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To cite this article: Nian Peng & Chow Bing Ngeow (2022): Managing the South China Sea Dispute: Multilateral and Bilateral Approaches, Ocean Development & International Law, DOI: [10.1080/00908320.2022.2034555](https://doi.org/10.1080/00908320.2022.2034555)

To link to this article: <https://doi.org/10.1080/00908320.2022.2034555>



Published online: 24 Feb 2022.



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Managing the South China Sea Dispute: Multilateral and Bilateral Approaches

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ABSTRACT

This article investigates and examines the efficacy of the multilateral and bilateral modalities or mechanisms in managing the South China Sea dispute between China and Association of Southeast Asian Nations (ASEAN) claimant states. There are three multilateral modalities in the management and control of the South China Sea dispute: the “ASEAN+China,” “ASEAN+X” and “ASEAN-X” modalities. At the bilateral level, mechanisms have developed between China and the Philippines, China and Vietnam, and China and Malaysia. It is argued in this article that the “ASEAN+China” modality remains the most realistic multilateral arrangement currently, while the alternative options of “ASEAN+X” and “ASEAN-X” might be feasible in the long term. Meanwhile, while bilateral mechanisms have fostered trust building and pragmatic maritime cooperation in the South China Sea, they are facing a number of challenges.

ARTICLE HISTORY

Received 19 August 2021
Accepted 24 January 2022

KEYWORDS

ASEAN; China; COC; DOC; maritime cooperation; South China Sea Dispute

Introduction

In the words of the former Association of Southeast Asian Nations (ASEAN) Secretary-General (and Undersecretary of Foreign Affairs of the Philippines) Rodolfo Severino, “It is highly unlikely that the jurisdictional disputes in the South China Sea will be resolved anytime soon, if ever.”¹ The South China Sea (SCS) dispute is one of the most difficult and complex territorial/maritime disputes in the world. It covers at least two major island groups (Xisha/Paracels and Nansha/Spratlys), involves territorial and maritime dimensions, draws in multiple claimants, and is now entangled in a major strategic rivalry between China and the United States. For the foreseeable future, the SCS dispute can only be managed, not resolved.

In the past three decades, China, ASEAN, and ASEAN claimant states have developed various multilateral and bilateral mechanisms to deal with the SCS dispute. At the multilateral level, ASEAN and China have been engaging with each other on the SCS dispute since the mid 1990s, culminating in signing the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. Negotiations for the Code of Conduct

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¹ Rodolfo C. Severino, “The Philippines and the South China Sea” in Pavin Chachavalpongpun (ed), *Entering Uncharted Waters? ASEAN and the South China Sea* (ISEAS, 2014), 197.

(COC) are ongoing. In addition, at the bilateral level, China has engaged with the Philippines, Vietnam, and Malaysia, respectively, through various forms of bilateral maritime consultation mechanisms.

For a long period, bilateral engagement has been China's preferred mode of conflict management, while ASEAN claimant states generally prefer the multilateral modality. Today, this bilateral/multilateral difference still reflects, respectively, China's and ASEAN claimant states' preference in the management of the SCS dispute. But the line between the two approaches has been somewhat blurred, as all states are now involved in both bilateral and multilateral processes to varying degrees.² Given the escalating tensions in the SCS in the past decade or so (from the late 2000s until the present), most observers would likely assess that the existing bilateral and multilateral management mechanisms have yielded, at best, only mixed results. This kind of assessment, coupled with the lack of a significant breakthrough from these existing processes, has led to suggestions of alternative modalities, principally the "ASEAN + X" and "ASEAN-X" modalities. Both of these alternatives, however, are still only discussed and conceptualized among scholars and think tank analysts. They are not yet endorsed officially by any party in the SCS dispute.

The purpose of this article is to build on existing literature, reviewing and examining these existing multilateral and bilateral mechanisms as well as proposed alternative options, including their effectiveness and shortcomings. Following this introduction, the two subsequent sections, respectively, discuss and analyze the three multilateral modalities ("ASEAN + China," "ASEAN + X," and "ASEAN-X") and the three bilateral mechanisms between China and three ASEAN claimant states (with the Philippines, Vietnam, and Malaysia). This article concludes with a discussion of the future prospect of these modalities and mechanisms.

Multilateral Modalities

ASEAN + China

The "ASEAN + China" modality refers to the consultation, negotiation, and, wherever feasible, cooperation between ASEAN and China on the SCS issue. ASEAN has engaged with the dispute since 1992, when it first issued the ASEAN Declaration on the South China Sea in Manila.³ Initially, China was reluctant to accept that ASEAN had any role

² The literature on the multilateral and bilateral processes of conflict management in the South China Sea is voluminous. The following are some representative works in this area: Ramses Amer, "Ongoing Efforts in Conflict Management" in Timo Kivimäki (ed), *War or Peace in the South China Sea?* (NIAS, 2002), 117; Ramses Amer, "China, Vietnam, and the South China Sea: Disputes and Dispute Management" (2014) 45 *Ocean Development and International Law* 17; Rommel C. Banlaoi, "The Bilateral Consultative Mechanism on the South China Sea and Philippines-China Relations" (2021) 51 *ISEAS Perspective* 1; Lee Lai To, *China and the South China Sea Dialogues* (Praeger, 1999); Lye Liang Fook, "The China-Philippine Bilateral Consultative Mechanism on the South China Sea: Prospects and Challenges" (2018) 14 *ISEAS Perspective* 1; Nguyen Hung Son, "ASEAN and the South China Sea" in Leszek Buszynski and Do Thanh Hai (eds), *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition* (Routledge, 2020), 24; Ian Storey, "Rising Tensions in the South China Sea: Southeast Asian Responses" in Ian Storey and Lin Cheng-yi (eds), *The South China Sea Dispute: Navigating Diplomatic and Strategic Tensions* (ISEAS, 2016), 134; Carlyle A. Thayer, "ASEAN, China, and Code of Conduct" in Leszek Buszynski and Do Thanh Hai (eds), *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition* (Routledge, 2020), 43.

³ 1992 ASEAN Declaration on the South China Sea, signed 22 July 1992, at: <https://cil.nus.edu.sg/wp-content/uploads/2019/02/1992-ASEAN-Declaration-on-the-South-China-Sea-1.pdf> (accessed 14 January 2022).

to play in the SCS issue, preferring only bilateral talks with individual states. China insisted that the SCS issue was a matter between and among the claimant states and was not a matter concerning the whole of ASEAN. At China's insistence, the ASEAN Regional Forum (ARF) in the 1990s refrained from including the SCS issue on its agenda. Nonetheless, in 1994, during the ASEAN-China Senior Officials' Meeting, representatives from China and ASEAN countries, for the first time, touched upon and discussed the SCS matters, albeit still informally.⁴ This tentative move gradually resulted in greater acceptance by China of the multilateral modality in managing the SCS dispute. In 1999, China agreed to begin talks on the COC with ASEAN.⁵ Hence, while China's preference for the bilateral modality still stands, it is not entirely correct to characterize Beijing's attitude toward multilateral dialogue on the SCS issue as "explicit disapproval."⁶ Over time, China has adjusted its position to be more amenable to the multilateral modality. Since 2016, China has promoted the notion of a "dual-track approach," which suggests that specific disputes should be directly negotiated by the parties directly concerned, while the more general issue of peace and stability in the SCS is to be jointly maintained by China and ASEAN.⁷ The "dual-track" approach still, in a way, reflects China's resistance to full acceptance of the multilateralization of the SCS dispute at the ASEAN level. Viewed differently, however, this approach also departs from China's previous unwillingness to explicitly recognize the role of ASEAN in the SCS issue.⁸

The clearest manifestations of the "ASEAN + China" modality are the DOC and the COC. Differences among the ASEAN claimant states, and between those states and China, led to the signing of the DOC, on 4 November 2002.⁹ The DOC was the first multilateral management and cooperative mechanism between China and ASEAN in the SCS. The document emphasizes and takes note of the general desire among all parties for regional peace and stability, peaceful means of resolving disputes, and respect for and commitment to international law. It also calls for the parties to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner."¹⁰ Pending resolution of the SCS dispute, the DOC urges the parties to undertake practical maritime cooperation. However, the DOC is a "soft" document, lacking mechanisms to ensure compliance and resolve differences. It also fails to specify the geographical scope of its application.

Despite its limitations, the DOC should be credited for having stabilized the SCS situation in the immediate years after its signature. It was under the more cooperative atmosphere after the signing of the DOC that the first meaningful joint exploration activity in the SCS, the trilateral (China, Vietnam, and the Philippines) Joint Marine

⁴ Lee, note 2, 35.

⁵ Storey, note 2, 137–138.

⁶ Huong Le Thu, "China's Dual Strategy of Coercion and Inducement towards ASEAN" (2019) 32 *Pacific Review* 21.

⁷ "Wang Yi: Stick to 'Dual-track Approach' When Dealing with the South China Sea Issue" 24 July 2016, Ministry of Foreign Affairs of China, at: <https://www.mfa.gov.cn/ce/cesa/eng/zgyw/t1384511.htm> (accessed 22 August 2021).

⁸ Aileen Baviera, "China's Strategic Foreign Initiatives under Xi Jinping: An ASEAN Perspective" (2016) 2 *China Quarterly of International Strategic Studies* 68.

⁹ Declaration on the Conduct of Parties in the South China Sea, signed 4 November 2002, at: <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2> (accessed 22 August 2021).

¹⁰ *Ibid.*

Seismic Undertaking (2005–2008), took place. However, despite the better atmosphere between states, the actual progress of the implementation of the DOC was actually quite slow. The absence of serious incidents in the SCS perhaps, ironically, contributed to the lack of a sense of urgency in implementing the DOC. It took both sides a few more years to conclude *Guidelines to Implement the DOC*, in July 2011, and by then, the SCS situation had become tense again.

Despite these challenges, the DOC process is still ongoing. As of the time of writing, China and ASEAN states have held 18 Senior Officials' Meetings and 30 Joint Working Group Meetings on the implementation of the DOC. The DOC listed five areas of maritime cooperation in the SCS: marine scientific research, marine environmental protection, safety of navigation and communication at sea, search and rescue, and combating transnational crime. In 2012, four technical expert committees (excluding safety of navigation and communication at sea) were established. In May 2017, the 14th ASEAN-China Senior Officials' Meeting on the implementation of the DOC examined and adopted a "Non-paper on the steps towards the establishment of the technical committees,"¹¹ which laid the foundation for further cooperation on marine research and environmental protection, safety of navigation, and search and rescue, as well as combat against transnational crimes at sea. In addition, China and ASEAN have established the "Hotline Communications among Senior Officials of the Ministries of Foreign Affairs of ASEAN Member States and China" and the "Maritime Emergency Search and Rescue Hotline Platform among China and ASEAN Member States" to manage the SCS dispute.

In parallel with the DOC process is the COC negotiation. In November 2012, a statement was issued during the 15th China-ASEAN Leaders' Meeting, whereby all parties indicated their willingness to jointly promote the establishment of the COC on the basis of consensus. In September 2013, the COC consultation was officially launched, and the COC framework document was adopted in August 2017, with the COC Single Draft Negotiating Text (SDNT) formed in August 2018.¹² In November 2018, Chinese Premier Li Keqiang proposed the vision of concluding the COC consultation within three years.¹³ This three-year timeline, however, was unilaterally decided by China and not all countries agreed to this deadline. In 2019, all parties completed the first reading of the COC SDNT ahead of the schedule and prepared for the second reading process.¹⁴ However, it was not until August 2021 that China and ASEAN member states agreed to restart the second reading and reached an initial consensus on its foreword (through the special online meeting and joint working group's meeting), which was suspended

¹¹ "The 14th Senior Officials' Meeting on the Implementation of the DOC Successfully Held" 21 May 2017, Mission of the People's Republic of China to ASEAN at: <http://asean.chinamission.org.cn/eng/zdjl/t1463777.htm> (accessed 14 September 2021).

¹² Carl Thayer, "A Closer Look at the ASEAN-China Single Draft South China Sea Code of Conduct" 3 August 2018, *The Diplomat* at: <https://thediplomat.com/2018/08/a-closer-look-at-the-asean-china-single-draft-south-china-sea-code-of-conduct> (accessed 14 January 2022).

¹³ "New Prospects for East Asian Cooperation," 16 November 2018, The State Council of China at: http://english.www.gov.cn/news/international_exchanges/2018/11/16/content_281476392726866.htm (accessed 30 September 2021).

¹⁴ "The First Reading of the Single Draft Negotiating Text of the Code of Conduct (COC) in the South China Sea Completed Ahead of the Schedule" 1 August 2019, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/201908/t20190802_8523410.htm (accessed 14 January 2022).

during the COVID-19 pandemic.¹⁵ At the China-ASEAN Leaders' Meeting held in October 2021, Chinese Premier Li Keqiang urged the two sides to use 2022, the 20th anniversary of the signing of the DOC, as an opportunity to expedite negotiations of the COC and strive for its early conclusion.¹⁶

Both the DOC and COC processes are on track. The DOC focuses more on implementing programs of practical cooperation, whereas the COC seeks to build a durable regional maritime order. However, both processes have encountered difficulties. The progress of maritime cooperation under the DOC has been undermined by the continuous low level of mutual trust between China and the ASEAN claimant states. An example of distrust undermining cooperation was an incident at Half Moon Shoal in Nansha/Spratlys between August and September 2018. In this case a Philippine warship ran aground in the disputed water and although China offered to help, this offer was rejected by the Philippine government. The Philippines was concerned that China might potentially have misunderstood the intention of the Philippines and might have interfered in their rescue activities,¹⁷ while China was worried that the Philippines might have used this incident to occupy the Half Moon Shoal (as occurred in 1999 when a Philippine vessel grounded in the Ren'ai Shoal/Second Thomas Shoal).¹⁸ Another example of mistrust relates to fisheries conservation. China established and has maintained a summer fishing moratorium in the SCS since 1999¹⁹ and has offered to cooperate with other SCS countries on this moratorium as a way to conserve fishery resources.²⁰ China is of the view that cooperation on fisheries conservation in the SCS is possible, but this assessment is not necessarily shared among its ASEAN counterparts. These states view China's offer to cooperate in fisheries

¹⁵ "Wang Yi Attends the ASEAN-China Ministerial Meeting" 3 August 2021, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/activities_663312/202108/t20210804_9168331.html (accessed 18 January 2022).

¹⁶ "Premier Urges Expedited Negotiations of the COC" 26 October 2021, The State Council of China at: http://english.www.gov.cn/premier/news/202110/26/content_WS61781ae2c6d0df57f98e3d8f.html (accessed 30 October 2021).

¹⁷ For instance, three Philippine officials said China was informed of the accident through its military attaché at its embassy in Manila to avoid any misunderstanding because the incident happened near a disputed region, and military spokesman Col. Noel Detoyato assured the Chinese that the grounding was not intentional. Additionally, the Philippine Presidential spokesperson Harry Roque clarified the speculation about possible Chinese interference with the grounded Navy ship by pointing out that retrieval operations for the Navy frigate were ongoing "with no problems from China" and "let's not speculate." See "China in Talks with Philippines on Recovery of Grounded Frigate Amid Sea Feud," 1 September 2018, *Philstar* at: <https://www.philstar.com/headlines/2018/09/01/1847783/china-talks-philippines-recovery-grounded-frigate-amid-sea-feud> (accessed 30 April 2021); Patricia Lourdes Viray, "Palace Dismisses Possible Chinese Interference on Grounded Navy Ship" 31 August 2018, *Philstar* at: <https://www.philstar.com/headlines/2018/08/31/1847516/palace-dismisses-possible-chinese-interference-grounded-navy-ship> (accessed 30 April 2021).

¹⁸ See Liu Yanhua, "Fei Lv Bin Jun Jian Ge Qian Ban Yue Jiao: You Yi Ci Zhan Ling Qi Tu? [The Philippine Warship Run Ground in the Half Moon Shoal: Another Attempt of Occupation?]" (2018) 19 *Shi Jie Zhi Shi [World Affairs]* 32.

¹⁹ According to Ministry of Agriculture and Rural Affairs of PRC, China initiated a summer fishing moratorium in the East Sea and Yellow Sea from 1995 and a summer fishing moratorium in the SCS from 1999. See "Quan Mian Zhi Xing Fu Ji Xiu Yu Zhi Du Jia Da Yu Ye Zi Yuan Yang Hu Li Du-Zhong Guo Yu Ye Bao Jiu Hai Yang Fu Ji Xiu Yu You Guan Gui Ding Zhuan Fang Nong Ye Bu Yu Ye Ju You Guan Fu Ze Tong Zhi [Initiating A Summer Fishing Moratorium in order to Conserve Fishery Resources-China Fishery News Interviewed the Comrades at Fishery Department, Ministry of Agriculture and Rural Affairs of China with the Relevant Regulations of the Summer Fishing Moratorium]" 6 April 2010, Ministry of Agriculture and Rural Affairs of China at: http://www.moa.gov.cn/xw/zwdt/201004/t20100406_1461552.htm (accessed 18 January 2022).

²⁰ Many Chinese scholars called for cooperation on a fishing moratorium between China and ASEAN claimant states in the SCS so as to protect the fishery resource. See Wu Shicun, "Shen Hua Nan Hai He Zuo Gong Jian Lan Se Jia Yuan [Deepening SCS Cooperation and Joint Building Blue Family]" 10 April 2019, National Institute for South China Sea Studies at: http://www.nanhai.org.cn/review_c/358.html (accessed 18 January 2022); Hu Bo, "Nan Hai Yu Ye Zi Yuan Bao Hu Ke Bu Rong Huan [There Is No Time to Lose the Protection on Fishery Resource in the SCS]" 21 May 2020, *Global Times* at: <https://opinion.huanqiu.com/article/3yK0nzfsvwX> (accessed 18 January 2022); Zhang Zuxing&Fang Shijie, "Yi Dai Yi Lu Jian She Zhong De Nan Hai Shen Hai Yu Ye Zi Yuan Yang Hu He Zuo [Cooperation in Fisheries Conservation in the Deep Waters of the SCS under BRI]" (2019) 4 *Dong Nan Ya Yan Jiu [Southeast Asian Studies]* 105.

conservation as a potential “trap” leading to the legitimization of China’s claims in the SCS, as all the key SCS claimant states view their fishers as important defenders of their respective legal claims in the disputed waters of the SCS.²¹ In addition, the programs under the DOC are not necessarily considered priorities for ASEAN states, largely owing to their low economic benefits. There is a sense, especially among ASEAN claimant states, that maritime cooperation with China is pursued only for the sake of demonstrating their implementation of the DOC and is not necessarily intrinsically important or appealing.²² The various governmental working groups under DOC function more as “dialogue-based” rather than “action-based,” thus delaying pragmatic cooperation on the nonsensitive areas in the SCS between China and ASEAN states.

Meanwhile, the ongoing COC negotiation is entering a very difficult phase, with challenges increasing from both within and outside the region. First, differences over the nature, geographic scope, the role of third parties, dispute resolution mechanism, and legal effect of the COC have not been substantially reduced among the negotiating parties.²³ Second, the face-to-face negotiation has not yet been resumed since the outbreak of the COVID-19 pandemic in early 2020, which led to a long delay in pushing forward the COC consultation.

Third, since the completion of the COC SDNT in 2018, episodic tensions in the SCS have further negatively affected the COC negotiation. From China’s perspective, unilateral actions by claimant states, such as Vietnam’s oil and gas activities in Wan’an Tan/Vanguard Bank, Malaysia’s submission to the UN Commission on the limits of its continental shelf beyond 200 nautical miles in December 2019,²⁴ and its authorization of the oil and gas exploration operation *West Capella* in waters claimed by China (and Vietnam) in 2020, were unilateral actions aiming at maximizing their benefits while undermining China’s claims in the disputed waters.²⁵ By contrast, ASEAN claimant states assert that these activities are consistent with their understanding of international law and the application of the law in protecting their own interests and claims to maritime resources, and hence, China’s objections and obstruction were seen as provocative and contributing to the loss of mutual trust.

²¹ Zhang Hongzhou, “Fisheries Cooperation in the South China Sea: Evaluating the Options” (2018) 89 *Marine Policy* 67.

²² This is drawn from the experiences and observations of the authors, based on their participation in various think tank and track II meetings between China and ASEAN.

²³ See Thayer, note 2, for a comprehensive analysis of the differences between China’s position and the positions of various ASEAN claimant states on the COC. For Chinese scholars’ discussions on the COC, see Yu Mingyou and Zhang Qiyue, “Nan Hai Xing Wei Zhun Ze De Fa Lv Yue Shu Li Bian Xi [Analysis of The Legally Binding of COC]” (2018) 28-4 *Tai Ping Yang Xue Bao [Pacific Journal]*; Wang Wenli and Li Yujie, “Nan Hai Xing Wei Zhun Ze Tan Pan Zhu Yao Zheng Yi Wen Ti Yan Jiu [Study on Main Disputes over COC Negotiation]” (2019) 21-5 *Guo Ji Lun Tan [International Forum]*; and Wang Yong, “Nan Hai Xing Wei Zhun Ze Cuo Shang Nan Dian Yu Zhong Guo De Ying Dui [Main Disputes over COC Consultation and China’s Response]” (2020) 1 *Zhong Guo Hai Yang Da Xue Xue Bao (She Hui Ke Xue Ban) [Journal of Ocean University of China (Social Sciences Edition)]*.

²⁴ See “Commission on the Limits of the Continental Shelf (CLCS) Outer Limits of the Continental Shelf beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Partial Submission by Malaysia in the South China Sea” 18 August 2021, Division for Ocean Affairs and the Law of the Sea of UN, at: https://www.un.org/depts/los/clcs_new/submissions_files/submission_mys_12_12_2019.html (accessed 18 January 2022).

²⁵ See Zhang Qiyue, “Nan Hai Xing Wei Zhun Ze Zuo Wei Hai Yang Hua Jie Qian Lin Shi An Pai De Yi Yi, Kun Jing Yu Dui Ce [The Significance, Obstacles, and Suggestions towards Regarding the Code of Conduct in the South China Sea as Provisional Arrangement of Maritime Delimitation]” (2021) 20 *Da Lian Hai Shi Da Xue Xue Bao (She Hui Ke Xue Ban) [Journal of Dalian Maritime University (Social Science Edition)]* 18.

Finally, the United States–China strategic rivalry further complicates matters. The rivalry causes any effort by an ASEAN claimant state to seek support from the United States on the SCS issue to be viewed very suspiciously and negatively by China. Some ASEAN claimant states, such as Vietnam, see support from the United States as constructive to the COC negotiation,²⁶ while China perceives the United States’ involvement as injecting an “anti-China” dynamic into the COC process, and hence as a form of obstructive interference that should be excluded.²⁷

The effectiveness of the DOC and COC processes has thus varied over time. In the early 2000s, noted SCS scholar Ramses Amer, using a “minimalist approach” to conflict management (which “aims only at the preventing conflict situations from escalating into open militarized confrontation”), judged these “ASEAN + China” efforts to be successful.²⁸ However, few would retain this optimism today. Instead, ASEAN is often judged to be ineffective and disunited in dealing with China on the SCS issue.²⁹ Hence, calls have been growing to develop alternative multilateral arrangements to manage the SCS dispute. Two major alternatives have emerged, in the form of “ASEAN + X” and “ASEAN-X.” It should be noted, however, that these alternatives remain only at only the conceptual level and are discussed and promoted by scholars and analysts. They are not yet (and not likely to be anytime soon) officially endorsed by the various SCS parties.

Alternatives: ASEAN + X and ASEAN-X

The idea of “ASEAN + X” is to broaden the parties in direct management of the SCS dispute beyond China and the member-states of ASEAN. Obvious candidates include the United States, Japan, Australia, New Zealand, India, and South Korea. Even European countries, such as Britain and France, or the European Union (EU) as an organization, might consider themselves to be legitimate candidates. All these countries

²⁶ For instance, Vietnamese Prime Minister Nguyen Xuan Phuc overtly welcomed the United States’ support for ASEAN’s stance on the SCS issue and COC negotiations on the basis of respect for international law during his meeting with U.S. Vice President Mike Pence at the 33rd ASEAN Summit and related meetings in Singapore on 14 November 2018. See “Prime Minister Nguyen Xuan Phuc Meets US Vice President Mike Pence” 15 November 2018, Embassy of Vietnam in the US at: <http://vietnamembassy-usa.org/news/2018/11/prime-minister-nguyen-xuan-phuc-meets-us-vice-president-mike-pence> (accessed 10 September 2021).

²⁷ Chinese scholars deemed that the United States has attempted to influence the ASEAN states and compete with China on the COC consultation in order to conclude an agreement in favor of the United States and thus restrain Chinese activities in the SCS. Therefore, China has overtly opposed U.S. interference in the COC process. See Chen Cihang and Kong Lingjie, “Zhong Mei Zai ‘Nan Hai Xing Wei Zhun Ze’ Wen Ti Shang De Ren Zhi Cha Yi Yu Zheng Ce Hu Dong [Sino-American Cognitive Differences and Policy Interaction on the Code of Conduct in the South China Sea]” (2018) 3 *Dong Nan Ya Yan Jiu [Southeast Asian Studies]* 85; Chen Cihang, “Mei Guo Zai ‘Nan Hai Xing Wei Zhun Ze’ Wen Ti Shang De Zheng Ce Lun Xi [The U.S. Policy on the Code of Conduct in the South China Sea]” (2018) 4 *Guo Ji Zheng Zhi Yan Jiu [International Political Studies]* 70; Wang Yong, “‘Nan Hai Xing Wei Zhun Ze’ Cuo Shang Nan Dian Yu Zhong Guo De Ying Dui [On Difficult Issues in the Negotiation and Formulation of the Code of Conduct in the South China Sea and China’s Response]” (2020) 1 *Zhong Guo Hai Yang Da Xue Xue Bao (She Hui Ke Xue Ban) [Journal of Ocean University of China (Social Science Edition)]* 39.

²⁸ Amer, “Ongoing Efforts in Conflict Management,” note 2, 124.

²⁹ Huang Le Thu, note 6; Phar Kim Beng, “ASEAN Is Failing on the South China Sea Issue” 26 October 2020, *The Diplomat* at: <https://thediplomat.com/2020/10/asean-is-failing-on-the-south-china-sea-issue/> (accessed 10 September 2021); Malcolm Cook, “Southeast Asia’s Developing Divide” in Gilber Rozman and Joseph Cinyong Liow (eds), *International relations and Asia’s Southern Tier: ASEAN, Australia, and India* (Singapore: Springer, 2018), 63; Daniel C. O’Neill, *Dividing ASEAN and Conquering the South China Sea: China’s Financial Power Projection* (Hong Kong University Press, 2018), 24.

have direct stakes in the peace and stability of the SCS, and an argument can be made that the future, the rules and norms, and the order concerning the SCS should not be made and decided by only China and the member states of ASEAN. It is on the basis of this rationale that Jagannath Panda, a prominent Indian security analyst, calls for the COC to be “non-claimant-inclusive,” so countries such as India, the United States, Japan, and Australia (the Quad countries) could join the COC and become parties that have a direct role in the management of the SCS dispute.³⁰

However, practically all likely candidates to be included in such a hypothetical “ASEAN + X” modality are allies and partners of the United States. Such an arrangement is effectively seen by China as an effort to further “internationalize” the SCS dispute for the purpose of “ganging up” against China. In the COC SDNT, China has already specifically sought to limit the involvement of “third parties” in the resource exploration and military activities in the SCS.³¹ Among the ASEAN states, it is unlikely that there will be a uniform view on this matter as well. Even among the ASEAN claimant states, the assumption that these states would always welcome more involvement of extra-regional countries in the SCS dispute does not actually always hold. Aristyo Rizka Darmawan, an Indonesian scholar, in fact warned about the “be-careful-what-you-wish-for” internationalization of the SCS dispute, as this “could also make it less likely that China and the ASEAN claimant states would be able to resolve the conflict through negotiations.”³² Apart from the wariness that such enlargement could be seen to contain a very clear “anti-China” connotation, having more extra-regional countries directly involved in the negotiations means having more parties with their own sets of views, values, and interests injected into the process, which may or may not align with the claimant states. This could risk further complicating an already extremely complicated issue.³³

An “ASEAN + X” format for the purpose of managing the SCS dispute (and for regulating the extraction and use of resources in the SCS) is not that improbable in the future. The idea of a hypothetical SCS regional organization or regime, with its membership open to extra-regional countries, was proposed a long time ago.³⁴ This idea has been favorably picked up by scholars from China as well. Qi Huaigao, a scholar at Fudan University, for example, proposed the setting up of a Spratly Resources Management Authority (SRMA), which is open to participation by extra-regional countries, and that this organization could be integrated with ASEAN as one of the ASEAN-anchored mechanisms.³⁵ Such a regional organization could ensure that the SCS is

³⁰ Jagannath P. Panda, “Code of Conduct Needed for South China Sea” 3 September 2020, *The Japan News* at: <https://the-japan-news.com/news/article/0006767747> (accessed 22 September 2021).

³¹ Thayer, note 2, 50–51.

³² Aristyo Rizka Darmawan, “Even the British Are Coming: ASEAN and the Internationalization of the South China Sea” 10 June 2021, *Asia Global Online* at: <https://www.asiaglobalonline.hku.hk/even-british-are-coming-asean-and-internationalization-south-china-sea> (accessed 22 September 2021).

³³ However, it should be noted that “ASEAN + X” is in a way already a reality, in the form of various ASEAN-anchored forums and mechanisms, such as ASEAN Regional Forum (ARF), East Asian Summit (EAS), and ASEAN Defense Minister Meeting (ADMM) Plus. But these forums are mostly “thin” institutions. For most part, they are to serve the purpose of general discussions but not to advance particular processes in the management and regulations of this sensitive regional security issue.

³⁴ See, for example, Mark Valencia, Jon M. Van Dyke, and Noel A. Ludwing, *Sharing the Resources of the South China Sea* (Martinus Nijhoff, 1997), 207–208.

³⁵ Huaigao Qi, “Joint Development in the South China Sea: China’s Incentives and Policy Choices” (2019) 8 *Journal of Contemporary East Asia Studies* 220.

indeed an open and inclusive sea. It would serve as a major platform where issues such as freedom of navigation, fisheries management, resource exploitation, and so forth could be discussed, common grounds forged, and differences well managed. However, the formation and durability of such a hypothetical organization, realistically, still has to be based on a structure where the core countries that lead it and drive its agenda are still the littoral states of the SCS, including China and ASEAN claimant states.

The second alternative is the “ASEAN-X” modality. The ASEAN decision-making process, where consensus of member states is needed, is the key political foundation of ASEAN. This process has ensured broad inclusiveness, and that the national interests of each member state are well protected. However, the consensual decision-making process is not without its drawbacks. Securing consensus from each member state can be cumbersome and difficult, making ASEAN less efficient. ASEAN can even be paralyzed by the intransigence of a single member state.

Cognizant of the potential problems of the consensus decision making, Article 21 of the ASEAN Charter actually prescribes the use of an “ASEAN-X” decision-making process, but it is only specifically applicable to “implementation in economic commitments” and, more importantly, only under the condition of “where there is a consensus to do so.”³⁶ “ASEAN-X” is still ultimately based on consensus. Historically, it has been more applicable in economic or technical matters rather than in the far more sensitive political and security context. However, occasionally it has been adopted in the political-security sphere. For example, the ASEAN Convention on Counter Terrorism entered into force without first securing the full ratification by all the member-states of ASEAN.³⁷ More recently, the coup in Myanmar in early 2021 led to the other nine member states of ASEAN disinviting the coup leaders attending ASEAN meetings and summits, effectively also setting a clear precedence of “ASEAN-X.”³⁸

The failure of ASEAN, in 2012, to issue a joint statement on the SCS issue, primarily owing to Cambodia’s insistence not to include the SCS issue in any statement, has often been used as the case to support the adoption of an “ASEAN-X” modality.³⁹ Fairly or unfairly, perceptions that Cambodia is the “Trojan horse” of China within ASEAN are widespread in many regional capitals and beyond.⁴⁰ The “ASEAN-X” modality, thus, is often raised with a view to excluding Cambodia in relation to SCS issues.⁴¹ The outspoken retired Singapore diplomat Bilahari Kausikan even suggested that Cambodia be

³⁶ ASEAN Charter, signed 20 November 2007 at: <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> (accessed 22 September 2021).

³⁷ Ralf Emmers, “ASEAN Minus X (A-X) Formula the Way Forward?” 31 October 2017, *New Straits Times* at: <https://www.nst.com.my/opinion/columnists/2017/10/297268/asean-minus-x-x-formula-way-forward> (accessed 6 September 2021). The Convention has now been ratified by all ASEAN member states.

³⁸ Ain Bandial, “ASEAN Excludes Myanmar Junta Leader from Summit in Rare Move” 17 October 2021, *Reuters* at: <https://www.reuters.com/world/asia-pacific/asean-chair-brunei-confirms-junta-leader-not-invited-summit-2021-10-16/> (accessed 14 January 2022).

³⁹ “ASEAN Nations Fail to Reach Agreement on South China Sea” 13 July 2012, *BBC* at: <https://www.bbc.com/news/world-asia-18825148> (accessed 22 September 2021).

⁴⁰ Huong Le Thu, note 6, 30.

⁴¹ Hoang Thi Ha, “ASEAN 2018: Reconciling Consensus with New Realities” 23 April 2018, *The Straits Times* at: <https://www.straitstimes.com/opinion/asean-2018-reconciling-consensus-with-new-realities> (accessed 22 September 2021); Nguyen Minh Quang, “Saving the ASEAN-China South China Sea Code of Conduct” 29 June 2019, *The Diplomat* at: <https://thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct> (accessed 6 September 2021).

expelled from ASEAN if it continued to undermine the cohesion and collective interests of ASEAN.⁴²

An idea related to “ASEAN-X,” but that is distinguishingly more subregional, is mini-lateralism. “ASEAN-X” begins with the assumption that a majority of the member states are in consensus about a certain goal or objective, and would have to “minus” the minority that are not yet ready to be part of this consensus. Minilateralism is a form of “ASEAN-X” also, but it begins with the assumption that only a select group of member states, within a certain geographical region, have direct interests in certain issues. For example, mainland Southeast Asian countries have engaged with China through the Lancang-Mekong Cooperation (LMC) mechanism, which excludes non-Mekong member states in ASEAN. Cooperation between China and the Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA) does not involve countries in mainland Southeast Asia (and Singapore). In the context of security, the Trilateral Cooperation Agreement (TCA) between Malaysia, Indonesia, and the Philippines over the Sulu Sea,⁴³ and the Malacca Straits Patrol (MSP) that involves Malaysia, Singapore, Indonesia, and Thailand,⁴⁴ are two examples of minilateral/subregional security cooperation arrangements. Both the TCA and MSP legally have no direct relationship with ASEAN, but their objectives and missions are perfectly compatible with the goal of the ASEAN Political and Security Community.

Excluding Cambodia through “ASEAN-X” would be deeply alienating to Cambodia. A recent editorial of the pro-government Cambodian newspaper *Khmer Times* strongly criticized what it called the “Minus X syndrome” as “tyranny of the majority” and said that its “domino effect” would lead to more cases of a ASEAN member state being ostracized just because it finds itself in disagreement with the rest.⁴⁵ Minilateralism, on the other hand, is less alienating, as it is starting not from the basis of excluding anyone (“minus” X), but from the presumption of establishing a minilateral grouping of directly affected stakeholders. The precedents of the TCA and MSP show that this kind of arrangement is compatible with ASEAN. An application of the minilateralism model in the SCS is likely to involve all the major littoral states of the SCS (Malaysia, Vietnam, the Philippines, Brunei, and Indonesia). A more expanded version could also include Singapore and Thailand.

The idea of using subregional minilateralism to engage China is intuitively appealing, but its feasibility and impact must be also carefully considered. While the TCA and MSP are useful precedents, it should be noted that these two initiatives deal with non-traditional security issues, are far removed from the United States–China strategic rivalry, and encounter no strong opposition from fellow ASEAN member states. But the geopolitics of the SCS is at a different level. In addition, ASEAN’s direct involvement in the management of the Malacca Straits and the Sulu Sea has always been relatively

⁴² David Hutt, “Time to Boot Cambodia Out of ASEAN” 28 October 2020, *Asia Times* at: <https://asiatimes.com/2020/10/time-to-boot-cambodia-out-of-asean> (accessed 6 August 2021).

⁴³ Prashanth Parameswaran, “Are Sulu Sea Trilateral Patrols Actually Working?” 29 January 2019, *Asian Dispatches* at: <https://www.wilsoncenter.org/blog-post/are-sulu-sea-trilateral-patrols-actually-working> (accessed 15 August 2021).

⁴⁴ “Fact Sheet: Malacca Straits Patrol” 21 April 2015, Ministry of Defence, Singapore at: <https://www.mindef.gov.sg/web/portal/mindef/news-and-events/latest-releases/article-detail/2016/april/2016apr21-news-releases-00134> (accessed 15 August 2021).

⁴⁵ Editorial, “ASEAN Minus X Syndrome” 13 August 2021, *Khmer Times* at: <https://www.khmertimeskh.com/50914936/asean-minus-x-syndrome> (accessed 15 September 2021).

marginal, and, correspondingly, there has been greater room for compatible arrangements such as the TCA and MSP to grow and operate. But on the SCS issue, ASEAN has already been deeply involved and embedded since the 1992 ASEAN Statement on the SCS, the 2002 DOC, and the ongoing COC negotiations. A form of path dependence is created. Hence, a separate subregional/minilateral grouping of countries specifically for the SCS, if at all possible, would have to be created under strong ASEAN consensus and endorsement, and this will lead right back to the question of the ASEAN consensual decision-making process.

Bilateral Approaches

China–Philippines

China and the Philippines have a long history of bilateral engagement on the SCS dispute. After the Mischief Reef Incident in 1995, China and the Philippines set up a bilateral code of conduct,⁴⁶ which was followed, in 1999, with the setting up of a Sino-Philippines Working Group on Confidence Building Measures.⁴⁷ After the first meeting in 1999, this Working Group held two more meetings, respectively in 2000 and 2001.⁴⁸ These early efforts in bilateral consultation, however, fizzled out a few years after they begun. No official reasons were given. Presumably, these bilateral efforts became unnecessary after the signing of the DOC in 2002.

The second attempt at bilateral dialogue took place several years later, under the presidency of Rodrigo Duterte (2016 to the present). In October 2016, during Duterte's first visit to China, it was agreed that both countries would commence a Bilateral Consultation Mechanism (BCM) on the SCS issue.⁴⁹ The BCM was formally launched in 2017, with the first BCM meeting held in May.⁵⁰ The launch of the BCM was hailed as an "exemplary practice in the peaceful management of conflicts in the SCS upholding a bilateral approach," a "confidence building measure that repairs damaged bilateral ties between China and the Philippines" (during the period of Duterte's predecessor Benigno Aquino III), and an "effective tool to rebuild mutual trust, to reduce misunderstanding, and to promote pragmatic cooperation."⁵¹

The BCM is composed of senior officials from the foreign ministries and maritime administrations of the two countries in equal size, and supposedly meets every six months.⁵² Three technical Working Groups have been created under the auspice of the

⁴⁶ Lee, note 2, 108–109.

⁴⁷ Amer, "Ongoing Efforts in Conflict Management," note 2, 121.

⁴⁸ "China, Philippines Hold Meeting on Confidence-building Measures" 3 April 2001, *People's Daily* at: http://en.people.cn/english/200104/03/eng20010403_66722.html (accessed 14 January 2022).

⁴⁹ See Article 42 of "Joint Statement of the People's Republic of China and the Republic of Philippines" 21 October 2016, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201610/t20161021_679488.html (accessed 14 January 2022).

⁵⁰ "Joint Press Release for the First Meeting of the China-Philippines Bilateral Consultation Mechanism on the South China Sea" 19 May 2017, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/201705/t20170519_8523377.htm (accessed 14 January 2022).

⁵¹ Rommel C. Banlaoi, "Promoting Peace, Friendship and Cooperation in South China Sea through Bilateral Consultative Mechanism" 2 July 2021, *Eurasia Review* at: <https://www.eurasiareview.com/02072021-promoting-peace-friendship-and-cooperation-in-south-china-sea-through-bilateral-consultative-mechanism-oped> (accessed 15 September 2021).

⁵² See paragraph 4 of the "Joint Press Release for the First Meeting of the China-Philippines Bilateral Consultation Mechanism on the South China Sea."

BCM: the Working Group on Political Security, the Working Group on Fisheries Cooperation, and the Working Group on Marine Scientific Research and Marine Environmental Protection.⁵³ As of the time of writing this article, there have been, in total, six BCM meetings (in May 2017, February 2018, October 2018, April 2019, October 2019, and May 2021).⁵⁴

Among these BCM meetings, a few notable achievements stood out. In the Second BCM meeting (February 2018), both sides reached a consensus “to convene technical working groups in the areas of fisheries, oil and gas, marine scientific research and marine environmental protection, and even political security.”⁵⁵ The Third BCM meeting (October 2018) achieved a breakthrough in cooperation on the joint development of oil and gas resources.⁵⁶ This paved the way to the signing, on 20 November 2018, of the Memorandum of Understanding on Oil and Gas Development by China and the Philippines.⁵⁷ The Fifth BCM meeting (October 2019) saw the convening of the First Meeting of the Philippine-China Inter-Governmental Joint Steering Committee on Cooperation on Oil and Gas Development.⁵⁸ In October 2020, the Philippine government lifted the ban on oil and gas exploration in the disputed waters of the SCS,⁵⁹ which was seen as a sign that there may be joint exploration of oil and gas between the energy companies of China and the Philippines in the near future. The positive momentum, however, was seriously disrupted with the outbreak of COVID-19, preventing a BCM meeting during 2020.

In conjunction with, but outside of, the BCM was the growing cooperation between the Coast Guards of China and the Philippines. In October 2016, both countries established a Joint Coast Guard Committee on Maritime Cooperation.⁶⁰ As of the time of

⁵³ The setting up of the Working Groups was mentioned in the Second BCM meeting (see note 55, below), and the existence of the three Working Groups was confirmed in the joint press release of the Fifth BCM Meeting. See “Joint Press Release: Fifth Meeting of the Philippines-China Bilateral Consultation Mechanism on the South China Sea” 29 October 2019, Department of Foreign Affairs, the Philippines at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/24872-joint-press-release-fifth-meeting-of-the-philippines-china-bilateral-consultation-mechanism-on-the-south-china-sea> (accessed 14 January 2022).

⁵⁴ Rommel Banlaoi, “On Recent Second Thomas Shoal Incident: Philippines and China Need to Overcome Misunderstanding” 22 November 2021, *Eurasia Review* at: <https://www.eurasiareview.com/22112021-on-recent-second-thomas-shoal-incident-philippines-and-china-need-to-overcome-misunderstanding-analysis> (accessed 28 November 2021).

⁵⁵ “Joint Press Release for the Second Meeting of the Philippines-China Bilateral Consultative Mechanism on the SCS” 13 February 2018, Department of Foreign Affairs, the Philippines at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/15562-second-meeting-of-the-philippines-china-bilateral-consultation-mechanism-on-the-south-china-sea> (accessed 15 May 2021).

⁵⁶ “Third Meeting of the Philippines-China Bilateral Consultative Mechanism (BCM)” 18 October 2018, Department of Foreign Affairs, the Philippines at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/18199-third-meeting-of-the-philippines-china-bilateral-consultation-mechanism-bcm> (accessed 14 January 2022).

⁵⁷ “Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People’s Republic of China and the Government of the Republic of the Philippines” 27 November 2018, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201811/t20181127_679548.html (accessed 14 January 2022).

⁵⁸ “Joint Press Release: PH-CN Joint Committee on Oil & Gas Dev’t Hold 1st Meeting in Beijing” 30 October 2019, Department of Foreign Affairs, the Philippines at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/24875-joint-press-release-first-meeting-of-philippines-china-inter-governmental-joint-steering-committee-on-cooperation-on-oil-and-gas-development-was-held-in-beijing> (accessed 15 May 2021).

⁵⁹ Eimor Santos, “Duterte Lifts Suspension of Oil Exploration in West PH Sea” 15 October 2020, *CNN Philippines* at: <https://www.cnnphilippines.com/news/2020/10/15/duterte-lifts-moratorium-petroleum-exploration.html> (accessed 14 January 2022).

⁶⁰ “Inaugural Meeting of the Joint Coast Guard Committee: Philippine and China Coast Guard Agree to Further Advance Cooperation” 22 February 2017, Embassy of the People’s Republic of China in the Republic of the Philippines at: http://ph.china-embassy.org/eng/zfgx/zzgx/201702/t20170222_1336113.htm (accessed 14 January 2022).

writing, three rounds of meeting have been held. In January 2020, a China Coast Guard (CCG) vessel, CCG5204, visited the Manila port and carried out, for the first time, joint maritime search-and-rescue and firefighting exercises with the Philippine Coast Guard ships.⁶¹

By the time the Sixth BCM meeting was convened in May 2021, however, much of the early enthusiasm had been lost (especially from the Philippines' side), notwithstanding the reaffirmation of cooperation through BCM by both sides during the meeting.⁶² The effectiveness of the BCM is now doubted more than before. Since its launch, the BCM has not really successfully deescalated the SCS tensions. Nor has it played a key leading role in the joint development of hydrocarbon resources and marine research in the SCS. The BCM has also never received broad-based political support within the Philippines. Instead, it is often criticized for fulfilling the agenda and interests of China, and it is unlikely that it will survive the Duterte presidency.⁶³ In addition, designed as a "consultative" mechanism, the BCM serves as a platform for exchanging views on issues related to the SCS between the Philippines and China, but its functions as an implementation or coordination mechanism on concrete measures of maritime cooperation and maritime security are less well defined.⁶⁴ Even Rommel Banlaoi, a well-known Filipino scholar who is a strong supporter of the BCM, acknowledged its limitations and suggested that "there is a need for the Philippines and China to establish *another* [emphasis added] mechanism that can promote closer coordination on the ground in order to avoid incidents that have the potential of damaging their overall bilateral relations."⁶⁵

As for prospects relating to joint development of oil and gas resources, the Philippines and China are still at the exploratory and consultative stage, and certainly are nowhere near the stage of actual implementation, primarily owing to various legal obstacles and political pressures from within the Philippines. Objectively speaking, the issues concerning joint development, such as eligible participants, site and scope of the project, and the law enforcement and administrative jurisdiction in the development areas, have become far more complex since the 2016 SCS Arbitral Award.⁶⁶ As the Philippines reconfirms its claims in the "disputed waters" in the SCS through the Arbitral Award, it is extremely difficult for Philippine companies to conduct joint development with Chinese enterprises in this region. Even if joint development successfully commences, various forces in the Philippines opposed to joint development are likely to invoke the Arbitral Award in order to impose sustained pressure on their government to challenge China's claims in the SCS.⁶⁷ Moreover, although the memorandum of

⁶¹ "China Coast Guard Ship Pays Friendly Visit to Philippines" 14 January 2020, *Xinhuanet* at: http://www.xinhuanet.com/english/2020-01/14/c_138704472.htm (accessed 15 September 2021).

⁶² "Philippines, China Convene Mechanism to Ease Tensions, Explore Cooperation in South China Sea" 22 May 2021, Department of Foreign Affairs, the Philippines at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/28997-philippines-china-convene-mechanism-to-ease-tensions-explore-cooperation-in-south-china-sea> (accessed 15 September 2021).

⁶³ Banlaoi, note 2, 6.

⁶⁴ Lye, note 2, 5.

⁶⁵ Banlaoi, note 54.

⁶⁶ Jacqueline Joyce F. Espenilla, "The Philippines-China Joint Development" in Leszek Buszynski and Do Thanh Hai (eds), *The South China Sea, from a Regional Maritime Dispute to Geo-Strategic Competition* (Routledge, 2020), 119.

⁶⁷ Kang Lin and Cao Qun, "Zhong Fei Da Cheng Nan Hai You Qi Zi Yuan Gong Tong Kai Fa Xin Gong Shi [China and the Philippines Reached A New Consensus on the Joint Development of Oil and Gas in the South China Sea]" (2019) 2 *Shi Jie Zhi Shi [World Affairs]* 31.

understanding (MoU) on joint development provides for an inclusive framework without touching the contentious issue of sovereignty or ownership of resources,⁶⁸ various limitations within Philippine domestic law, such as the 1987 Constitution⁶⁹ (which bans “joint development” within its exclusive economic zone with another sovereign state) and Presidential Decree No. 87⁷⁰ (which stipulates total control of the exploration contract by the Philippine government), constitute major obstacles to joint development. Politically, in spite of a great deal of political will expressed by Philippine President Duterte to launch joint development with China, there is still strong resistance from nationalists, Supreme Court justices, pro-American liberals, and other nonstate stakeholders such as oil companies, fishers, and coastal communities.⁷¹

China–Vietnam

Vietnam often appears to be the toughest opponent of China on the SCS issue, a view shared by China. But at the same time, both countries also share a history of bilateral maritime cooperation in the SCS. The pattern of maritime interactions between Vietnam and China is broadly reflective of Vietnam’s “cooperating and struggling” strategy toward China. On one hand, Vietnam is determined in its needs to “struggle” hard against China when it feels that its national interests are threatened, but on the other hand, it has maintained maritime cooperation and dialogue with China in order to manage disputes so that they will not become too destabilizing to overall bilateral ties.⁷²

In the past two decades, both sides have signed a number of agreements on maritime cooperation, mainly in the Bei Bu Wan/Gulf of Tonkin.⁷³ The first Sino-Vietnamese Fisheries Agreement for the Bei Bu Wan/Gulf of Tonkin was signed in December 2000, together with the Agreement on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves in the Bei Bu Wan/Gulf of Tonkin.⁷⁴ Both

⁶⁸ According to Article IV (Relevant Position) of the MoU, “This Memorandum of Understanding, and all discussions, negotiations and activities of the two governments or their authorized enterprises under or pursuant to this Memorandum of Understanding, will be without prejudice to the respective legal positions of both governments. This Memorandum of Understanding does not create rights or obligations under international or domestic law.” See “Memorandum of Understanding on Cooperation on Oil and Gas Development between the Government of the People’s Republic of China and the Government of the Republic of the Philippines” 27 November 2018, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1616644.shtml (accessed 15 September 2021).

⁶⁹ See “The Constitution of the Republic of the Philippines” Official Gazette at: <https://www.officialgazette.gov.ph/constitutions/1987-constitution> (accessed 15 September 2021).

⁷⁰ See “Presidential Decree No. 87, s. 1972” Official Gazette at: <https://www.officialgazette.gov.ph/1972/12/31/presidential-decree-no-87-s-1972> (accessed 15 September 2021).

⁷¹ For the nationalism and legal restrictions on the joint development between China and the Philippines, see Carlos Santamaria, “Sino-Philippine Joint Development in the South China Sea: Is Political Will Enough?” (2018) 10 *Asian Politics and Policy* 322. For the political groups, see Yang Chao, “Fei Lv Bin Zheng Zhi Ji Tuan Zai Nan Hai Wen Ti Shang De Gong Shi, Fen Qi Ji Cheng Ying [Consensus and Divergences among Philippine Political Groups on the South China Sea Issue and Their Causes],” (2021) 3 *Guo Ji An Quan Yan Jiu [International Security Studies]* 52; for the nonstate stakeholders, see Julius Cesar Trajano, “Resource Sharing and Joint Development in the South China Sea: Exploring Avenues of Cooperation” March 2019, *NTS Insight*, no. IN19-01.

⁷² Carlyle A. Thayer, “Vietnam’s Strategy of ‘Cooperating and Struggling’ with China over Maritime Disputes in the South China Sea” (2016) 3 *Journal of Asian Security and International Affairs* 200.

⁷³ Benoît de Tréglodé, “Maritime Boundary Delimitation and Sino-Vietnamese Cooperation in the Gulf of Tonkin (1994–2016)” (2016) 3 *China Perspectives* 33.

⁷⁴ Ibid, 37. See also Zou Keyan, “The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin” (2005) 36 *Ocean Development and International Law* 14.

countries then negotiated a Supplementary Protocol to the Fisheries Agreement, from 2001 to 2004,⁷⁵ and the Fisheries Agreement finally entered into force in June 2004.

According to the Fisheries Agreement, both sides agree to hold annual meetings to discuss measures for fishing vessel management in certain waters of the Bei Bu Wan/Gulf of Tonkin, to resolve problems in the implementation of the agreement, to agree on issues including the distribution of fishing quota and the issue of fishing permits and anticounterfeiting marks, and to discuss ways to conduct maritime supervision.⁷⁶ The agreement was due to expire on 30 June 2019, but was extended to 30 June 2020.⁷⁷ The agreement has not been extended beyond 30 June 2020, and there is no new agreement in place. Recently, China's Ministry of Agriculture and Rural Affairs and the Ministry of Foreign Affairs, respectively, in January and July 2021, released news that China and Vietnam had reached a consensus to renew the Fisheries Agreement for the Bei Bu Wan/Gulf of Tonkin. However, these reports have not been officially confirmed by Vietnam.⁷⁸ During the 13th meeting of the Steering Committee for Bilateral Cooperation between China and Vietnam, in September 2021, Vietnam was reported to have agreed only to complete negotiations toward the signing or renewal of a new agreement in the Bei Bu Wan/Gulf of Tonkin, but without giving a timeline.⁷⁹

In 2005, China and Vietnam signed the Agreement on Joint Patrols by the two Navies in the Bei Bu Wan/Gulf of Tonkin. The joint patrol was launched in April 2006.⁸⁰ From 2006 to 2021, the two navies conducted 31 joint patrols in the Bei Bu Wan/Gulf of Tonkin.⁸¹ During the same period, Chinese and Vietnamese Coast Guards launched 21 joint inspection operations in the Bei Bu Wan/Gulf of Tonkin.⁸² Both countries further enhanced their maritime law enforcement cooperation through a new Memorandum of Understanding on Coast Guard Cooperation (signed in June 2016), which established a regular meeting mechanism attended by the senior officials of both

⁷⁵ Zou Keyan, *ibid.*, 17.

⁷⁶ See "Zhong Hua Ren Min Gong He Guo Zheng Fu He Yue Nan She Hui Zhu Yi Gong He Guo Zheng Fu Bei Bu Wan Yu Ye He Zuo Xie Ding [Agreement on Fishery Cooperation in the Gulf of Tonkin between the Chinese government and Vietnamese government]" 25 December 2000, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/t556668.shtml (accessed 11 November 2021).

⁷⁷ "Vietnam-China Agreement on Fishery Cooperation in Tonkin Gulf Expires" 1 September 2020, *Vietnam Plus* at: <https://en.vietnamplus.vn/vietnam-china-agreement-on-fishery-cooperation-in-tonkin-gulf-expires/182226.vnp> (accessed 11 November 2021).

⁷⁸ See "Shi San Wu Yu Ye Liang Dian Lian Zai-Wo Guo Yu Ye Zou Chu Qu Cheng Xiao Xian Zhu [The Achievements in Fishery in the 13th Five-Year Plan-The Remarkable Success in China's Go Out Strategy of Fishery Cooperation]" 4 January 2021, Ministry of Agriculture and Rural Affairs of China, at: http://www.moa.gov.cn/xw/bmdt/202101/t20210104_6359370.html (accessed 10 November 2021); "Zhong Yue Ju Xing Hai Shang Di Min Gan Ling Yu He Zuo Zhuan Jia Gong Zuo Zu Xin Yi Lun Cuo Shang [China and Vietnam Held the New Round Consultation of the Expert Group for Low-Sensitivity Maritime Cooperation]" 7 July 2021, Ministry of Foreign Affairs of China, at: https://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/bjhysws_674671/xgxw_674673/t1890207.shtml (accessed 10 November 2021).

⁷⁹ "Viet Nam, China Hold 13th Meeting of Steering Committee for Bilateral Cooperation" 13 September 2021, Ministry of Foreign Affairs of Vietnam at: <https://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns210913175319> (accessed 10 November 2021).

⁸⁰ "China Launches Joint Naval Patrol with Vietnam" 29 April 2006, *China Internet Information Center* at: <http://www.china.org.cn/english/2006/Apr/167254.htm> (accessed 14 January 2022).

⁸¹ "China, Vietnam Navies Wrap Up 31st Joint Patrol in Beibu Gulf" 3 December 2021, *China Military Online* at: http://eng.chinamil.com.cn/view/2021-12/03/content_10112368.htm (accessed 14 January 2022).

⁸² "Zhong Yue Hai Jing Kai Zhan Bei Bu Wan Hai Yu Lian He Xun Hang [China and Vietnam Conduct Joint Patrol at the Sea Area of the Beibu Gulf]" 29 April 2021, *Xinhuanet* at: http://www.xinhuanet.com/2021-04/29/c_1127391883.htm (accessed 14 January 2022).

Coast Guards.⁸³ This high-level Coast Guard meeting has been held four times since its inception, with the last meeting in December 2020.⁸⁴ In October 2013, the two countries signed the first intergovernmental agreement on the cooperation of integrated management of the coastal and island environment in the Bei Bu Wan/Gulf of Tonkin, aiming to begin bilateral cooperation on marine environment protection and scientific research in the mouth of Bei Bu Wan/Gulf of Tonkin.⁸⁵

Outside of the Bei Bu Wan/Gulf of Tonkin, China and Vietnam, in October 2011, signed an Agreement on Guiding the Settlement of Sea-Related Issues Existing between the Two Countries, which is considered the foundational bilateral document setting out guiding principles in managing the SCS dispute.⁸⁶ In this agreement, both sides commit to properly resolving their maritime disputes through friendly negotiation, to steadily push forward the negotiation on the delimitation of their territorial seas, to actively discuss joint development outside the Bei Bu Wan/Gulf of Tonkin, and to positively promote low-sensitivity maritime cooperation.⁸⁷ In line with the cooperative spirit of this agreement, China and Vietnam have set up a number of bilateral technical working groups to discuss and advance cooperation in various spheres. In May 2012, two working groups were created: the Working Group on the Offshore Areas outside the Mouth of the Bei Bu Wan/Gulf of Tonkin and the Working Group on Maritime Cooperation on Low Sensitivity Issues.⁸⁸ In November 2013, the Working Group on Consultation on Joint Development in the SCS was created, which advanced talks on the more sensitive areas of joint development, although the focus was on clearly undisputed waters in the SCS.⁸⁹ All of these working groups have held regular and numerous meetings since their inception (as of the time of writing, the three working groups have held 15, 15, and 12 rounds of meetings, respectively).⁹⁰ Under the auspices of these working groups, the two countries

⁸³ "Zhong Yue Hai Jing Zai Jing Ju Xing Di Yi Ci Gong Zuo Hui Wu [The First Working Meeting between China and Vietnam Coast Guards Held in Beijing]" 28 August 2016, *China Daily* at: http://cn.chinadaily.com.cn/2016-08/28/content_26618407.htm (accessed 14 January 2022).

⁸⁴ "Zhong Yue Hai Jing Ju Xing Di Si Ci Gao Ceng Gong Zuo Hui Yi [The Fourth Meeting of High-Level Work Meeting of the Coast Guards of China and Vietnam]" 9 September 2020, China Coast Guard at: http://www.ccg.gov.cn//2020/gjhz_1209/235.html (accessed 15 November 2021).

⁸⁵ "Zhong Yue Qian Shu Bei Bu Wan Hai Yang He Zuo Xie Yi, Hai Yang He Zuo Huo Xin Tu Po [China and Vietnam Sign A Maritime Cooperation Agreement, A New Breakthrough in Maritime Cooperation]" 14 October 2013, *China Central Television* at: <http://news.cntv.cn/2013/10/14/ARTI1381730216581312.shtml> (accessed 14 January 2022).

⁸⁶ "VN-China Basic Principles on Settlement of Sea Issues" 14 October 2011, Embassy of the Socialist Republic of Vietnam in the United States at: <https://vietnamembassy-usa.org/news/2011/10/vn-china-basic-principles-settlement-sea-issues> (accessed 14 January 2022).

⁸⁷ See "Guan Yu Zhi Dao Jie Jue Zhong Guo He Yue Nan Hai Shang Wen Ti Ji Ben Yuan Ze Xie Yi [Agreement on Guiding the Settlement of Sea-related Issues Existing between China and Vietnam]" 12 October 2011, Ministry of Foreign Affairs of China at: <https://www.fmprc.gov.cn/nanhai/chn/zcfg/t866484.htm> (accessed 10 November 2021).

⁸⁸ Ramses Amer and Li Jianwei, "Recent Developments in the South China Sea: Assessing the China-Vietnam and China-Philippines Relationships" in Wu Shicun and Nong Hong (eds), *Recent Development in the South China Sea Dispute: The Prospect of a Joint Development Regime* (Routledge, 2014), 32–33.

⁸⁹ "Zhong Yue Jiu Jian Li Hai Shang Gong Tong Kai Fa Cuo Shang Zu Da Cheng Gong Shi [China and Vietnam Reaches Consensus on Establishing the Working Group on Joint Development]" 15 November 2013, *People's Daily* at: <http://world.people.com.cn/n/2013/1115/c1002-23547371.html> (accessed 14 January 2022).

⁹⁰ In a recent consultation held on 8 January 2021, both sides agreed to promote the fishery cooperation in the SCS, maritime cooperation in the Gulf of Tonkin, and the joint development of the oil and gas resources in the undisputed waters of the SCS. See "Zhong Yue Ju Xing Bei Bu Wan Wan Kou Wai Hai Yu Gong Zuo Zu Di Shi Si Lun Cuo Shang He Hai Shang Gong Tong Kai Fa Cuo Shang Gong Zuo Zu Di Shi Yi Lun Cuo Shang [China and Vietnam Held 14th Consultation of the Working Group on the Offshore Areas outside the Mouth of the Gulf of Tonkin and 11th Consultation of the Working Group on Consultation on Joint Development]" 8 January 2021, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/web/wjtb_673085/zjzg_673183/bjshysws_674671/xgxw_674673/t1845235.shtml (accessed 10 November 2021); "Zhong Yue Ju Xing Hai Shang Di Min Gan Ling Yu He Zuo Zhuan Jia Gong Zuo Zu Xin Yi Lun Cuo Shang [China and Vietnam Held the New Round Consultation of the Expert Group for Low-

have discussed marine environmental protection, marine scientific research, fishery resource management, maritime search-and-rescue and law enforcement, disaster reduction and prevention, and so forth.

Hence, compared to the China–Philippines BCM model, China and Vietnam have adopted and maintain a multitude of bilateral agreements, mechanisms, and platforms for the Bei Bu Wan/Gulf of Tonkin and the SCS. However, these robust bilateral engagements, useful as they are, have not been able to alleviate the declining level of strategic trust between China and Vietnam in recent years. Even in the Bei Bu Wan/Gulf of Tonkin, the area where China–Vietnam cooperation is most vigorous, the cooperative momentum has slowed down. As Benoît de Tréglodé, a French scholar, has noted, Vietnam has never been as enthusiastic about maritime cooperation in the Gulf of Tonkin, in contrast to China. Vietnam, in fact, continues to feel ambiguous about China’s active agenda in the Gulf of Tonkin, fearing that the rhetoric of cooperation from China is “above all a seduction tactic,” meant to keep the SCS claimant countries “within reach” while “continuing to strengthen [China’s] position unilaterally in the South China Sea.”⁹¹

After 2019, when the Fisheries Agreement for the Gulf of Tonkin was due to expire, China felt that Vietnam lacked the political will to continue cooperating on the conservation and management of fishing resources in the Gulf of Tonkin,⁹² although China was keen to conclude the renewal of the agreement as soon as possible. The June 2019 expiry date of the Fisheries Agreement also coincided with a tense standoff between Vietnam and China in the Wan’an Tan/Vanguard Bank.⁹³ The stalemate in the SCS has certainly made the negotiation for the renewal or for the adoption of a new Agreement difficult. Moreover, differences over fishing during this period have escalated even further. While Vietnam regards China’s fishing activities, including its annual fishing moratorium program, as encroaching into maritime areas under its jurisdiction, China perceives Vietnam as being uncooperative and intransigent on issues such as illegal fishing carried out by Vietnamese vessels in seas near China’s Guangdong, Guangxi, and Hainan provinces. This issue has become more pronounced as some Chinese scholars have accused Vietnamese fishing boats as being part of a maritime militia, conducting military-related or intelligence-gathering activities. These accusations have prompted rebuttals and counteraccusations from Vietnamese and other foreign scholars.⁹⁴

sensitivity Maritime Cooperation]” 7 July 2021, Ministry of Foreign Affairs of China at: https://www.fmprc.gov.cn/web/wjb_673085/zjg_673183/bjhysws_674671/xgxw_674673/t1890207.shtml (accessed 10 November 2021).

⁹¹ Tréglodé, note 73, 40.

⁹² Zhou Xinchao, “Nan Hai Yu Ye Zi Yuan Yang Hu Yu Kai Fa ‘Hui Yi Zong Shu’ [Summaries of the Conference of Conservation and Management of Fishing Resources in the SCS]” (2012) 2 *Zhong Guo Hai Yang Fa Xue Ping Lun* [*China Oceans Law Review*] 178.

⁹³ Zhuang Pinghui, “Vietnam Calls for Chinese Vessels to Leave Vanguard Bank in South China Sea” 20 July 2019, *South China Morning Post* at: <https://www.scmp.com/news/china/diplomacy/article/3019449/vietnam-calls-chinese-vessels-leave-vanguard-bank-south-china> (accessed 14 January 2022).

⁹⁴ There is a debate over whether the Vietnamese fishing boats are maritime militia or not between Chinese and Vietnamese scholars. See Chen Xiangmiao, “Vietnam’s Maritime Militia: A “Black Hole” of the South China Sea” 30 April 2020, South China Sea Strategic Situation Probing Initiative (SCSPI) at: <http://www.scspi.org/en/dtfx/1588176000> (accessed 10 November 2021); Yan Yan, “Is Vietnam Sending Its Maritime Militia to China’s Coast?” 5 March 2020, *The Diplomat* at: <https://thediplomat.com/2020/03/is-vietnam-sending-its-maritime-militia-to-chinas-coast> (accessed 10 November 2021); Nguyen The Phuong, “Vietnam’s Maritime Militia Is Not A Black Hole in the South China Sea” 22 May 2020, Asia Maritime Transparency Initiative (AMTI) at: <https://amti.csis.org/vietnams-maritime-militia-is-not-a-black-hole-in-the-south-china-sea/> (accessed 10 November 2021).

China–Malaysia

In the past, there has been some convergence of the views of Malaysia and China on the SCS, in comparison to Vietnam and the Philippines. In the 1999 ASEAN Regional Forum, Malaysia and China were the two countries opposed to “outsider involvement” in the Spratly negotiations.⁹⁵ The 2014 Malaysia–China Joint Communiqué stated that on the SCS issue, all “directly concerned states” should “settle their differences by peaceful means, through friendly consultations and negotiations, and in accordance with universally recognized principles of international law,” while recognizing that the “intervention or involvement of parties not directly concerned could be counterproductive and further complicate the aforementioned differences.”⁹⁶ A 2016 Joint Press Statement reiterated that “both sides recognised that the involvement of parties not directly concerned could be counterproductive.”⁹⁷ The 2018 Joint Statement issued stated that “both sides emphasized the need for all sovereign states directly concerned to resolve their differences by peaceful means through friendly consultations and negotiations.”⁹⁸ The phrasing of not involving “parties not directly concerned” in these documents is interesting, as it is closer to China’s position; this kind of phrasing is absent in the bilateral documents between China and Vietnam and China and the Philippines.

Ironically, Malaysia is also an odd case where, while the bilateral relationship with China is good, the progress on any kind of maritime bilateral consultation has been remarkably slow. For years, China tried to persuade Malaysia to accept a bilateral consultation mechanism, but Malaysia did not show any indication that it was interested. Hence, it came as a real surprise that during the then Malaysian Foreign Minister Saifuddin Abdullah’s visit to China in September 2019, reportedly “the two sides have agreed to set up a bilateral consultation mechanism for maritime issues, a new platform for dialogue and cooperation for both sides.”⁹⁹ However, no progress has occurred following this announcement. This apparent “breakthrough” was also met with lukewarm responses among Malaysia’s policy and think-tank circles. A source close to the Malaysian government commented that “Malaysia is consistent that the ASEAN route is the only way to resolve any disputes on the SCS. The mechanism should not be equated to bilateral negotiations on the SCS.”¹⁰⁰

⁹⁵ Joseph Liow Chinyong, “Balancing, Bandwagoning or Hedging? Strategic and Security Patterns in Malaysia’s Relations with China, 1981–2003” in Ho Khai-Leong and Samuel C. Y. Ku (eds), *China and Southeast Asia: Global Changes and Domestic Challenges* (ISEAS, 2005), 294.

⁹⁶ See Article 30 of “Zhong Hua Ren Min Gong He Guo Yu Ma Lai Xi Ya Jian Li Wai Jiao Guan Xi 40 Zhou Nian Lian He Gong Bao [Joint Communiqué between the People’s Republic of China and Malaysia in Commemoration of the 40th Anniversary of the Establishment of Diplomatic Relations]” 3 June 2014, Embassy of the PRC in Malaysia at: http://my.china-embassy.org/zt/zmgxzywj/201406/t20140603_1769050.htm (accessed 14 January 2022).

⁹⁷ See Article 26 of “Joint Press Statement” 4 November 2016, Ministry of Foreign Affairs of Malaysia at: https://www.kln.gov.my/web/guest/home?p_p_id=101&p_p_state=maximized&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_type=content&_101_viewMode=view&_101_urlTitle=joint-press-statement (accessed 1 May 2021).

⁹⁸ See Article 13 of “Joint Statement between the Government of the People’s Republic of China and the Government of Malaysia” 20 August 2018, Ministry of Foreign Affairs of Malaysia at: https://www.kln.gov.my/web/guest/speeches-statements/-/asset_publisher/mN2jZPWqWjGA/content/joint-statement-between-the-government-of-the-people-s-republic-of-china-and-the-government-of-malaysia-20-august-2018-beijing (accessed 1 May 2021).

⁹⁹ “Malaysia, China to Set Up South China Sea Dialogue Mechanism” 12 September 2019, *Reuters* at: <https://www.reuters.com/article/us-china-malaysia-idUSKCN1VX0JN> (accessed 22 June 2021).

¹⁰⁰ Tashny Sukumaran, “How Will Malaysia and China’s Maritime Consultation Mechanism Affect the South China Sea Dispute?” 22 September 2019, *South China Morning Post* at: <https://www.scmp.com/week-asia/explained/article/3029732/how-will-malaysia-and-chinas-maritime-consultation-mechanism> (accessed 22 May 2021).

In July 2020, after then U.S. Secretary of State Michael Pompeo issued a strong statement criticising China in relation to the SCS dispute,¹⁰¹ the Chinese Embassy in Kuala Lumpur published a rebuttal letter in the Malaysian mainstream media. The letter stated that “the peace and stability of the SCS are of common interests to China and Malaysia. It is our expectation that both sides can work together to fully implement and push forward the COC consultation to safeguard the peace and stability of the SCS.”¹⁰² That the letter from the Embassy did not mention the bilateral mechanism suggested the absence of progress on the bilateral mechanism.

Malaysia appears to have regretted agreeing to the 2019 bilateral mechanism, and has since been purposefully procrastinating without openly repudiating it. The change of government of Malaysia in late February 2020, the ensuing and ongoing political instabilities, and the COVID-19 pandemic all became apparent excuses for Malaysia to move slowly (or in fact, not move at all) on the bilateral mechanism.¹⁰³ Why, then, is Malaysia so reluctant to enter into a bilateral dialogue with China on the SCS issue?¹⁰⁴

First, there is a real anxiety from Malaysia that after entering bilateral talks, it and China would eventually have to discuss the geographical area that is in “dispute.” Malaysia’s official position is that there is “no dispute,” since Malaysia does not recognize the U-shaped line of China. After the Arbitral Award in 2016, Malaysia has subtly aligned its position in accordance with its interpretation of the Award, which further reinforces the strong belief that there is no overlapping claim between Malaysia and China. Hence, the idea of bilateral discussion on the SCS, especially if it is going to lead to discussion of an overlapping geographical area, will compromise the official position of Malaysia. It would be seen as legitimizing the U-shaped line position of China. This is a step too far for Malaysia, regardless of how cordial Malaysia–China overall ties are.

Second, there is also an anxiety that once the mechanism is established, the space for future action by Malaysia will be constrained. The advantages of bilateral discussions, including greater transparency and clarity of the parties’ respective positions, can also be seen as disadvantages. Without the bilateral mechanism, there is no obligation on Malaysia to share information and to clarify its positions with China. In the eyes of Malaysian policy sector, this lack of obligation exactly enables and facilitates a wider range of action options for Malaysia. With a bilateral mechanism in place, would there be an obligation to discuss with China the course of action to be taken by Malaysia in the SCS? Would informing China of a certain action become a precedent and therefore change the status quo? These are complex questions that can be avoided in the current state of ambiguity and with no bilateral talks.

¹⁰¹ Jennifer Hansler, “US Declares ‘Most’ of China’s Maritime Claims in South China Sea Illegal” 14 July 2020, *CNN* at: <https://edition.cnn.com/2020/07/13/politics/south-china-sea-pompeo-announcement/index.html> (accessed 14 January 2022).

¹⁰² Embassy of China in Malaysia, “Letter: China Does Not Want Outside Powers Meddling in South China Sea Claims” 25 July 2020, *New Straits Times* at: <https://www.nst.com.my/opinion/letters/2020/07/611422/china-does-not-want-outside-powers-meddling-south-china-sea-claims> (accessed 22 June 2021).

¹⁰³ Catherine Wong, “South China Sea: Does One-on-One Mean One-Sided Deal for Malaysia?” 27 September 2020, *South China Morning Post* at: <https://www.scmp.com/news/china/diplomacy/article/3103175/south-china-sea-does-one-one-mean-one-sided-deal-malaysia> (accessed 22 June 2021).

¹⁰⁴ These concerns or points of objections are derived from interpretation of Malaysia’s openly stated positions and statements, but also from one of the author’s interviews with various government officials and think-tank analysts.

Third, given where the Philippines–China BCM is heading, a Malaysia–China bilateral mechanism would be likely to lead to discussions on joint development. While Malaysia is no stranger to joint development, it does not see the merit in discussing joint development with China in the SCS. As such, a bilateral mechanism is seen as a mechanism to possibly “entrap” Malaysia into discussing something Malaysia does not want to discuss.

Fourth, Malaysia’s policy elite generally sees the bilateral and multilateral modalities as somewhat zero-sum in nature. Enhancement of the bilateral mechanism risks undermining Malaysia’s commitment to ASEAN as the proper framework for managing the dispute. There is also a perceived reputational cost that once Malaysia embraces a bilateral mechanism, this will damage Malaysia’s credibility. Even though both the Philippines and Vietnam are already pursuing bilateral discussions to different degrees, a persistent view is that this is not the “Malaysian way.” A related argument is that with multiple claimants in the SCS, it is best left to the multilateral format, where all claimant parties are present.

Fifth, even if Malaysia is open to bilateral discussions with China, there is also the belief that, in a bilateral setting, this would be to the disadvantage of Malaysia, since China is overwhelmingly more powerful.

Finally, even if there are some who are more open to the bilateral mechanism, the preference is still for Malaysia to “wait and see.” The Philippines–China BCM is being watched closely by Malaysian officials, and so far the conclusion is that the Philippines–China BCM is not working well. It is not a particularly positive example that inspires Malaysia’s confidence.

Assessment and Prospects of the Multilateral and Bilateral Modalities

In terms of the multilateral modalities, the “ASEAN + China” modality remains the most realistic in the near future, while “ASEAN + X” and “ASEAN-X” might be more feasible options in the long term. The conventional wisdom about the “ineffectiveness” of ASEAN in managing the SCS dispute with China (through the DOC and COC processes) is more exaggerated than real.¹⁰⁵ As pointed out by Le Hu, the “ASEAN + China” modality is formed on the basis of the common consensus of all the ASEAN states and China, and crucially, it remains ASEAN driven. Although skeptics often see China as gaining the most from this modality, it is not inherently the case that ASEAN does not benefit. This modality can still ensure interests of both ASEAN states and China. For ASEAN, the “ASEAN + China” modality increases a level of predictability, which is essentially in line with the goal of conflict management. For China, this modality is premised on a recognition of the crucial role of ASEAN. Its success could reduce the concern that China has about the influence of external forces, particularly the United States, in the region. This is an important incentive for China to commit to this modality.

In addition, despite various standoffs and tense moments in the SCS, ultimately, there has been no war in the SCS since the beginning of the multilateral discussions between

¹⁰⁵ Le Hu, “Examining ASEAN’s Effectiveness in Managing South China Sea Disputes” (2021) *The Pacific Affairs* at: <https://www.tandfonline.com/doi/full/10.1080/09512748.2021.1934519> (accessed 20 January 2021).

ASEAN and China in the 1990s. The scheduled meetings and working groups under the “ASEAN + China” framework provide a range of channels for both sides to continuously exchange views. The exchanges have helped all sides to avoid misunderstandings and misjudgments, while allowing for mutual adjustments.

Finally, amid the COVID-19 pandemic, China and ASEAN are more likely to maintain the status quo, rather than creating new approaches to manage the SCS dispute. At the moment, most of the cooperative programs under the DOC and the face-to-face COC negotiation are temporarily suspended. Once conditions permit, the priority should be to restart these processes.

The “ASEAN + X” and “ASEAN-X” options might be feasible in the long term, but this depends largely on the developing trends of the China–United States relations and the security environment in the SCS. Generally speaking, the more China–United States tensions ease, the more the “ASEAN + X” model may become acceptable to China. China is less likely to refuse the involvement of the United States in the SCS if the United States, in China’s eyes, is able to maintain a consistently neutral position on the SCS dispute, or has stopped challenging China’s claims while supporting ASEAN claimant states’ positions and actions in the disputed waters. In addition, any realistic likelihood of “ASEAN + X” or “ASEAN-X” would only occur after the COC is concluded. The COC, once adopted, will improve the security environment of the SCS, and this perhaps may inspire more confidence on all sides to expand and experiment with these alternative modalities. In this sense, the “ASEAN + China,” “ASEAN + X,” and “ASEAN-X” modalities are not either–or choices, but complementary platforms for one another.

As for the bilateral modalities, these have also played a constructive and stabilizing role in the SCS in the past, and these mechanisms have been developed without necessarily undermining the “ASEAN + China” modality. One of the criticisms of these bilateral mechanisms is that they were adopted at the expense of multilateralism and the centrality of ASEAN. This, however, is not the case. Bilateral and multilateral modalities are not either–or choices but can be complementary to one another.

However, currently, the bilateral mechanisms are all beset by various problems and do not support an optimistic outlook, collectively or individually. The COVID-19 pandemic has disrupted the regular meetings of the China–Philippines BCM, as well as the various bilateral mechanisms between China and Vietnam, delaying these parties from having dialogue and exchanges for more than a year, during which tensions have built up. During the COVID-19 pandemic, a number of incidents in the SCS have further reduced confidence in the bilateral engagement between China and the Philippines, Vietnam, and Malaysia, while China also felt aggravated by what it deemed as opportunistic and unilateral behavior from these claimant states.¹⁰⁶ Domestically, all ASEAN claimant states have had to deal with a resurgence in nationalistic public opinion, which makes bilateral engagement with China much less popular. None of the governments of the ASEAN claimant states wants to be seen as “soft” toward China. As presidential

¹⁰⁶ Incidents included, but are not limited to, the collision of a Vietnamese fishing boat and China Coast Guard vessel in the Paracels in April 2020, the three-way “standoff” between vessels from China, Malaysia, and Vietnam in disputed waters in April–May 2020 (the *West Capella* incident), the alleged gathering of Chinese maritime militia in Niu’e/Whitsun Reef in April 2021, and the difficulties of the Philippines in carrying out a resupply mission to Ren’ai/Second Thomas Shoal in November 2021.

elections will be held in May 2022 in the Philippines, the Duterte administration is very unlikely to push forward the joint development with China at this time. Vietnam's procrastination with respect to the renewal of the Fisheries Agreement on the Bei Bu Wan/Gulf of Tonkin and Malaysia's similar procrastination around the supposed China–Malaysia BCM are reflective of the trend of increasing skepticism toward the bilateral modalities entered into by ASEAN claimant states. In addition, the bilateral modalities have received no external support or encouragement. Extra-regional countries such as the United States or Japan are, at best, indifferent to these bilateral mechanisms, if not actually discouraging ASEAN claimant states from engaging in them. Malaysia's continuous misgivings about its BCM with China have also presented a unique challenge for China. Malaysia's commitment to friendly ties with China ironically actually narrows the space to explore alternatives, because there is no strong impetus to do so. For Malaysia, the status quo works well without the BCM. And for China, to press Malaysia more strongly on accepting the BCM risks undermining this cordial bilateral relationship.

Conclusion

In conclusion, we reiterate several arguments made by this article. First, all existing and alternative modalities to engagement in the SCS have serious limitations, but the “ASEAN + China” modality remains the broadest common denominator and the most feasible way to establish a durable regional maritime order. Whatever the flaws of the DOC and COC processes, they are still the mechanisms where practical cooperation and conflict management can take place, and hence should be vigorously enhanced.

Second, currently, China has expressed strong reservations and concerns on the “ASEAN-X” and “ASEAN + X” modalities, but in the future, China could take a more flexible position, especially if these modalities are pursued as supplementary arrangements under a foundational “ASEAN + China” modality. China should have confidence that such arrangements are not necessarily inimical to the interests of China.

Third, the bilateral mechanisms for maritime cooperation between China and the Philippines, Vietnam, and Malaysia to manage the SCS dispute have been or can be a useful complementary mechanism to the “ASEAN + China” modality. They do not undermine each other. However, there are various short-term and long-term challenges to these mechanisms. The COVID-19 pandemic, trust-reducing incidents in the SCS, rising domestic nationalism, and discouragement from extra-regional powers all combine to make a less than optimistic outlook for bilateral cooperation between China and ASEAN claimant states in the SCS in the near future.

The management of the SCS dispute is vitally important for the peace and stability of the region and the world. This article has explored all modalities of managing the SCS dispute and analyzed their opportunities and challenges. It is suggested that communication and coordination on major issues, and promoting pragmatic cooperation in the SCS through existing bilateral and multilateral mechanisms, should remain the top priority for China and ASEAN. In the long term, exploring alternative options should also be considered.

Acknowledgments


The authors thank the journal editor and anonymous reviewers for their precious comments and suggestions. The authors remain responsible for any errors or mistakes. The authors also would like to thank Kuik Cheng-Chwee for having read an earlier draft of the paper and for providing constructive feedbacks.

Funding

This work was supported by the National Social Science Foundation of China under project number 20CGJ048.

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