chinese scholars and policy-makers, to engage and research and dialogues on the specific issues, which would provide a platform to explore ideas and ways on how to ensure the establishment of a partnership for peace in the region. The project selected only the most qualified scholars and/or resource persons to be part of the meetings. All ASEAN countries and China were asked to send one government representative, preferably from the ASEAN-China Working Group, in their private capacities.

At the third conference, a group of international experts from outside ASEAN and China attended to give their inputs on the interim report.

There is also a Board of Advisors to provide feedbacks to the ongoing discussion and preliminary outcome.

Conference Schedule

The first conference was held in Jakarta on 14-15 September 2015, and the second conference was held in Haikou on 18-19 January 2016. In between the first two conferences, a co-chairs meeting was held in Bali on 3 November 2015. The third conference took place in Singapore on 21-22 July

About this Final Report

This report is the result of the three main conferences and studies done alongside them. It is intended to be concise, and may appear general in some of the points. The objective is for the Track 1 to be able to grasp our main points and allow them extra room to detail and flesh out the more general points included in our policy recommendations.
I. Latest developments in 2015 and 2016

During the past year, there have been heated maritime issues intertwined with a growing number of maritime conflicts in the South China Sea. The most vital one is land reclamation and military activities, which have caused new issues and could cause the window of compromise and cooperation to be growingly narrow. These activities result in opposition and criticism from countries both within and outside of the region.

Participants of the conference made profound deliberation on these developments and recognised the arising problems, discussed ways and means for resolution.

Another significant matter is the Philippines-China Arbitration. On 29 October 2015, the Permanent Court of Arbitration “on behalf of the Arbitral Tribunal in the Philippines v. China arbitration” released a nine-page press release, which explained that the court unanimously decided that it had jurisdiction over the dispute. The release also explained that the tribunal, convened under the provisions of UNCLOS, would hold further hearings. The hearings took place in November 2015. On 12 July 2016 the international Arbitral Tribunal issued its award. Beijing rejected the ruling.

The third event is the process of COC consultation. Based on DOC, COC is institutionalized to manage South China Sea disputes, especially aimed at designing confidence-building measures and establishing crisis management mechanisms. Compared to DOC, COC is expected to be a more legally binding agreement.

II. Dispute Settlement Mechanisms

Ideas and new thinking regarding dispute settlement mechanisms was a “favorite” topic discussed throughout the project. For example, one idea is to introduce a third party dispute settlement mechanism to settle the disputes, with the consideration that in bilateral mechanisms one party may not be willing to bend for fear of domestic opposition. A third-party mechanism will add some fairness to the process and make it more likely for one party to make concessions. Chinese participants opposed this idea, and have expressed their intention to limit the possibilities of a third party settlement mechanisms.
III. Legal Issues

At the first conference, the project highlighted the topic of United Nations Convention on the Law of the Sea (UNCLOS) vis-à-vis the historic right of China, which is a topic that was very relevant in the midst of China’s reclamation of some islands in the South China Sea.

At the second conference, the discussion was more specified to discussing the legal principles of maritime domain, which include the general principle of international law, the relevant provision of UNCLOS as well as the DOC, the ASEAN Treaty of Amity and Cooperation (TAC), the principle of non-prejudice, and recommendations for practical cooperation. The discussions took place as an attempt to examine major legal issues and principles inherent in the South China Sea disputes, to enhance common understanding on such principles between ASEAN and China. The discussions also touched upon elements of the law of the sea relevant to the South China Sea, including the Vietnam-China and Philippines-China cases.

UNCLOS could be used as a reference or vehicle (among other references) for discussion on the South China Sea disputes, thus there should be commitment of both ASEAN and China to abide by the principles of UNCLOS and the DOC. Articles of UNCLOS that are relevant in the South China Sea issue are 301, 74, and 94; all of which should provide general principles for countries involved in the South China Sea disputes. Nonetheless the project still debates the degree of relevance of each of these articles. With regards to territorial disputes and overlapping claims, the principle of non-prejudice should be upheld.

The project sought to form a guideline that would be applicable for all stakeholders of the dispute. However, the differing perception of participants with regard to international law such as UNCLOS proved to be problematic. Nonetheless, the project reaffirmed the importance of the commitments of states to the purposes and principles of the Charter of the United Nations, UNCLOS, the Treaty of Amity and Cooperation in Southeast Asia, as well as the Five Principles of Peaceful Coexistence. The project also emphasized the importance of States to uphold the general duty to cooperate in all activities in the South China Sea.

Any negotiation and arrangement to enhance cooperation should expressly provide that it is “without prejudice” to the status of any and all claims of the Parties, whether to sovereignty over features or to maritime jurisdiction. Cooperation without prejudice promotes and enhances further cooperation because none of the parties give up any of their respective claims, nor do they recognize those of others.

IV. Extra-Regional Powers

This issue was not one of the main topics to be discussed in a Working Group; nonetheless, it kept being raised by participants during the plenary sessions, most likely because it was considered an important factor that influence the developments of the South China Sea disputes.
One view that was expressed during the discussion was how China’s land reclamation in the South China Sea offered a pretext to the United States, Japan and Australia to pay more attention to the disputes in the South China Sea. On 27 October 2015, the U.S. sent the USS Lassen into 12 nautical miles of Subi and Mischief reefs on the pretext of maintaining freedom of navigation and pledged more of the same operations in the future. In 2016, the U.S. navy again staged its freedom of navigation operation (FONOP) in the South China Sea with the USS Curtis Wilbur in January and USS William P. Lawrence in May. Japan also made similar claims, and conducted joint exercises with some ASEAN members.

This shows the increasing involvement of the extra-regional powers in the disputes, which adds to the dynamics alongside the continuous interaction between China and ASEAN in various frameworks of dialogues. This is the reason why this project invited international experts, outside of ASEAN and China, to also give their comments to our discussion.

V. Joint Cooperation

The project discussed possible joint cooperation or activities between ASEAN states and China in the disputed areas, and to promote sustainability efforts for peace. There are four areas on possible activities: Marine Environmental Protection; Marine Scientific Research (MSR); Management and Conservation of Marine Living Resources; and Management and Conservation of Marine Non-living Resources.

VI. Confidence Building Measures

The project made the effort to identify specific and doable, short-to medium-term military, political-diplomatic, economic, and functional measures that may be pursued in order to (a) de-escalate tensions and prevent new conflicts from occurring; (b) create a positive (and publicly-support) political atmosphere for dialogue and cooperation”, considering the limit of time.

There are at least four areas of activities that can be pursued: marine environment protection, marine scientific research, management and conservation of living resources and non-living resources. In addition to those, there are specific examples of such as regional fishery management, the Code for Unplanned Encounters at Sea (CUES), coordination among the law enforcement in exclusive economic zone (EEZ), and coral reef conservation.

The project also assessed the roots of strategic and lack of mutual confidence by regional states in addressing maritime disputes; reviews the trust-making on the policy level between China and ASEAN. Moreover, the most frequent incidents that trigger conflict and conditions under which escalation is most likely to occur were identified.
VII. Preventive Diplomacy

The project discussed potential practical measures for cooperation between ASEAN and China as a way to prevent conflicts and promote cooperation between the two sides. There were three key questions: (1) What measures are recommended as a part of preventive diplomacy process between ASEAN and China? (2) What are the principles for these measures to be implemented? (3) How should these measures be implemented?

The guiding principles for cooperation are: (1) Based on consultation and consensus; (2) Proposed measures must be non coercive, and voluntary upon specific request and clear consent of all parties directly involved; (3) Proposed measures should be in accordance with universally recognised principles of international law and regional agreements including UNCLOS and the DOC; and (4) proposed measures must be without prejudice, (i.e. having no impact on states’ claims in the SCS.)

The definition of preventive diplomacy must be based on that defined by the ASEAN Regional Forum (ARF) in 2001, which covers three major points: (1) To help prevent disputes and conflicts from arising between States; (2) To help prevent such disputes and conflicts from escalating into armed confrontation; and (3) To help minimize the impact of such disputes and conflicts on the region.

VIII. Crisis Management

The project made the effort to clarify the definition of crisis. This includes, for example, clarification of both concept and character of unexpected encounter at sea, especially how to define “unexpected”. There is also the need for a thorough look at the sources of crisis, the distinction and categorization of different ships involved in a crisis at sea.

The most important discussion on this topic was on how to deal with a crisis. First, it is necessary to distinguish the relationship between escalation and over-reaction of a crisis. It is general acknowledged that over-reaction is a kind of abuse of strength, while escalation refers to the crisis itself. Nevertheless, differences between these two concepts are fundamental. Second, as most crises result from mixed encounters, there are a number of difficulties that people are faced with, language barriers in particular. In general, there should be more transparency, more information exchange, trust, confidence, improving mechanism, better institutionalised.

IX. Code of Conduct

The general consensus throughout the project was to build the COC as the “rules of the road” for South China Sea, operating in three broad capacities: promoting confidence; preventing incidents; and crisis management (managing incidents if they have already occurred). Moreover, the project also agreed not to draft the COC, as it was not the main objective. Rather, the project focused on the substantive elements of the COC, such as its objectives, the main parts and structure, challenges, and what should and should not be included.
POLICY RECOMMENDATIONS

I.

Legal Principles to Promote Cooperation and Minimise Tensions in the South China Sea

1. The project stresses upon the importance of States to uphold the general duty to cooperate in all activities in the South China Sea. Taking into account UNCLOS, DOC, the UN Charter, and TAC, the project calls attention to on the following principles:
   a. Duty to exercise self restraint (Paragraph 5 of the DOC);
   b. Peaceful uses of the ocean (Paragraph 4 of the Preamble and Article 301 of UNCLOS);
   c. Good faith and non abuse of rights (Article 300 of UNCLOS);
   d. Cooperation among States bordering semi-enclosed seas (Article 123 of UNCLOS).

2. The project recommends that these following principles in Articles 74(3) and 83 (3) of UNCLOS be applied to all disputes in the South China Sea, pending the final resolution of such disputes:
   a. Duty to make every effort to enter into provisional arrangement of a practical nature;
   b. Duty not to jeopardise or hamper the reaching of final resolution of disputes.

3. The project proposes that any negotiation and arrangement to enhance cooperation should expressly provide that it is “without prejudice” to the status of any and all claims of the Parties, whether to sovereignty over features or to maritime jurisdiction.

4. The project recommends the following practical measures that could be undertaken by every party, without prejudice to the status of any and all claims:
   a. To refrain from interfering with the navigation of the vessels or aircraft of others. In this regard, parties shall observe and implement the pertinent provisions of SOLAS and COLREGS;
   b. Not to assert control over the airspace above the features they occupy or control;
   c. Not to navigate or fly within a certain distance (xx meters or xx nautical miles, or as may be agreed by parties) of features occupied or controlled by others;
   d. To take necessary measures to ensure that vessels flying their flag and/or their nationals do not engage in destructive fishing methods, practices, or activities such as cyanide fishing, dynamite fishing, coral mining, and harvesting of endangered species;
   e. To agree on a joint or coordinated moratorium period/area for fishing activities in the South China Sea to promote conservation and sustainable uses of fish stocks;
   f. To inform other parties of their planned activities to undertake projects on or in relation to features they occupy or control; to conduct environmental impact assessments thereof; and to make the result accessible to all parties;
   g. To allow the repair of submarine cables upon receipt of prior notification by the submarine cable repair ships.
II. Confidence Building Measures

In line with the implementation of the 2002 DOC (Para. 4, 5 and 6), which exhorts countries to exercise self-restraint, not take actions that would further complicate the disputes, and undertake cooperation especially on non-traditional security issues, the project recommends the following proposals that are mutually complementary and to be pursued in an integrated approach.

1. Urging for and pending the early conclusion of the Code of Conduct and without prejudice to comprehensive and durable settlement of the disputes over sovereignty and sovereign rights, parties are urged to begin the process of negotiating interim functional rules of conduct, such as for fisheries exploitation and conservation marine environmental protection and law enforcement activities promoting good order at sea. These functional rules are intended to prevent incidents that trigger conflicts and to promote habits of dialogue and cooperation. Together and gradually, they can contribute to the establishment of a regional cooperative maritime regime that can benefit claimant states, littoral states and user states alike.

2. In view of the recent developments in the South China Sea, ASEAN and China should cooperate to maintain regional peace and stability, including preventing situations that may be perceived as provocative or escalating tensions, such as the construction and use of facilities that demonstrate further militarization and unilateral assertions of jurisdiction. In particular, CBMs should be directed at preventing an action-reaction pattern of competitive build-up and deployment of military capabilities, involving regional as well as extra-regional states.

3. Multilateral joint exercises, ranging from simulations, table-top exercises to field exercises should be pursued, focusing on non-traditional security scenarios such as search and rescue, humanitarian assistance and disaster relief, and safety of navigation. These may involve military, paramilitary as well as civilian law enforcement authorities. Participation may be as inclusive as needed, and may be pursued under existing mechanisms and agreements such as ADMM Plus, ARF, 2002 ASEAN-China Agreement on Non-traditional Security Cooperation.
III. 

On Preventive Diplomacy

The project recommends the following preventive diplomacy measures:

1. Research the possibility to extend CUES agreement for civilian maritime law enforcement agencies (LEAs), or construct a code of conduct for LEAs in the SCS:

2. Capacity-building for agencies at operational levels
   a. CUES training for navies
   b. English teaching for staffs at operational level in the SCS, including the LEAs and navies;

3. Establish Hotlines connection between Chiefs of Navy;

4. Fostering all measures of cooperation for search and rescue;

5. ASEAN and China should jointly develop an early warning information cooperation to preclude potential conflict escalation. “Early warning information” should be understood in the diplomatic context, which refers to information sharing between parties regarding their intentions. This is not to be misunderstood with the military concept of “early warning system.”

The recommended measures would be applied primarily between ASEAN and China. However, as these are cooperative measures to prevent conflicts from occurring, they should be open to other stakeholders should any want to join.

The recommended measures could be implemented using the ASEAN-China Maritime Cooperation Fund. States could host events and workshops on voluntary and rotational basis. States are also invited to financially contribute to the initiative.
IV.

Crisis Management

1. On how to know that a crisis is unfolding, the project recommends the following:
   a. More efficient information exchange mechanisms at the multilateral level;
   b. Given the complexity of information exchange, boundaries need to be set on the type of information shared and the parties involved.

2. On how to respond to a crisis, the project recommends the following:
   a. Improve efficacy of communication channels between policy makers in a crisis;
   b. Setup hotlines between claimant countries;
   c. Early mediation by a Third Party (with the exception of sovereignty-related matters);
   d. Encourage the use of Track II platforms in changing political mind-sets to see the bigger picture beyond national interest.

3. On how to end a crisis (exit strategy), the project recommends the following:
   a. Encourage the reduction of maritime security vessels in a crisis;
   b. Have a pool of ‘old-hands’ available to mediate and end the crisis in a face-saving manner;
   c. ASEAN (especially the Secretary General and ASEAN Chair) to play a bigger role in crisis mediation.

4. On how to better manage the next crisis, the project recommends the following:
   a. Promote crisis management awareness through empathy;
   b. Use past examples as case studies when dealing with future crises;
   c. Use Track II as a forum to promote mutual understanding of lessons drawn from a crisis;
   d. Encourage Track II to organise simulation exercises for crisis management in the South China Sea;
   e. Raise crisis awareness among regional governments;
   f. Build people-to-people confidence in addition to military-to-military confidence.
Concluding Notes

This is the final report of the project “Partnership for Regional Peace: Operationalizing ASEAN-China Strategic Partnership in Southeast Asia.” The project included three conferences, where 60 to 70 people attended each of the conferences, with 50 from ASEAN and 12-20 from China. We intend to hand this report to the governments of ASEAN countries and China as input and feedback on the South China Sea issue. This is the contribution of ASEAN and China’s main think tanks and experts.

What have been initiated in the first conference in Jakarta and then matured in the second one in Haikou and then the third one in Singapore are the trust and confidence between ASEAN and Chinese participants of the conference. Even the officials representing the Track One has learned a lot about the different perspectives among states. The project takes pride in the openness and transparency of its processes. Such process is an effective catalyst for trust and confidence in conflict resolution.

The third conference in Singapore was held a few days after the arbitral tribunal’s decision; nonetheless, we decided to not allow the discussion to be dominated by that particular topic. We believe the importance of focusing on future cooperation and activities between ASEAN and China, which would be more productive for the region’s future. In addition to the participation of ASEAN-China think tanks, six international observers from USA, Japan, Korea, India, Canada and Australia also attended the third Conference, and presented their comments and inputs to the report of the previous two conferences. Two high-ranking representatives from the Governments (China and Indonesia) were also present and gave their comments and inputs. All important points of the discussion and the inputs of the observers have been taken into account into producing this final report.

As you may have read in this report, this project found that there are a number of topics and ideas to be studied further. Among them are rules about fisheries (especially IUU fishing) and the formulation of CUES (Code for Unplanned Encounters at Sea) for the civilian maritime Law Enforcement Agencies (LEA’s). In addition to the need for a more concise study on the implementation the DOC and formulation the COC, the proposal for further research has been taken up by the initiators of this project, namely CSIS and NISCSS. We have agreed upon the establishment of a permanent research institute called the China-South East Asia Research Center on the South China Sea. For this effort, a governing body has been established chaired by Wu Shicun and co-chaired by Jusuf Wanandi.

CSIS and NISCSS as co-conveners of the project convey our highest gratitude to all of those involved in this project. We would like to thank the Foreign Ministry of The People’s Republic of China for their generous support, financial and otherwise, for the series of conferences and for the work of the Institute mentioned above in the future. We sincerely hope that the results of the project, including the policy recommendations, would be useful for the governments of the countries in the region. Above all, we hope that our effort could provide profound contribution to the peace and stability of the region.