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The South China Sea Dispute: Opportunities for ASEAN to enhance its policies in order to achieve resolution

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Abstract

This paper examines the ongoing dispute in the South China Sea with a view to identifying opportunities for ASEAN to enhance its policies in order to achieve resolution. It notes that China's longstanding dispute with a number of coastal states has resulted in an environment that is far from conducive to achieving peaceful settlement. It also notes that while ASEAN has tried to manage the dispute multilaterally through dialogue and consultation, it has not yet been successful in playing a mediating role due to a lack of consensus among its member states.

The paper highlights the evolution of the dispute and current developments within the South China Sea. It also examines China's foreign policy and its strategy in the South China Sea, as well as assessing the likely responses from ASEAN disputants and ASEAN's framework for dealing with the issue. The paper concludes by proposing a revitalisation of ASEAN, and suggesting how ASEAN should implement its policies to assist in managing the dispute, including how this is likely to impact on the situation over the coming decade.

The South China Sea Dispute: Opportunities for ASEAN to enhance its policies in order to achieve resolution

If your enemy is secure at all points, be prepared for him. If he is in superior strength, evade him. If your opponent is temperamental, seek to irritate him. Pretend to be weak, that he may grow arrogant. If he is taking his ease, give him no rest. If his forces are united, separate them. If sovereign and subject are in accord, put division between them. Attack him where he is unprepared, appear where you are not expected.

Sun Tzu, *The Art of War* ¹

Introduction

The South China Sea is unquestionably one of the busiest international sea lanes in the world, with Robert Kaplan describing it as ‘the throat of global sea routes’.² However, activities within the South China Sea are not only about seaborne trade and navigation; there is also considerable exploitation and exploration of natural resources, such as natural gas, oil and fish stocks. The littoral states with a particular interest in these natural resources are Indonesia, Vietnam, The Philippines, China, Taiwan, Brunei and Malaysia, while several international companies from countries such as the US, UK, Canada, India, Russia and Australia are also involved in commercial activities.³

However, China’s longstanding dispute with a number of coastal states has resulted in the South China Sea being labelled as ‘troubled waters’ or a flash point.⁴ Several of these states, namely Vietnam, The Philippines, Malaysia and Brunei, are members of ASEAN. Indonesia, which is also an ASEAN member, has an exclusive economic zone (EEZ) generated from the Natuna Islands, overlapping China’s so-called ‘nine-dash-line claim’ in the South China Sea. But Indonesia officially insists that it is not a claimant.⁵

Notwithstanding these claims, the South China Sea issue has much broader implications for maritime security, peace, stability and security in the region. Coastal states’ interests are centred on maritime boundaries, territorial sovereignty and the right to exploit the region’s resources, while many other countries’ interests are to ensure secure sea lines of communications (SLOCs) and in satisfying their national geopolitical strategies. For example, Japan and South Korea’s interests are to secure SLOCs for trade and oil transportation, and in fisheries, with roughly two-thirds of South Korea’s energy, and nearly 60 per cent of Japan’s crude oil imports (and 80 per cent of China’s) coming through the South China Sea.

Meanwhile, the US demands freedom of navigation through the South China Sea, as codified in the UN Convention on the Law of the Sea (UNCLOS), despite it not being a party to the Convention.⁶ Freedom of navigation is a particularly contentious issue between the US and China over the right of vessels to operate unchallenged in the 200 nautical mile EEZ claimed by China. In August 2015, during a regional meeting in Kuala Lumpur, US Secretary of State John Kerry asserted that the US will not accept any restrictions on freedom of navigation or overflight in the disputed South China Sea.⁷

Moreover, current developments associated with the dispute are far from conducive to achieving peaceful settlement. China’s construction of facilities on man-made islands has raised tensions and risked the militarisation of competing claims by other states. And ASEAN, which has tried to manage the dispute multilaterally through dialogue and consultation with China, has not yet been successful in playing a mediating role due to a lack of consensus among its member states on how to address sovereignty disputes.

This was evident during the 45th ASEAN Ministerial Meeting in Phnom Penh in July 2012, when member states failed to reach agreement on issuing a joint communiqué, reflecting the disunity of ASEAN on this issue.⁸ Still, more recent developments which saw China agree in 2013 to commence discussions on a code of conduct in the South China Sea, and attend a meeting in July

2015 on the implementation of a Declaration on the Conduct of Parties in the South China Sea, are more positive and indicate some progress is being made, with Malaysian Foreign Minister Anifah Aman noting that the latter meeting included 'important progress with regard to the code of conduct'.⁹

In the meantime, growing Chinese assertiveness reaps criticism not only from coastal states but also from the US, which has criticised China's artificial island-building project as posing a serious threat to stability in the region.¹⁰ Some would also argue that the determined way in which China is pursuing its territorial and jurisdictional claims indicates that China is prepared to disregard international law, jeopardise the maintenance of regional order, and its obligations to abide by regional as well as international mechanisms.¹¹

In considering these recent developments, it is assessed that ASEAN could follow any of three different pathways in order to resolve or defuse the dispute, namely to argue legal jurisdiction; pursue political negotiations; or promote the prospects for joint resource exploitation. However, it will be difficult to find a single, unified solution if it depends on current ASEAN dispute resolution mechanisms, as ASEAN is a grouping of states with individual national interests. That is not intended as a criticism but simply highlights that, as a regional organisation, ASEAN is neither structurally nor functionally organised to resolve such issues. In this regard, like the EU and NATO, in which member states have different national interests and struggle to achieve consensus on contentious issues, ASEAN is unexceptional.¹²

Against that background, the paper will examine the South China Sea dispute and ASEAN's policy response and strategy. Firstly, it will highlight the evolution of the dispute and current developments within the South China Sea. It will then examine China's foreign policy and its strategy in the South China Sea. The paper will then assess the likely responses from ASEAN disputants, before reviewing ASEAN's framework in dealing with the issue, and identifying its limitations. The paper will conclude by proposing a revitalisation of ASEAN, and suggesting how ASEAN should implement its policies to assist in managing the dispute, including how this is likely to impact on the situation over the coming decade.

Evolution of the South China Sea dispute

It could be argued that the South China Sea dispute is an intractable issue or 'wicked problem', having developed for decades, which presents a security risk to the region but for which no peaceful settlement is yet in sight. When the issue first arose, no-one could foresee the direction it would take. Today, the fact that tensions escalate from time-to-time to a level that may lead to military tension and deadly conflict, reflects the complexity of the issue and the strength of commitment by nations to protect their national interests.¹³

The first claim that China made regarding the South China Sea was in 1951 in response to the signing of the San Francisco Treaty.¹⁴ However, in 1947, the Nationalist Government of the Republic of China (Kuomintang) had published an 'eleven-dash line' map which subsequently became the basis of the 'nine-dash-line' claim after China removed two dashes as a concession to (North) Vietnam after 1954.¹⁵ China's resurgent claim, to more than 60 per cent of the South China Sea, and its ongoing occupation of several islands and reclamation activities on several reefs and rocks, including building airstrips and adding military fortifications, is creating a significantly-changed regional environment.¹⁶

The legality of China's actions is controversial, as the reclamation activities, in particular, have the potential to generate new territorial waters and EEZs. It is expected that these will not be recognised by the majority of the international community because of their legal ambiguity.¹⁷ Regardless, in late 2014, China classified its nine-dash line claim as a historical claim when it released the Chinese Government's 'Position Paper on a Matter of Jurisdiction in the South China Sea Arbitration', in response to a legal challenge initiated by The Philippines, asserting that:

Chinese activities in the South China Sea date back to over 2000 years ago. China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them.¹⁸

China's claim is based on the argument of 'historical discovery'. However, while it could be true that China discovered and named some features within the South China Sea, simple discovery without effective governance extending over a long period of time is not sufficient as a matter of law.¹⁹ This was shown by the precedent set in international arbitration of the Palmas Island dispute between the US and the Netherlands.²⁰ In that case, it was agreed that the US had 'discovered' Palmas Island. However, its claim of sovereignty was lost in arbitration to the Netherlands, which was the administrator of the island. So it could be expected that in international law, based on the precedent of the Palmas Island case, China would be challenged in asserting a lawful claim over the South China Sea based on 'historical discovery'.²¹

Other important events occurred in relation to the South China Sea between 1955 and 2015, which have further clouded the ownership issue.²² After the establishment of the People's Republic of China in October 1949 and its subsequent assertion of its territorial claim to the South China Sea, Taiwan in 1956 followed the example of China by claiming Taiping (Itu Aba) Island in the Spratly Islands and garrisoning permanent troops on the island. In 1970, The Philippines claimed the western portion of the Spratly Islands group by occupying five features. This was quickly followed by South Vietnam occupying six features and officially claiming the Spratly Islands as a Vietnamese province in 1974. In the same year, China took control of the Crescent Group of the Paracel Islands from Vietnam.²³ Then, in 1983, Malaysia occupied three features in the Spratly Islands and in 1986 claimed an additional two.

These island-claiming disputes continued in 1988, when China attacked Vietnamese forces on Johnson South Reef. In addition, China became involved in a territorial dispute with The Philippines when China occupied the Philippines-claimed Mischief Reef and built several structures on it in 1994. China and The Philippines also competed for ownership of Scarborough Shoal by placing flags and erecting markers in 1997. In 2012, China virtually annexed Scarborough Shoal by deploying maritime law enforcement vessels there on a permanent basis.²⁴ Then, in May 2014, the deployment of the Chinese oil rig Haiyang Shiyou 981 into Vietnam's claimed EEZ resulted in incidents and triggered a major crisis in Sino-Vietnam relations that raised tensions in the region to the highest level since the end of the Cold War.²⁵

While overlapping territorial claims are continuing, reclamation projects are also taking place within the South China Sea. Some countries, including Taiwan, Vietnam and Malaysia, have expanded their territory by land reclamation on existing islands. However, China is the only country that has undertaken land reclamation activities on reefs, thereby creating artificial islands in the South China Sea.²⁶ Such man-made constructions do not fall under the legal framework of UNCLOS. Therefore, China's projects to create artificial islands will generate complicated legal issues under international law or UNCLOS that are unlikely to be settled for years to come.

Consequently, the development of this situation in the South China Sea has the potential to result in unforeseen stakes and risks, such as generating an arms build-up in the region, in particular among disputant countries. If tensions rise, and waters of the South China Sea are classified 'high-risk' in terms of international shipping, this could result in increased insurance premiums or alternative routes or sources of supply being developed, with significant implications for global trade and commerce.

Recognising the potential of a deteriorating security situation, ASEAN made its first effort to create a positive atmosphere for eventual pacific settlement by adopting the 1992 ASEAN Declaration on the South China Sea which urged all parties to exercise self-restraint.²⁷ Earlier, in 1990, Indonesia—as a neutral party in the dispute—had attempted to facilitate a dispute-resolution process, in particular between ASEAN disputant states and China, by initiating an informal diplomacy initiative through a series of workshops involving academics and government officials in their private capacities. From 1990 to 2009, Indonesia organised 19 workshops involving the Chinese (as well as representatives from Taiwan), aimed at managing potential conflict in the South China Sea, under the auspices of the Policy Planning and Development Agency within Indonesia's Department of Foreign Affairs.²⁸

These meetings tried to achieve objectives that were summarised as ‘managing the potential conflicts, developing confidence building measures and exchanging views through dialogues’.²⁹ However, it could be argued that this was more an informal diplomatic exchange than a formal mechanism to develop implementation strategies to manage the dispute, as no binding agreement such as a code of conduct eventuated. Therefore, the only existing confidence-building mechanism for the dispute is the Declaration on the Conduct of Parties in the South China Sea, signed by all members of ASEAN and the Republic of China in 2002.³⁰

Although ASEAN successfully created the 1992 Declaration on the South China Sea—signed by the foreign ministers of Indonesia, Brunei, Singapore, Vietnam, The Philippines and Thailand—it is not a legally-binding agreement, rather it is an example of ASEAN’s internal diplomacy.³¹ Even so, the declaration did serve to reduce the tension among ASEAN states and several disputes were solved by bilateral agreement or through a third party.

For example, the dispute between Indonesia and Malaysia in 2002 regarding Sipadan Island and Ligitan Reef, and the dispute between Malaysia and Singapore in 2008 over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge were settled by utilising a third party such as the International Court of Justice.³² Along similar lines, the bilateral agreement of 1997 between Thailand and Vietnam on the delineation of their continental shelf and EEZ boundaries in the Gulf of Thailand; the 2003 agreement between Indonesia and Vietnam on the delineation of their continental shelf boundaries in an area to the north of the Natuna Islands; and the 2014 agreement on the EEZ boundary in the Mindanao Sea and Celebes Sea between Indonesia and The Philippines, are several examples of bilateral negotiations to solve maritime boundary disputes among ASEAN states within the South China Sea.³³

Still, ASEAN has not been successful at conflict resolution when negotiating with non-ASEAN states, where it seems that ASEAN’s spirit of collective goodwill is not as effective. For example, in 2002, ASEAN and China agreed to sign a Declaration of Conduct that promised to enhance favourable conditions for peace and find a durable solution to the differences and disputes among the countries concerned.³⁴ However, China has since responded in different ways in dealing with each disputant country which indicates it has shifted away from a collective ASEAN position, highlighting the ineffectiveness of the declaration.³⁵ China was able to do so because ASEAN itself could not retain its collective bargaining position—each ASEAN state has its own national interests and these prevailed.

In other words, as Carlyle Thayer has stated, the declaration was stillborn because it has not been implemented, even though implementation guidelines were agreed and adopted in July 2011.³⁶ Further developments, such as land reclamation by disputant states, reflect such failure—in particular, point five of the declaration which is to exercise self-restraint in the conduct of activities.³⁷ Additionally, even though point 10 of the declaration stated that the parties agreed to adopt a code of conduct to promote peace and security in the region, the disputant countries have not been successful in actualising it.³⁸ It seems that China is not interested in creating a code of conduct, evidenced by statements that it would discuss a code of conduct with ASEAN at an ‘appropriate timing’ or when ‘appropriate conditions’ were met.³⁹

It is clear that a code of conduct is still needed to overcome the declaration’s weakness and create a dispute-resolution process.⁴⁰ However, while ASEAN states are generally supportive of the creation of a binding agreement, such as a code of conduct, it may not eventuate for many years as there is no real progress being made.⁴¹ ASEAN exhibited a newfound sense of unity and expected to reach agreement with China when the two parties agreed to start discussions on a code of conduct in September 2013.⁴² However, even after the Ninth Senior Officials’ Meeting on the Implementation of Declaration of Conduct in July 2015, only minimal progress has been achieved due to what is perceived as Chinese reluctance and the sense that China is biding its time to gain benefits from the ongoing development of its man-made islands within the disputed area.⁴³

Moreover, Ian Storey, for example, assesses that a code of conduct is unlikely to be agreed in the foreseeable future, particularly because—in his view—five key constraints still persist among the disputants, namely popular nationalism concerning sovereignty of the islands and features;

claimants' ongoing efforts to strengthen their jurisdictional claims; competition to exploit fisheries and hydrocarbons; the ongoing militarisation of the dispute and China's willingness to apply coercive pressure; and the growing geostrategic competition between the US and China.⁴⁴

In the absence of a peaceful settlement process, and with the pathway to a code of conduct seemingly at an impasse, disputes over territorial claims have resulted in an escalation of tensions exacerbated by a region-wide upgrade of military capabilities and the new-found assertiveness of several claimants. This has resulted in several deadly incidents in recent decades between China and two ASEAN member-states, Vietnam and The Philippines. In January 1974, a clash between China and Vietnam, known as 'the Battle of the Paracel Islands', resulted in 36 troops from both sides being killed.⁴⁵ Two years later, 74 Vietnamese sailors died in a clash between Vietnam and China over Johnson Reef.⁴⁶

China has also been involved in incidents with The Philippines. In 1996, opposing gunboats clashed near Capones Island.⁴⁷ In 1999, a Chinese fishing boat collided with a Philippines' naval vessel and sank off Scarborough Shoal and, in 2000, Philippines' soldiers shot at Chinese fishermen off Palawan Island, killing one fisherman.⁴⁸ In April 2012, there was a reported challenge between China and The Philippines in an effort to control Scarborough Shoal, which a senior PLA Army officer, Major General Luo Yuan, described as 'China's proactive stance' against The Philippines.⁴⁹

In addition, in May 2014, China dispatched an oil rig into Vietnam's claimed EEZ, with a back-up force from the PLA Navy of six warships and 40 coast guard vessels. It clearly deterred and intimidated the Vietnamese, which resulted in incidents of violence against Chinese people and businesses in Vietnam, and a rise of anti-China nationalism.⁵⁰

China's naval capability dwarfs other Asian countries' capabilities, with more than 300 surface ships, submarines, amphibious ships and patrol craft; indeed, Chinese naval combatants and maritime law enforcement vessels outnumber the combined maritime forces of Japan, Indonesia, Vietnam, Malaysia and The Philippines.⁵¹ Furthermore, as a reflection of Chinese confidence in its ability to manage the dispute, Beijing has reportedly adopted a civilian maritime enforcement policy in which civilian law enforcement vessels have taken the lead, supported by PLA Navy elements.⁵²

Some commentators have speculated that China's assertiveness over the South China Sea dispute may become more aggressive when the construction of artificial islands is complete.⁵³ By 2017, it is expected that 'these artificial islands will have been equipped with ports, barracks, battlements, artillery, air strips and long-range radar systems' that will enable China to project military and paramilitary power which, according to an un-named (but presumably Western) official source, will be 'a huge strategic victory for China'.⁵⁴

In response to the situation, disputants from ASEAN member states, notably Malaysia, The Philippines and Vietnam, are stepping up their own military modernisation.⁵⁵ In December 2014, for example, Rear Admiral Taccad, head of the Philippine Navy's weapons systems, announced that US\$885 million would be allocated for the procurement of three guided-missile fast attack craft, two guided-missile stealth frigates and two anti-submarine helicopters, asserting that 'events in the West Philippines Sea [South China Sea] actually gave some urgency on the acquisition'.⁵⁶

In October 2014, Malaysia similarly announced an increase in its defence budget by 10 per cent, in part because of concerns over Chinese assertiveness in the disputed waters around James Shoal, with Admiral Aziz Jaafar, Chief of the Royal Malaysian Navy, later announcing plans to procure 'eight guided-missile corvettes and six anti-submarine helicopters ... as well as the acquisition of small craft and the replacement of obsolescent torpedo and missile systems on navy ships'.⁵⁷

Meanwhile, between December 2014 and early 2015, Vietnam conducted strategic dialogues with India, Russia and the US, which included substantial military equipment procurement.⁵⁸ According to Murray Hiebert and Phuong Nguyen, Vietnam had the largest increase in defence

spending among Southeast Asian countries over the period 2004 to 2013, increasing its defence outlay by 113 per cent, with total spending in 2013 of US\$3.4 billion.⁵⁹

Another measure of China's assertiveness in the South China Sea has been an increase in the number of military exercises and requests for military assistance made by regional states to external major powers. In August 2015, for example, The Philippines requested US assistance in resupplying and rotating its military forces in the South China Sea because, according to an unnamed military spokesman, 'they face harassment from regional power China'.⁶⁰ Hiebert and Nguyen note that Vietnam similarly received military assistance from the US in the form of an US\$18 million maritime security package, and from Japan in the form of decommissioned coast guard vessels.⁶¹

The Philippines has also actively continued its program of bilateral military exercises with the US, which included an amphibious landing exercise (PHIBLEX 16) in September 2015, and the CARAT (Cooperation Afloat Readiness and Training) Exercise which took place off Palawan Island in June 2015.⁶² A Philippines' military spokesman asserted that 'the holding of CARAT Philippines 2015 ... was part of regularly planned and scheduled drills ... [and] had nothing to do with Manila's ongoing dispute with China'.⁶³ However, in a signal clearly intended for China, The Philippines also held a similar exercise with Japan, which occurred shortly after President Benigno Aquino's visit to Tokyo, during which he and Japanese Prime Minister Shinzo Abe 'pledged to strengthen ... their strategic partnership ... and agreed to open discussions on ... [an] agreement that would allow Tokyo access to Philippine military bases'.⁶⁴

Despite being a non-claimant state, Indonesia is also proposing to boost its defence measures near the South China Sea, with Indonesia's Defence Minister, Ryamizard Ryacudu, announcing in September 2015 that Indonesia will equip its Natuna Islands with a port and extend its military air base runway, noting that the South China Sea remains an Indonesian concern and one of the country's security challenges.⁶⁵

More broadly, the ongoing dispute has also dragged the US into heightened rivalry with China as a result of the potential disruption of its interests in the South China Sea, particularly in regard to freedom of navigation, as well as the support it provides to ASEAN claimants.⁶⁶ However, some have argued that as the only power that could counter China's geopolitical ambition in the region, the US does not have a sustained commitment to defending the rule and law and *status quo* in the South China Sea because of its lack of legal standing as a non-party to UNCLOS.⁶⁷

China's foreign policy and strategy

China's policy on the South China Sea dispute is seen by some as being deliberately vague.⁶⁸ As Shannon Tiezzi argues, perhaps China's foreign policy in relation to the dispute could be stated simply as 'China's rise is peaceful but China will not hesitate to use whatever means necessary to defend itself'.⁶⁹

The peaceful aspect was evident in a speech by Chinese President Xi Jinping in May 2014, celebrating the 60th anniversary of the Chinese People's Association for Friendship with Foreign Countries, when he asserted that 'China loves peace and will not pursue hegemony.... China will insist on a peaceful way of development ... [and] there's no gene for invasion in the Chinese people's blood'.⁷⁰ The somewhat harder dynamic was evident in a speech by General Fang Fenghui, Chief of the General Staff of the PLA, during a visit to the US in the same month, when he said:

We do not make trouble. We do not create trouble. But we are not afraid of trouble ... [and in relation to the] territory which has passed down from our ancestors into the hands of our generation ... China cannot afford to lose an inch.⁷¹

A closer reading of these two statements would suggest that, on the one hand, China promises not to use force with respect to territory over which it has no claim. However, on the other, it will stoutly defend territory over which it does have a claim—which would also suggest that China

has no intention of reaching a compromise with other disputants in relation to the South China Sea. China has also tried to warn off other states from interfering, asserting in May 2015:

On the issues concerning China's territorial sovereignty and maritime rights and interests, some of its offshore neighbors take provocative actions and reinforce their military presence on China's reefs and islands that they have illegally occupied. Some external countries are also busy meddling in South China Sea affairs.⁷²

This policy is not surprising; in fact, it is not new Chinese policy. The policy has been adopted to justify China's denial of responsibility for rising tensions in the South China Sea, for which it blames the Southeast Asian claimants, the US and Japan, as well as to justify the artificial island construction it is now undertaking on seven features in the Spratly Islands.⁷³

Moreover, while President Xi Jinping asserted in October 2014 that the basic tenet of Chinese diplomacy is to treat its neighbours as friends and partners to make them feel safe and help them develop,⁷⁴ China in practice has been exercising more assertive actions when confronting other disputants which notably are China's neighbours. Certainly, China's actions in constructing military bases in the South China Sea to reinforce its military presence in the area would indicate it has no intention of withdrawing its claim or compromising with other disputants.⁷⁵

There is also a concern that China will attempt to impose an air defence identification zone (ADIZ) in the South China Sea, as it did in the East China Sea in November 2013 in the area in dispute with Japan over the Senkaku (Diaoyu) Islands.⁷⁶ An ADIZ is an additional zone of aerial control, beyond territorial airspace, which would allow China to monitor approaching aircraft—both civilian and military—including by requiring them to identify themselves in accordance with Chinese instructions. Already, there have been several instances where Chinese military authorities based on islands in the South China Sea have warned US aircraft that they are approaching restricted Chinese airspace around the islands, based on what China would claim as territorial waters around the islands.⁷⁷

However, most of the islands in question are not natural islands but artificial constructions derived through land reclamation on otherwise submerged reefs, which the Commander of the US Pacific Fleet, Admiral Harry Harris, has described as China's 'Great Wall of Sand'.⁷⁸ Article 60(8) of UNCLOS states that such artificial islands are only entitled to a 500-metre safety zone around them. Most other countries, therefore, assume that—other than the 500-metre zone—passage through the South China Sea is regarded as freedom of navigation on the high seas, as articulated in Article 87 of UNCLOS.

That is certainly the position of the US which, on at least two occasions, has deliberately approached the islands by sea and air, ignoring Chinese demands not to do so, to enforce the US policy of freedom of navigation in and through what it contends are international waters.⁷⁹ More broadly, if China does implement an ADIZ in the South China Sea, it would likely attract considerable criticism from other countries, such as occurred when it declared its East China Sea ADIZ, which Japan and the US argued was contrary to international law.⁸⁰

A further uncertainty is the intent of China's land reclamation activities, notably on Fiery Cross Reef, which lies in the southern end of contested waters in the South China Sea, close to The Philippines. The construction could simply be Chinese efforts to improve the defensive posture of its claimed territory, providing an additional measure of protection, and a warning to other disputants that it is actively committed to the retention of its claim. Of course, China is not alone in undertaking such land reclamation. A number of regional countries, including Taiwan, Vietnam, Singapore and Malaysia have similarly expanded their territory, however, China is the only country that has transformed reefs into artificial islands in the South China Sea.⁸¹

There are also concerns that the construction of a military-grade airstrip on Fiery Cross Reef could be a tipping point in China's ability to project air power thousands of kilometres from its mainland. On the one hand, China has been at pains to explain the development in terms of its civilian potential, with a spokesman saying the island-building was 'beneficial to the whole of international society ... because it aided China's search-and-rescue efforts and environmental

protection work'.⁸² However, a more assertive line has also been evident in a number of official comments, such as the statement by a Foreign Ministry spokesperson that:

China holds a clear and consistent stance on the South China Sea issue. China's normal construction activities on our own islands and in our own waters are lawful, reasonable and justifiable. We hope that relevant part[ies] can take a calm view on this.⁸³

China's willingness to disclose its activities in the Spratly Islands—such as the media coverage of two civilian airliners landing on Fiery Cross Reef in early January 2016—could mean a move towards more transparency from China.⁸⁴ Or it could be an indication that China is now very confident in asserting its claim to the disputed areas. Similarly, the potential for the islands to be used by both civilian and military aircraft would not have been lost on other claimants, nor would China's significantly improved ability to patrol the area and enforce its claims in the South China Sea.⁸⁵ Regardless of Beijing's talk of benefitting 'the whole of international society', China's newfound strategic reach is unlikely to be viewed by other regional states as a measure to promote peace and stability.

It is arguable, therefore, whether China's foreign policy is intended to promote the peaceful rise expressed by President Xi Jinping.⁸⁶ In the view of some commentators, Beijing has become more assertive and more proactive in international affairs.⁸⁷ Others believe the change to be a reflection of an increase in Beijing's confidence, by exposing its capabilities, which would be a move away from the traditional dictum of 'hide your strength, bide your time', rather than a significant policy change.⁸⁸ So they argue that nothing has changed from the policy known as 'peaceful rise or peaceful development'. According to Zheng Bijian, a prominent policy adviser to the Chinese leaders who were the creators of this foreign policy concept in 2003, peaceful development was China's intention in order to become a great power peacefully.⁸⁹

Another perspective is that the Chinese foreign policy concept of peaceful development could be defined as a Chinese campaign to reassure the international community, particularly neighbouring countries, that China's future is benign and that its rise will not be a zero-sum game.⁹⁰ However, questions remain about the future of China's foreign policy, especially associated with territorial disputes in the South China Sea, particularly as China becomes stronger economically and militarily, and others—including the US—are critically interdependent on China's economy.⁹¹

Some would also argue that even though China's actions in revealing its new foreign policy have increased transparency, the future implementation and practice of the policy is still unclear.⁹² In part, that is because the Communist Party's power is paramount over the state, and the Politburo Standing Committee remains the country's decision-making hub—which could still lead to a lack of transparency.⁹³ Hence, in considering the South China Sea dispute in terms of China's foreign policy, there is obviously some prospect that the *status quo* will be maintained. However, what seems more likely—based on China's recent actions in enforcing its nine-dash-line claim—is that China will gradually become more coercive.

Moreover, Chinese increased assertiveness will certainly be evident if it establishes an ADIZ in the South China Sea. Such a strategy is clearly being discussed in Chinese military circles, with a senior researcher at the China's People's Liberation Army Military Academy, Senior Colonel Li Jie, saying publicly in February 2014 that the establishment of an ADIZ in the South China Sea was necessary for China's long-term national interest.⁹⁴ The concern of ASEAN states is that the modernisation of China's military will encourage Beijing to become more assertive and confident in claiming and protecting its territory in the South China Sea. If it does, China's stated ambition of rising peacefully and achieving peaceful development will likely be severely tested.

ASEAN's likely responses

Somewhat pessimistically, it seems that several ASEAN claimant states are coming to the conclusion that a negotiated settlement of the South China Sea dispute is unlikely. As The Philippines' government indicated in its statement to the Arbitration Tribunal in early 2013, in

its claim against China, 'over the past 17 years of such exchanges of views, all possibilities of a negotiated settlement have been explored and exhausted'.⁹⁵

Initially, The Philippines' effort received little support from ASEAN and its constituent members.⁹⁶ However, a March 2015 statement from the current ASEAN Secretary General might be interpreted that ASEAN supports The Philippines' decision to file arbitration against China, with Le Luong Minh reportedly saying that the nine-dash line is 'not binding on any claimant ... and that ASEAN supports The Philippines' efforts to bring about a peaceful resolution in its own territorial dispute with China'.⁹⁷

Notwithstanding the gloomy prospects for a possible settlement, ASEAN should be encouraged to continue making concerted efforts to settle the dispute, as there is every prospect that a failure to do so will adversely affect peace and security in the region. The next section of this paper therefore examines how ASEAN might respond to the issue over the coming decade, contending it may involve pursuing three different options on behalf of the involved parties as they seek a peaceful settlement of the issue, namely pursuing legal avenues, diplomatic or political negotiations, and/or joint development.

Legal avenues

Pursuing legal avenues to solve the South China Sea dispute will not be an easy pathway but arguably is the most well-founded option. The Philippines initiated its legal effort against China in January 2013 but—three years on and after six hearings of the Permanent Court of Arbitration—the case is still far from conclusion.⁹⁸ Therefore, predicting how this issue will play out in the legal field is difficult, particularly as China has ruled out using legal arbitration as the basis for dispute settlement.

Another reason is that the status of the sovereignty of the Paracel and Spratly Islands has been unclear since the dispute first emerged many decades ago. When colonial states such as the US, France, the Netherlands and Spain ruled littoral states around the South China Sea, the area was an important part of their economic activities. At the end of colonial rule, four international documents regarding the settlement of sovereignty and borders, namely the San Francisco Treaty, the Cairo Declaration, the Potsdam Declaration and the Joint Communiqué between the People's Republic of China and Japan, failed to generate any clarity regarding sovereignty of the Paracel and Spratly Islands.⁹⁹

In addition, Thi Lan Anh Nguyen has contended that there are three sets of laws governing the South China Sea: the law concerning territorial acquisition that is agreed by customary international law; the law of the sea (UNCLOS) that codified the maritime domain under customary international law; and the law of dispute settlement that resulted from the applicability of Part XV of UNCLOS in the effort of dispute settlement.¹⁰⁰ However, while any of these three laws might be applied to the South China Sea dispute, the reality is that the implementation of an award under the law needs an enforcement body which does not yet exist in any of the three areas of law.¹⁰¹ Hence, in this case, legal efforts alone are unlikely to lead to the end of the dispute.

Since all ASEAN states are parties to UNCLOS, it is also likely that ASEAN will continue to favour UNCLOS as the legal framework for assessing maritime claims or disputes. Meanwhile, even though the US is not a party to UNCLOS, the US supports adopting UNCLOS to resolve maritime claims and disputes in the South China Sea.¹⁰² The majority of external parties with an interest in the region, such as Japan, South Korea and Australia, also support UNCLOS as the legal framework for addressing claims or entitlements to maritime areas.

The Philippines has shown this predilection for the legal framework of UNCLOS by serving China with a formal claim to the Permanent Court of Arbitration in respect of maritime jurisdiction in what it refers to as the West Philippines Sea. Other disputants from within ASEAN, such as Vietnam and Malaysia, may decide to take the same action as The Philippines, particularly if its case is successful. This would be beneficial to all parties as a tribunal ruling (or any other legally-

recognised form of dispute resolution decision) would provide clarity to the case and, ideally, a satisfactory resolution for all parties.

However, there are several complications facing claimants pursuing a legal means of resolution. One is that the dispute negotiation process is protracted, which arguably benefits those countries intent on changing the situation on the ground, either through physical possession or reclamation activities such as China's 'Great Sand Wall'. Another is that China is strongly opposed to the legal avenue of the Permanent Court of Arbitration and may ignore any decisions that do not go in its favour.

Another problem is the practical reality that all disputants have a heavy economic dependency on China, which is ASEAN's largest trading partner, so economic considerations understandably influence the thinking of individual states to varying degrees.¹⁰³ Most are also mindful of the impact that taking legal action against China could have on their bilateral diplomatic relations. So with the individual states of ASEAN having such varying concerns, it is unlikely that ASEAN itself could generate the consensus to prosecute a legal claim against China.

Political negotiations

A second possible response in pursuing a settlement is the continuation of political negotiations, although this route too is likely to have problems in the coming decade. Most ASEAN states lack the political resolve to mount a serious counter-challenge to China, because of their economic dependency on China, resulting in a disunited ASEAN view on the issue. So reaching a political settlement with China using diplomatic efforts is unlikely to be successful for ASEAN claimant-states in the coming decade. However, as stated in its charter, ASEAN follows the principle of peaceful settlement of disputes, so ASEAN will continue to try and exploit diplomatic efforts through consultation and negotiation.¹⁰⁴

ASEAN has long been aware that China is reluctant to discuss the South China Sea issue solely on a multilateral basis and, even when it does, there is a lack of consistency and commitment in any political negotiations. The creation of the Declaration of Conduct, and internal meetings between ASEAN and China to discuss implementation of the declaration and a code of conduct, have not resulted in any concrete advancement on the issue, particularly because China seems to have adopted a 'hedging strategy'.¹⁰⁵

It is anticipated that this lack of a full commitment will continue over coming years until such time as China is confident it has further consolidated its national interests in the South China Sea. Therefore, the prospective outcome of any future political negotiation remains the same as in the past—more marking time. On the one hand, the stalling of political negotiations will have serious disadvantages for ASEAN. While political negotiations continue to end up in limbo, China will likely continue its reclamation projects in the South China Sea and continue bolstering its military garrisons in the region. On the other hand, addressing the dispute on a multilateral basis is important for ASEAN to show its centrality as a leading role-player in the region.¹⁰⁶

While ASEAN agreed in 2011 to adopt guidelines to implement the Declaration of Conduct, it is unfortunate that efforts to progress the suggested cooperative activities and confidence-building measures have not eventuated. Moreover, Chinese participation in code of conduct consultations in a number of recent meetings has not resulted in any agreement beyond two separate lists of commonalities.¹⁰⁷ It seems unlikely, therefore, that any progress will be made quickly in coming years, not least because China remains suspicious that the code of conduct is designed to thwart its activities in the South China Sea. China also likely perceives that a code of conduct is not necessarily an ASEAN formulation—China is well aware of US interest in the South China Sea, and that some other disputants—notably Vietnam and The Philippines—are keen to have the US involved in the dispute.¹⁰⁸

As a result, China does not want an ASEAN draft code of conduct to be the basis of negotiations, so it will continue to shy away from participating fully in future meetings on these issues.¹⁰⁹ However, it is predicted that ASEAN will continue its efforts to manage the conflict through negotiations under its principles of consensus and defusing tension, especially if ASEAN takes

into account Chinese Foreign Minister Wang Yi's commitments made during the 48th ASEAN Foreign Ministers' Meeting in August 2015, which were cited as maintaining peace and stability in the South China Sea; peacefully solving disputes through negotiation and consultation; controlling differences through rules and regulations; maintaining freedom of navigation and overflight in the area; and gaining mutual benefits through cooperation.¹¹⁰ If China's commitments are to be believed, they would provide an important basis for negotiations between China and ASEAN, and a significant step towards settlement of dispute.¹¹¹

Joint resource development

The final possible ASEAN response is to promote joint development of South China Sea resources. This could be undertaken even while international arbitration is proceeding because it is consistent with Article 74(3) of UNCLOS, which allows such activity during transition periods before an agreement is reached. The arrangement for joint development normally defines the limits of disputed areas and includes a means to share the resources in a way that is independent of the relative strengths of the claims.¹¹² There is some prospect that in the next decade, in the absence of a sovereignty dispute (as distinct from a territorial claim) over islands, joint development ventures could be considered by claimants.

In addition, joint development may be possible in areas which are subject to competing claims but which have not been claimed or occupied previously and therefore have no specific historical attachment for the claimant countries. Joint development initiatives would create benefits not only in promoting peace, security and stability to the region but also by providing economic prosperity to the countries concerned. As Zou Keyuan argues, a form of joint development among the disputants would significantly enhance the prospects for long-term peace and security in the South China Sea.¹¹³

ASEAN's framework and its limitations

The aims and purposes of ASEAN, when it was founded in 1967, were about cooperation in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the UN Charter.¹¹⁴ Since its establishment, ASEAN has evolved into a mature organisation by achieving these goals through its contribution to the region, notably in relation to peace, prosperity and geopolitical stability.¹¹⁵ This achievement is often attributed to the way that ASEAN takes decisions—the so-called 'ASEAN way', which has succeeded in shaping its identity—achieved by a process of consultation and consensus.¹¹⁶

Some believe that ASEAN is the core and most prominent regional institution of the post-war order in East Asia.¹¹⁷ The Association conducts its business in accordance with the ASEAN Charter, in particular the principles expounded in Chapter I Article 2.¹¹⁸ Since its establishment, ASEAN member states have concluded 39 maritime boundary arrangements, of which three were exceptions because they were achieved through third-party binding dispute settlement, namely the dispute concerning Myanmar and Bangladesh over maritime boundaries in the Bay of Bengal, the sovereignty dispute between Indonesia and Malaysia over Sipadan and Ligitan, and the sovereignty dispute between Singapore and Malaysia over Pedra Branca.¹¹⁹

Another ASEAN success has been its leading role in sponsoring wider regional cooperation through forums such as the ASEAN Regional Forum and the East Asia Summit, which involves the ten ASEAN members and eight dialogue partners (US, China, Russia, Australia, India, Japan, New Zealand and South Korea). Therefore, ASEAN's ineffectiveness in dealing with China in the case of the South China Sea issue has not yet tarnished the reputation of the organisation, since its mediation efforts have not been conducted as a third-party binding dispute settlement.

Indeed, the standard operation of ASEAN as a security organisation focuses more on conflict management than conflict resolution.¹²⁰ Moreover, it is ASEAN's weakness as well as ASEAN's strength that it has to operate within the mandate of its Charter, namely 'respecting the

fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity'.¹²¹

An associated element is the Treaty of Amity and Cooperation in Southeast Asia, which is a code of conduct to govern inter-state relations in Southeast Asia.¹²² As at 2013, 19 states outside ASEAN's membership had acceded to the Treaty, which included important players in the region such as China and the US. The Treaty underpins ASEAN's conflict management model. Therefore, ASEAN's solution to the dispute settlement methodology is through decision-making based on consensus and consultation, even if it is a slow process.¹²³

As a regional organisation whose members are only Southeast Asian states, ASEAN is based on international law, taking into account the Bangkok Declaration of 1967, the Kuala Lumpur Declaration of 1971, the Declaration of the ASEAN Concord of 1976 and the Treaty of Amity and Cooperation in Southeast Asia of 1976.¹²⁴ However, an ASEAN declaration is not binding on its members; rather, it is a political statement that provides no obligations for its members.

On the other hand, the Treaty is a binding instrument for managing relations between one nation and another with the explicitly-stated purpose of 'promoting perpetual peace, everlasting amity and cooperation among their people, which would contribute to their strength, solidarity and closer relationship'.¹²⁵ The Treaty adopts six fundamental principles which the signatories are expected to obey, namely: mutual respect; the right of every state to lead its national existence; non-interference; peaceful settlement of disputes; renunciation of the use of force; and effective cooperation.¹²⁶ However, the Treaty is not an instrument of law that solves legal problems such as territorial disputes. Consequently, ASEAN is not able to enact international laws.

As a result, ASEAN harbours three significant limitations in dealing with the South China Sea dispute—a lack of cohesion among its members, a slow ASEAN decision-making mechanism, and limitations on the implementation of its code of conduct. The first on these is reflected in the disunity of ASEAN's view on the South China Sea dispute. As Mark Valencia argues, 'ASEAN has no official position on the South China Sea dispute'.¹²⁷ In fact, it has divergent views on the dispute, as was illustrated by Cambodia during its chairmanship in 2012, when the lack of a joint communiqué tarnished ASEAN's credibility.

Other issues associated with the South China Sea dispute over which ASEAN states have a difference of opinion include whether China should be invited to participate in the drafting of a code of conduct, differences over which elements of the Declaration of Conduct should be emphasised in a code of conduct, and the key issue of whether ASEAN member states should discuss the issue first among themselves before consulting with China.¹²⁸

As a matter of fact, ASEAN, which started out as purely a political undertaking to tackle the climate of uncertainty and suspicion within the five founding states of ASEAN (Indonesia, Malaysia, Thailand, Singapore and The Philippines), is already committed to building an 'ASEAN community' by 2015, one of the three pillars of which will be the ASEAN Political Security Committee.¹²⁹ In the interim, one of the main goals is to create a vision of common mechanisms to deal with regional security issues.¹³⁰

However, the absence of unity within ASEAN members on the South China Sea issue, leading to the fact that the organisation as a whole cannot agree on a regional approach to the problem, indicates that it faces serious challenges to ever achieving such an ambitious vision. In the view of some commentators, ASEAN needs to pursue a more inclusive approach and united stand on the South China Sea dispute, otherwise it will face increasing criticism from the international community.¹³¹

The second limitation is ASEAN's way of making decisions. ASEAN's decision-making mechanism is through consultation and consensus, as stated in Chapter VII, 'Decision Making', Article 20, of the ASEAN Charter, which has been identified as the 'ASEAN way'.¹³² ASEAN's failure to issue a joint communiqué in 2012 was criticised by some as exposing the organisation's inability to reach consensus on key issues. However, consensus should not be seen in an absolute context, in which all members should share the same concerns and are willing to sacrifice some or all of

their interests to unify the organisation's view; rather, members should not necessarily have to sacrifice their interests as long as the organisation's needs are satisfied without damaging the interests of its members.¹³³

Moreover, Rhoda Severino argues that consensus is not an 'across the table' negotiation but rather a manifestation of goodwill and a giving of trust.¹³⁴ In fact, to some extent, a decision-making process through consensus to craft a dispute resolution is a slow process because Article 20(2) states that if consensus cannot be achieved, then an ASEAN Summit will make the decision. However, the decision-making process principle within an ASEAN Summit is also based on consultation and consensus, so the problem becomes cyclical.¹³⁵

In addition, there are four types of ASEAN meetings on different levels: an ASEAN Summit, an ASEAN Ministers' Meeting, an ASEAN Economics Meeting, and other ministerial meetings under the umbrella of the ASEAN Foreign Ministers' Meeting, which results in an inherently-slow process decision-making process—and suggests that ASEAN needs to modify both its definition of 'consensus' and how it is arrived at, to speed up the decision-making process.

The third limitation is on the implementation of the Treaty of Amity and Cooperation as a code of conduct. The Treaty began as a 'peace treaty' between its own member states but is now widely recognised as a code of conduct in inter-state relations in Southeast Asia.¹³⁶ However, the Treaty's mechanism for the pacific settlement of disputes, as stated in Chapter IV, which is through a High Council, has never been adopted to settle any dispute, not only among ASEAN states, but also between ASEAN states and other signatories to the Treaty.

Therefore, it could be argued that the Treaty's inability to resolve issues has resulted in China's perception that the South China Sea dispute is not a matter between China and ASEAN but a matter which China intends to discuss bilaterally with the individual disputants. Cambodia's Foreign Minister Hor Namhong might have reinforced this perception when he asserted that 'we are not a tribunal to adjudicate who is right, who is wrong'.¹³⁷ This aversion could be a reflection of ASEAN's principle of non-interference. But it is also the case that most of ASEAN's successes in settling disputes have been through bilateral negotiations or third-party settlements, with none by adjudication of the Treaty of Amity and Cooperation's High Council.

Recommendations

Some believe that ASEAN must not take sides in the South China Sea dispute but instead take and state a position which is neutral, forward-looking and encourages the peaceful resolution of the issue.¹³⁸ However, in order to be able to adopt such a stance, ASEAN must revitalise the founding arrangements of the organisation so that it can maintain its unity. Therefore, this paper suggests two policy recommendations for ASEAN to implement in revitalising the organisation: these are to redefine the terms 'consultation' and 'consensus'; and to empower the ASEAN High Council.

It cannot be denied that for more than four decades, ASEAN has been able to prevent serious conflict in the region. To some extent, ASEAN has achieved its initial primary objective to serve as a regional security community, promoting social and political stability, and providing its members with a voice to speak on issues in the same tone, through a process of consultation and consensus. Two examples are the creation of the Zone of Peace, Freedom and Neutrality during the Cold War, and the centrality of ASEAN in the ASEAN Regional Forum and the East Asia Summit in addressing contemporary security issues, even though the contribution of these forums is typically more discussion than action.¹³⁹

At the same time, ASEAN's tradition of consultation and consensus has had some negative impacts. But it has also provided benefits to the organisation in that the outcome of consensus is a firm sign of unity within the organisation. More recently, however, achieving consensus has been threatening the unity of the organisation.¹⁴⁰ Therefore, it is time for ASEAN to redefine the process of how it arrives at consensus, which this paper would argue could be done through the implementation of a code of conduct to resolve disunity among members if any of their positional stances contain elements that conflict with the constraints of the principles stated in the Treaty

of Amity and Cooperation. The objective of this policy would be to mitigate bias and different interpretations.

Currently, a code of conduct to manage the decision-making process within ASEAN does not exist. But such a code could and should be implemented. As ASEAN has previously amended its Treaty of Amity and Cooperation from the original version with the addition of new articles concerning the roles of the High Council, so ASEAN could do the same thing to introduce a new process for making decisions via a modification of the concept of consensus to one involving a mixed process of achieving consensus (or unanimity) and a voting system (with a majority-rule outcome).

As consultation and consensus are fundamental to ASEAN's culture and tradition, so this new code of conduct should have several levels or phases, ranging from purely implementing a unanimous decision, through to implementing a majority-rule voting decision. In between, there should be several levels that involve a mixture of these processes. The code of conduct should also specify the types of occasions when the organisation should implement a consensus/unanimity-based decision (such as when a situation exists that has a direct impact on a certain member) and the types of occasions where there is no direct impact to a certain member and the organisation may implement a majority-rule voting system in making a decision.

Agreement to adopt such a code of conduct for its decision-making process would ensure that ASEAN projects a greater degree of organisational unity to the international community. Another benefit is that the changed process would enhance the success of the proposed ASEAN Community.

The second recommendation is to take action to empower the High Council, which is mandated by the Treaty of Amity and Cooperation to adjudicate in dispute settlements. Indeed, originally only two of five articles dealing with the pacific settlement of disputes in the Treaty referred to the arrangements for a High Council. In 2001, ASEAN amended the Treaty by inserting new rules of procedure for the High Council, which provided comprehensive arrangements and powers to settle disputes.

However, Rule 19 of Part VII of the Treaty states that 'all decisions of the High Council shall be taken by consensus at a duly-convened meeting'.¹⁴¹ Consequently, it seems that ASEAN's habitual conformation to following its historical interpretation of 'consultation and consensus' has hampered the implementation of the use of the High Council to adjudicate disputes. This situation could change if a code of conduct were adopted relating to the decision-making process as discussed previously.

Furthermore, there is no provision in the Treaty that the High Council shall only be involved in resolving political and security disputes, or that its adjudication cannot be sought to solve legal issue such as in the South China Sea dispute. Some might argue that ASEAN is not a tribunal to adjudicate the rights or wrongs of a particular dispute. However, referral to the High Council may be an appropriate avenue to consider some of the legal issues or at least give recommendations for appropriate consideration to prevent a deterioration of the dispute.

It also needs to be remembered that Article 3 of the ASEAN Charter states that ASEAN is considered a legal personality, suggesting it has 'the lawful characteristics and qualities of an entity'.¹⁴² Accordingly, it could be argued that ASEAN possesses rights and obligations in international law, which includes the arbitration of legal claims. Hence, it is time for ASEAN to amend its policies and procedures by implementing actions to empower the High Council to provide a pacific settlement to the South China Sea dispute.

Conclusion

The increasing escalation of the dispute in the South China Sea may indicate a change of policy and strategic intent from disputant countries, especially by China which has the biggest claim to the area. Taking into account these recent developments, the territorial claims in the South China Sea have further increased the challenge of arriving at a long-term peace settlement of this dispute. Diplomatic efforts made by ASEAN over several decades to formulate a peace settlement

have not resulted in any significant developments, and it is a fact that even now ASEAN member-states have differing views on the issues associated with the South China Sea. This was particularly illustrated in 2012 when, for the first time in 45 years, the ASEAN Foreign Ministers' Meeting failed to produce a joint communiqué summarising its proceedings, because of concerns that the proceedings were implicitly critical of China.

Meanwhile, another significant development reflecting the level of frustration of ASEAN members over the South China Sea issue, as well as testing ASEAN's resolve not to interfere in the internal affairs of other countries, has been the action by The Philippines to refer its territorial dispute with China to an international tribunal. Some would argue that The Philippines' action is actually in line with what is mandated by the ASEAN Charter and the Treaty of Amity and Cooperation, namely to support the use of the principles adopted by international law.

However, The Philippines' action also shows that there is a level of distrust among ASEAN members as to whether the organisation can provide a satisfactory solution to issues in line with its members' national interests. On the other hand, it is a positive sign that the ASEAN principles of non-interference and the application of international law to settle a dispute are being applied, instead of resorting to the use of force. While some ASEAN states may feel that The Philippines should have consulted more broadly before it took such action, the outcome of the case is being eagerly awaited not only by the parties directly concerned but others who are involved in territorial disputes with China.

Another option that remains open for ASEAN to assist in resolving the dispute is to continue consultations with China, especially to actualise the creation of a binding code of conduct. However, these efforts will be more difficult given that China considers that the dispute in the South China Sea is not a matter between China and ASEAN but a bilateral issue between China and specific ASEAN countries. Given that the outcome will have significant ramifications both for ASEAN and a number of its members, it is in the interests of ASEAN as an organisation to involve all its members in the consultation process. This paper has also argued that another possible route that could be pursued is the joint development of resources in the disputed areas.

Meanwhile, the latest developments on the ground should be used as an opportunity for ASEAN to review its existing policies and instruments so as to improve the shortcomings of its existing dispute resolution mechanisms. To that end, ASEAN could formulate new policies that would assist in the peaceful settlement of disputes in the South China Sea. This paper has recommended two courses of action that should be implemented, namely the re-definition of the concepts of consultation and consensus, and that ASEAN should try to use the mechanism of the High Council to achieve a peaceful settlement of the dispute.

In particular, the redefinition and implementation of a new form of consensus decision-making should be regulated in the Treaty of Amity and Cooperation, including details which define the limitations on the use of consensus/unanimous decision-making, as well as the facility to apply a majority rule voting system with certain requirements. This would require ASEAN to make another amendment to the Treaty. Meanwhile, in terms of the implementation and use of the High Council, ASEAN should clarify the circumstances that should exist as a pre-condition for the implementation of the use of the High Council to settle legal disputes between signatories.

Should these recommendations be implemented, ASEAN would be better able to state its position on the dispute, which is neutral but forward-looking in seeking peaceful settlement. In addition, by implementing and empowering its High Council, ASEAN would have a structured dispute-settlement mechanism providing an enhanced prospect of addressing and reducing the competing legal claims of territorial sovereignty over islands in the South China Sea. In sum, the changes would enable ASEAN to better reflect the unity and purpose of the organisation, which is essential if it is to retain its influential position in contributing to the security and stability of the region.

Notes

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- 6 Freedom of navigation is a principle of customary international law, whereby all ships (military and commercial ships) flying the flag of any sovereign state shall not suffer interference from others states; this right is codified as article 87(1) of the 1982 UN Convention on the Law of the Sea (UNCLOS).
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