

NEGOTIATIONS ON SOUTH CHINA SEA CODE OF CONDUCT: DOES IT MATTER?

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Defence Minister Rajnath Singh, at the 9th ASEAN Defence Ministers' Meeting (ADMM) Plus in Cambodia in November 2022, expressed the hope that the "ongoing negotiations on the Code of Conduct [COC] on the South China Sea [SCS] will be fully consistent with international law, in particular, UNCLOS [The United Nations Convention on the Law of the Sea] and should not prejudice the legitimate rights and interests of nations not a party to these discussions".¹ Historical and current events back India's apprehensions.

Indonesia, currently holding the rotating presidency of the Association of Southeast Asian Nations (ASEAN), and China, on 22 February 2023 announced their intention to intensify their efforts to negotiate the COC.² The SCS has been an area of contested disputes, as various nations claim its islands and waters. China's growing military presence in the region has caused global concern. Some of the world's most heavily trafficked shipping lanes can be found in the waters of the SCS.

The overlapping claims on the Exclusive Economic Zone (EEZ) in the SCS have become a significant source of regional tensions and instability. China, in particular, has been asserting its sovereignty over nearly the entire SCS, claiming historical rights and referring to the 'nine-dash line', encompassing over 1.3 million square miles. Efforts to address contentions through negotiations and international arbitration have been slow and complicated.

China's exaggerated claims have been a significant reason for a hostile regional environment. Philippines brought the issue to the Permanent Court of Arbitration in The Hague. The court ruled essentially in favour of the Philippines and invalidated China's claims to most of the South China Sea. The tribunal declared that China's historical rights claim to the waters had no legal basis under UNCLOS.³ The tribunal also found that China's actions in the region, including building of artificial islands and interfering with fishing and oil exploration, violated the Philippines' sovereign rights.⁴ However, China rejected the ruling and continues to assert its territorial claims in the South China Sea.

Despite Chinese Foreign Minister Qin Gang endorsing ASEAN's strategic autonomy and agreeing to expedite negotiations for a Code of Conduct, the situation on the ground suggests a different reality. China seems determined to expand the existing islands and construct other artificial islands in the region, including military installations, ports and airstrips. China claims sovereignty over most of the sea, while other countries such as the Philippines, Vietnam, Malaysia, Brunei, and Taiwan have their territorial claims.

The ASEAN proposed a regional code of conduct to resolve territorial claims in the SCS. After years of negotiation with ASEAN, a non-binding Declaration of Conduct was agreed upon in November 2002 in Phnom Penh, Cambodia. The DOC aimed to promote peace, stability, and cooperation in the South China Sea region by providing a framework for managing disputes. It called upon the parties to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability. It urged for respecting the freedom of navigation and overflight in the South China Sea in accordance with international law.

Regional conflict resolution was expected to benefit significantly from this critical milestone. However, China occupied more islands and resorted to military activities. In August 2017, another document, the 'Single Draft South China Sea Code of Conduct Negotiating Text'⁵ (SDNT), proposed to establish a basis for the adoption of a Code of Conduct in the South China Sea. This was structured on the basis of the 2002 adopted framework.⁶ Experts suggest that given that the draft code was non-binding in nature, it is a 'limited document'.

The 2017 adopted framework had the 'so-called' intention to make an effective COC in a mutually agreed timeline. In November 2017, at the 20th ASEAN-China Summit, China proposed to complete COC negotiations by 2021.⁷ However, this intention has yet to see the light of day. Recent events and satellite images suggest that China is seizing new land in the South China Sea.⁸ Analysts note that China seeking control over the SCS is part of its plan to 'pursue regional hegemony'.⁹ Moreover, while most of the ASEAN member states appear to support the COC as legally binding, China has been opposing the binding nature of the COC.¹⁰

The latest meeting between the Chinese and Indonesian Foreign Ministers on 22 February 2023 does not mention when the next phase of negotiations will occur. The Ministry of Foreign Affairs of the People's Republic of China stated that China "will work with other ASEAN countries to fully and effectively implement the Declaration on the Conduct of Parties in the South China Sea (DOC), [and] advance the consultations on a code of conduct in the South China Sea at a faster pace."¹¹

The COC is often seen as a way for China to delay an agreement on SCS contentions, given its preference to deal with each ASEAN member state at the bilateral level, even as it proactively alters the situation on the ground.¹² China has fully armed at least three (Mischief Reef, Subi Reef and Fiery Cross) of its controlled islands.¹³ It seems an opportune moment for Beijing to resume talks on a regional code that upholds Chinese demands and advances its economic interests. However, this may come at the cost of both ASEAN member states regional interests and the concept of a free and open Indo-Pacific.

China has hindered ASEAN's attempts to reach a binding agreement for over 27 years. Despite the optimistic statements and assertions, there are still concerns that the negotiations between ASEAN and China regarding a COC will continue to be prolonged and evasive.

Views expressed are of the author and do not necessarily reflect the views of the Manohar Parrikar IDSA or of the Government of India.

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